

# 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

Volume XXXIII, Issue 22

November 29, 2022

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## Notices of Rulemaking and Proposed Rules

### MEDICAL BOARD

#### NOTICE OF PUBLIC HEARING

**Public Notice.** The New Mexico Medical Board (NMMB) gives notice that it will conduct a public rule hearing on December 30, 2022 at 10:00 a.m. (MDT). This rule hearing is tentatively in person and can be accessed virtually. The purpose of the public hearing is to receive public input on the proposed amendments to 16.10.5 NMAC - Disciplinary Power of the Board. Physical Hearing Location is 2055 South Pacheco Street, Bldg. 400, Santa Fe, NM 87505.

Join Zoom Meeting  
<https://us02web.zoom.us/j/83140102469?pwd=M1diTzRtZmNiNUkxR1ltNzBkNG1SQOT09>

Meeting ID: 831 4010 2469  
 Passcode: 947330  
 One tap mobile  
 +13462487799,,83140102469#,,, \*947330# US (Houston)  
 +16699006833,,83140102469#,,, \*947330# US (San Jose)

Dial by your location  
 +1 346 248 7799 US (Houston)  
 +1 669 900 6833 US (San Jose)  
 +1 253 215 8782 US (Tacoma)  
 +1 312 626 6799 US (Chicago)  
 +1 929 205 6099 US (New York)  
 +1 301 715 8592 US (Washington DC)  
 Meeting ID: 831 4010 2469  
 Passcode: 947330  
 Find your local number: <https://us02web.zoom.us/j/83140102469>

**Purpose.** To clarify the Terms of Suspension and make it more specific by changing the language to “The board may suspend a license for a specified period of time.”

**The statutory authorization.**  
 Sections 61-6-1 through 61-6-35 NMSA 1978.

**No technical information serves as a basis for this proposed rule change.**

**Public comment.** Interested parties may provide comment on the proposed amendments of this state rule at the public hearing or may submit written comments to Sondra Frank, Esq., New Mexico Medical Board, 2055 South Pacheco Street, Bldg. 400, Santa Fe, NM 87505, or by electronic mail to AmandaL.Quintana@state.nm.us. All written comments must be received no later than 5:00 p.m. (MDT) on December 29, 2022. All written comments will be posted to the agency website within (3) three business days.

**Copies of proposed rule.** Copies of the proposed rules may be accessed through the New Mexico Medical Board’s website at [www.nmmb.state.nm.us](http://www.nmmb.state.nm.us) or may be obtained from the Board office by calling (505) 476-7220 or via email at AmandaL.Quintana@state.nm.us.

Individuals with disabilities who require the above information in an alternative format, or who need any form of auxiliary aid to attend or participate in the public hearing are asked to contact Amanda Quintana at (505) 476-7230 or via email at [AmandaL.Quintana@state.nm.us](mailto:AmandaL.Quintana@state.nm.us). The New Mexico Medical Board requires at least ten (10) calendar days advance notice to provide any special accommodations requested.

**Summary of proposed changes.**  
 The Board summarizes its proposed changes to its administrative rules as follows:

16.10.5 NMAC - Disciplinary Power of the Board  
 As a general summary, the proposed change to Subsection B of 16.10.5 NMAC is to change the language from “The board may suspend a license for either a specified period of time or indefinitely.” TO “The board may suspend a license for a specified period of time.”

### PUBLIC EDUCATION DEPARTMENT

#### NOTICE OF PROPOSED RULEMAKING

##### Public Hearing

The New Mexico Public Education Department (PED) gives notice that it will conduct a public hearing for the following proposed rulemaking on Tuesday, January 3, 2023, from 1 p.m. to 3 p.m. (MDT) in Mabry Hall, located in the Jerry Apodaca Education Building, 300 Don Gaspar Ave., Santa Fe, New Mexico 87501:

- ☐ Repeal and replace of **6.60.6 NMAC, Continuing Licensure for Licensed Educator in New Mexico;**
- ☐ Amendment to **6.60.7 NMAC, Educator Licensure Application Fee**
- ☐ Repeal and replace of **6.69.4 NMAC, Performance Evaluation System Requirements for Teachers;** and
- ☐ Repeal and replace of **6.69.5 NMAC, Performance Evaluation System Requirements for Librarian-Teachers**

The location of the public hearing is subject to change due to concerns surrounding COVID-19. Continuous updates on hearing changes will be provided on the PED website. The PED will give a verbal summary statement, on record, at the hearing.

The purpose of the public hearing is to receive public input on the proposed rulemaking. Attendees who wish to provide public comment on record will be given three minutes to make a statement concerning the proposed rulemaking. Written comment will also be accepted at the hearing.

##### Explanation of Purpose of Proposed Rulemaking

The purpose of the proposed rulemaking is to establish an educator licensure advancement pathway that phases out the professional development dossier and implements an advancement program comprising a series of five micro-credentials – classroom environment, multi-layered system of supports, assessment literacy, culturally and linguistically responsive instruction, and family engagement – that align with the department-approved educator evaluation system, Elevate NM.

#### Summary of Text by Proposed Rule

**6.60.6 NMAC, Continuing Licensure for Licensed Educator in New Mexico.** The proposed repeal and replace of this rule adds definitions, establishes requirements for advancement of educator licensure, and makes technical changes for concision. The proposed rule would also attempt to equalize certain licensure requirements for in-state-teachers and out-of-state teachers.

**6.60.7 NMAC, Educator Licensure Application Fee.** The proposed repeal and replace of this rule adds the fee educators would be required to pay for the educator licensure advancement program and makes technical changes for concision.

**6.69.4 NMAC, Performance Evaluation System Requirements for Teachers.** The proposed repeal and replace of this rule adds definitions, addresses technical requirements for advancement between level 1 and level 2 educator licensure, and makes technical changes for concision.

**6.69.5 NMAC, Performance Evaluation System Requirements for Librarian-Teachers.** The proposed repeal and replace of this rule adds definitions, addresses technical requirements for advancement between level 1 and level 2 librarian-teacher licensure, and makes technical changes for concision.

#### Statutory Authorizations by Proposed Rule

**6.60.6 NMAC, Continuing Licensure for Licensed Educator in New Mexico.** Sections 9-24-8, 22-2-1, 22-2-2, 22-2-8.1, and 22-10A-3 NMSA 1978

**6.60.7 NMAC, Educator Licensure Application Fee.** Sections 22-2-1, 22-8-44, and 22-10A-3 NMSA 1978

**6.69.4 NMAC, Performance Evaluation System Requirements for Teachers.** Sections 9-24-8, 22-2-1, 22-2-2, 22-2-8.1, and 22-10A-3 NMSA 1978

**6.69.5 NMAC, Performance Evaluation System Requirements for Librarian-Teachers.** Sections 9-24-8, 22-2-1, 22-2-2, and 22-10A-3 NMSA 1978

No technical information served as a basis for this proposed rule change.

#### Public Comment

Interested parties may provide comment at the public hearing or may submit written comments by mail, e-mail, or fax.

#### Mailing Address

Policy and Legislative Affairs  
Division  
New Mexico Public Education  
Department  
300 Don Gaspar Avenue, Room 121  
Santa Fe, New Mexico 87501

#### E-Mail Address

Rule.Feedback@ped.nm.gov

#### Fax Number

(505) 827-6520

Written comments must be received no later than 5 p.m. (MDT) on Tuesday, January 3, 2023. The PED encourages the early submission of written comments.

#### Public Comment Period

The public comment period is from Tuesday, November 29, 2022, to

Tuesday, January 3, 2023, at 5:00 p.m. (MDT). The PED will review all feedback received during the public comment period and issue communication regarding a final decision of the proposed rulemaking at a later date.

Copies of the proposed rules may be obtained from Gregory Frostad at (505) 470-5752 during regular business hours or may be accessed through the PED Police and Legislative Affairs webpage titled, "Proposed Rules," at <http://webnew.ped.state.nm.us/bureaus/policy-innovation-measurement/rule-notification/>.

Individuals with disabilities who require the above information in an alternative format or need any form of auxiliary aid to attend or participate in the public hearing are asked to contact Gregory Frostad at (505) 470-5752 as soon as possible before the date set for the public hearing. The PED requires at least 10 calendar days advance notice to provide any special accommodations requested.

## PUBLIC EDUCATION

### NOTICE OF PROPOSED RULEMAKING

#### Public Hearing

The New Mexico Public Education Department (PED) gives notice that it will conduct a public hearing for the following proposed rulemaking on Tuesday, January 3, 2023, from 10 a.m. to 12 p.m. (MDT) in Mabry Hall, located in the Jerry Apodaca Education Building, 300 Don Gaspar Ave., Santa Fe, New Mexico 87501:

□ Amendment to **6.31.2 NMAC, Children with Disabilities/ Gifted Children**

The location of the public hearing is subject to change due to concerns surrounding COVID-19. Continuous updates on hearing changes will be provided on the PED website. The



PED will give a verbal summary statement, on record, at the hearing.

The purpose of the public hearing is to receive public input on the proposed rulemaking. Attendees who wish to provide public comment on record will be given three minutes to make a statement concerning the proposed rulemaking. Written comment will also be accepted at the hearing.

### Explanation of Purpose of Proposed Rulemaking

The purpose of the proposed rulemaking is to provide more definite timelines and requirements for public educational agencies throughout the identification, initial evaluation, and reevaluation procedures for children with disabilities from the use of the multi-layered system of supports (MLSS) and initial evaluation to the eligibility determination and initial individualized education program (IEP) meetings. Additionally, the rule was amended to explicitly include current Individuals with Disabilities Education Improvement Act (IDEA) requirements; address requirements when a student receives a regular high school diploma or exceeds the age of eligibility for special education services; and preclude the use of the severe discrepancy model as a method of evaluating for specific learning disabilities. The subsection regarding initial evaluations and reevaluations was also reorganized and amended to better clarify the requirements for evaluation and reevaluation.

### Summary of Text

The proposed amendment to **6.31.2 NMAC, Children with Disabilities/ Gifted Children**, primarily amends section 6.31.2.10, Identification, Evaluation, and Eligibility Determination by:

1. providing that the parent requests for evaluations and the evaluation process can commence while MLSS interventions are provided to a student;
2. providing public agency requirements when a student

receives a regular high school diploma or exceeds the age of eligibility;

3. explicitly requiring that written informed consent be obtained before conducting an initial evaluation or reevaluation;
4. explicitly permitting public agencies to utilize the consent override provisions when a parent does not provide consent to evaluate a student;
5. providing requirements of the public agency when it receives a parent request for evaluation, including a 15 school-day prior written notice deadline with considerations for school breaks;
6. providing requirements of the public agency when it receives a referral for evaluation without a parent request including a 15 school-day deadline after the referral to request parent consent to evaluate with consideration for school breaks;
7. explicitly permitting parents to utilize mediation, state complaint, and due process hearing procedures to challenge the public agencies' response or lack of response to a request to evaluate;
8. requiring that the evaluation and written evaluation report be completed within 60 days of parental consent to evaluate;
9. providing additional and clarified requirements for evaluation and reevaluation procedures including that the parent be provided the written evaluation or reevaluation reports at least two calendar days before the eligibility determination team meeting;
10. adding explicit requirements regarding requests for independent education evaluations already included in the IDEA regulations;
11. providing 15 school-day deadlines for the eligibility determination team meeting with considerations for school breaks;
12. precluding the use of the severe discrepancy model as a method of evaluating for specific learning disabilities;

13. requiring that public agencies use the dual discrepancy model to identify specific learning disabilities for students in kindergarten through grade 12.

The proposed rule changes also significantly reorganize current provisions of 6.31.2.10 to improve construction and readability and include minor technical changes throughout the rule.

### Statutory Authorizations by Proposed Rule

Sections 22-2-1, 22-2-2, 22-13-5 and 22-13-6.1 NMSA 1978.

No technical information served as a basis for this proposed rule change.

### Public Comment

Interested parties may provide comment at the public hearing or may submit written comments by mail, e-mail, or fax.

#### Mailing Address

Policy and Legislative Affairs  
Division  
New Mexico Public Education  
Department  
300 Don Gaspar Avenue, Room 121  
Santa Fe, New Mexico 87501

#### E-Mail Address

Rule.Feedback@ped.nm.gov

#### Fax Number

(505) 827-6520

Written comments must be received no later than 5 p.m. (MDT) on Tuesday, January 3, 2023. The PED encourages the early submission of written comments.

### Public Comment Period

The public comment period is from Tuesday, November 29, 2022, to Tuesday, January 3, 2023, at 5:00 p.m. (MDT). The PED will review all feedback received during the public comment period and issue communication regarding a final



decision of the proposed rulemaking at a later date.

Copies of the proposed rules may be obtained from Gregory Frostad at (505) 470-5752 during regular business hours or may be accessed through the PED Police and Legislative Affairs webpage titled, "Proposed Rules," at <http://webnew.ped.state.nm.us/bureaus/policy-innovation-measurement/rule-notification/>.

Individuals with disabilities who require the above information in an alternative format or need any form of auxiliary aid to attend or participate in the public hearing are asked to contact Gregory Frostad at (505) 470-5752 as soon as possible before the date set for the public hearing. The PED requires at least 10 calendar days advance notice to provide any special accommodations requested.

## **REGULATION AND LICENSING BOARD HOME INSPECTORS BOARD**

### **NOTICE OF TERMINATION**

### **DECEMBER 8, 2022 SPECIAL MEETING AND RULE MAKING NEW MEXICO HOME INSPECTORS BOARD**

The New Mexico Home Inspectors Board is providing notice of termination of the Special Board Meeting and Rule Making scheduled for December 8, 2022, at 9 a.m. at the Regulation and Licensing Department offices, 5500 San Antonio Drive, Albuquerque, New Mexico.

The notice of the Special Board Meeting and Rule Hearing was published on November 8, 2022 in Volume XXXIII, Issue 21 of the New Mexico Register.

Notice of the Special Board Meeting and Rule Hearing was also published on the Regulation and Licensing Department website, and the New Mexico Sunshine Portal. Notice of

the Special Board Meeting and Rule Hearing was also provided to the New Mexico Legislative Council Service.

The purpose of the rule hearing was to consider and adopt rules pursuant to legislative mandates in House Bill 120 and Senate Bill 2 enacted by the 2021 legislature and the State Court of Appeals action on a joint stipulation by the Home Inspectors Board and the Examination Board of Professional Home Inspectors (EBPHI) dba National Home Inspectors Examination for a stay of enforcement of rules adopted by the Board on November 29, 2021.

The rule hearing will be re-scheduled by the Home Inspectors Board at a future date determined by the Board.

## **REGULATION AND LICENSING BOARD HOME INSPECTORS BOARD**

### **NOTICE OF RULE HEARING AND REGULAR MEETING**

MONDAY, JANUARY 9, 2023, 9:00 A.M.  
NEW MEXICO REGULATION  
AND LICENSING DEPARTMENT  
OFFICES  
5500 SAN ANTONIO DRIVE NE  
ALBUQUERQUE, NEW MEXICO  
87109

The New Mexico Home Inspectors Board will convene a rule hearing and regular meeting on Monday, January 9, 2023, at the New Mexico Regulation and Licensing Department offices at 5500 San Antonio Drive NE in Albuquerque, New Mexico.

The Board will convene a regular meeting immediately following the rule hearing for the purpose of adopting the rules discussed at the rule hearing.

The rule hearing and meeting will also be held via Cisco Webex Meetings for those wishing to attend virtually by using the following link:

<https://nmrld.webex.com/nmrld/j.php?MTID=m17c14a90007a95e5a4860e75df292e84>

**Join by meeting number**

**Meeting number (access code):**

2483 112 0826

**Meeting password:**

GmTVA8ZmM33 (46882896 from video systems)

### **Purpose of Proposed Rules**

The purpose of the proposed rules is to:

- Address and act on the State Court of Appeals action on a joint stipulation by the New Mexico Home Inspectors Board and the Examination Board of Professional Home Inspectors (EBPHI) dba the National Home Inspector Examination (NHIE) for a stay of enforcement of the rules adopted by the board on November 9, 2021.
- Fulfill legislative mandates in House Bill 120 enacted by the 2021 state legislature providing for expedited licensing for military members, their family members, and veterans.
- Fulfill legislative mandates in Senate Bill 2 enacted by the 2021 state legislature establishing a list of criminal convictions which could potentially disqualify an applicant from being issued a home inspector's license.
- Create new definitions in Part 1, General Provisions and Definitions, of the board rules for ancillary services, business relationships, electronic signatures, pre-inspections agreements, and other definitions that may require amendments as a result of the foregoing new definitions.
- Amend pre-licensing examination requirements in Part 3, Applications and Licenses, of the board rules, to accept passage of the proctored examination offered by the International Association of Certified Home Inspectors (Inter-NACHI) from candidates applying for licensure under the training and examination category of licensure.
- Amend and create new definitions in Part 7, Standards of

Practice, of the board rules related to privacy walls, outbuildings, attached structures, load-bearing components, roof covering materials, surge protection devices, and domestic potable water heating equipment and distribution systems.

### Statutory Authority

The Board is granted rule making authority in Subsections F and G of Section 61-24D-3 NMSA 1978 of the Home Inspectors Licensing Act which state that the board is to possess all powers and perform all duties prescribed by the Home Inspectors Licensing Act and otherwise provided by law and may make and enforce rules to carry out the provisions of the Act.

The full text of the proposed changes is included in this notice and may also be obtained by contacting Wayne W. Ciddio, administrator of the Home Inspectors Board at 5500 San Antonio Drive NE, Albuquerque, New Mexico 87109, by telephone at (505) 785-3937, or by email at [wayne.ciddio@state.nm.us](mailto:wayne.ciddio@state.nm.us).

The full text of the proposed changes is also posted on the Home Inspectors Board web site at <https://www.rld.nm.gov/boards-and-commissions>. <https://www.rld.nm.gov/boards-and-commissions/individual-boards-and-commissions/home-inspectors/rs> - NM RLD.

Persons wishing to participate in the rule hearing may do so in person at the Commission office or virtually via Cisco WebEx Meetings.

Persons wishing to comment on the proposed rules may do so in person at the hearing, virtually via WebEx Meetings, or by submitting written comments to Board Administrator Wayne W. Ciddio by no later than Friday, January 6, 2023.

If you are an individual with a disability who is in need of a reader, amplifier, qualified signed language interpreter or any other form of

auxiliary aid or service to attend or participate in the meeting, please contact Board Administrator Wayne W. Ciddio at least one week before the meeting and hearing.

Public documents, including the agenda, minutes, and proposed rules can be provided in various accessible formats.

The full text of the proposed rules follows. Words, sentences and paragraphs ~~stricken through~~ are proposed to be deleted. Proposed new words, sentences, and paragraphs are underlined. Words, sentences, and paragraphs that are neither ~~stricken through~~ nor underlined represent existing language that is not proposed to be amended.

## **TITLE 16 OCCUPATIONAL AND PROFESSIONAL LICENSING CHAPTER 66 HOME INSPECTOR LICENSING PART 1 GENERAL PROVISIONS**

**16.66.1.1 ISSUING AGENCY:** New Mexico home inspectors board.

[16.66.1.1 NMAC – N, 1/15/2021]

**16.66.1.2 SCOPE:** All licensed home inspectors, license applicants, other agencies, professional associations, and any member of the general public affected by or interested in home inspectors.

[16.66.1.2 NMAC – N, 1/15/2021]

**16.66.1.3 STATUTORY AUTHORITY:** These rules are promulgated pursuant to the Home Inspector Licensing Act, Sections 61-24D-1 through 16 NMSA 1978 (2019).

[16.66.1.3 NMAC – N, 1/15/2021]

**16.66.1.4 DURATION:** Permanent.

[16.66.1.4 NMAC – N, 1/15/2021]

**16.66.1.5 EFFECTIVE DATE:** January 15, 2021, unless

a later date is cited at the end of a section.

[16.66.1.5 NMAC – N, 1/15/2021]

**16.66.1.6 OBJECTIVE:** The objective of Part 1 of Chapter 66 is to set forth the provisions which apply to all of Chapter 66 of Title 16 and to define the terms and terminology related to home inspectors used through Chapter 66 of Title 16.

[16.66.1.6 NMAC – N, 1/15/2021]

**16.66.1.7 DEFINITIONS:** These rules adopt, as if stated herein, all of the definitions contained in Section 61-24D-2 NMSA 1978.

**A. Definitions**  
**beginning with the letter “A”:**

**(1) “Access panel”** means a panel provided for homeowner inspection and maintenance that has removable or operable fasteners or latch devices in order to be lifted off, swung open, or otherwise removed by one person. Its edges and fasteners are not painted in place. Access panels are limited to those panels within normal reach at human height or from a stepladder, and those which are not blocked by stored items, furniture, or building components.

**(2) “Activate”** means the act of turning on, supplying power, or otherwise enabling systems, equipment, or devices to become active by normal operating controls]

**(3) (2) “Adverse condition”** means a condition which is producing, or which has the potential to produce, a detrimental effect on a system or component that either impairs the system or component’s normally intended function or operation or which is inconsistent with generally established practice(s) regarding the historically or conventionally applied and acknowledged methods of installation, assembly, and operation or use.

**(4) (3) “Alarm”** means a warning device that is either permanently installed or freestanding, including but not limited to smoke detectors and alarms, carbon-monoxide detectors, flue gas and

other spillage detectors, security equipment, ejector pumps, and smoke alarms.

**(4) “Ancillary services”** means a service or inspection provided by a licensee or other provider but beyond the scope of the Standards of Practice for Home Inspection provided in 16.66.7 NMAC including but not limited to Mold Inspection, Lead Paint Assessment, Commercial Building Inspection, Pool and Spa Inspection, Termite Inspection, and other Ancillary Services.

**(5) “Appliance”** means a permanently installed household device powered by electricity or gas, but not including central heating, central cooling, or plumbing components.

**(6) “Architectural service”** means any practice involving the art and science of building design for construction of any structure or grouping of structures, and the use of space within and surrounding the structures or the design, design development, preparation of construction contract documents, and administration of the construction contract.

**(7) “Automatic safety controls”** means devices designed and installed to protect systems and components.

**B. Definitions beginning with the letter “B”:**

**(1) “Board”** means the New Mexico Home Inspectors Board.

**(2) “Business relationship”** means a former, current or prospective relationship between a person or a person’s licensed agent, a home inspection company and its clients, a home inspection company and the company providing ancillary services, and between a client and a company providing ancillary services. The business relationship is based upon a financial contract between a person and a consumer which is in force including those relationships in which the individual benefits by receiving a salary, royalty, intellectual property rights, consulting fee, honoraria,

ownership interest (e.g., stocks, stock options or other ownership interest, excluding diversified mutual funds), or other financial benefit. A former relationship if it occurred within a twelve-month time period of the contract, a current or prospective relationship shall be disclosed in writing to the client and the client must acknowledge in writing receipt and acceptance of the disclosure. The receipt and acceptance of the disclosure may be by electronic signature.

**C. Definitions beginning with the letter “C”:**

**[~~(1)~~] “Central air conditioning”** means a system which uses ducts to distribute either or both cooled or dehumidified air to more than one room or uses pipes to distribute chilled water to heat exchangers in more than one room. This definition does not include systems or appliances that are plugged into an electrical convenience outlet;]

**[~~(2)~~] (1) “Component”** means a constituent element or part of a system.

**[~~(3)~~] (2) “Concealed, latent, or intermittent condition”** means any condition affecting any system or component which occurs after the inspection or is intermittent or otherwise not reasonably detectable by a competent and professional home inspector for any reason during the inspection.

**[~~(4)~~] (3) “Condition”** means the visible and conspicuous state of being of an object regarding its appearance, quality, or working order.

**(4) “Cooling and air conditioning”** means:

**(a)** designed to be permanently installed for central cooling and or heating (ducted) or modular (non-ducted) systems. Systems may include evaporator coil(s), condenser unit(s), heat pump(s), air handler(s) and furnace(s) or

**(b)** permanently installed evaporative cooling ducted systems. This definition does not include cooling units or appliances that are designed

and intended to be portable, non-permanent and are designed for installation at windows.

**(5) “Cosmetic imperfection”** means an irregularity or imperfection which does not affect a component’s normally intended function or operation, and which could but is not required to be repaired.

**(6) “Crawlspace” or “underfloor crawlspace”** means the area within the confines of the foundation and between the ground and the underside of the lowest floor’s structural components.

**D. Definitions beginning with the letter “D”:**

**(1) “Describe”** means to document in writing.

**(2) “Dismantle”** means the act of taking apart or removing any component, device, or piece of equipment that is bolted, screwed, or fastened by other means and which would not otherwise be taken apart or removed by a homeowner in the course of normal household maintenance.

**E. Definitions beginning with the letter “E”:**

**(1) “Electronic signature”** means an electronic sound, signal, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

**[~~(1)~~] (2) “Engineering”** means the application of scientific knowledge for the design, control, or use of building structures, equipment, or apparatus.

**[~~(2)~~] (3) “Engineering service”** means any professional service or creative work requiring engineering education, training and experience, and the application of special knowledge of the mathematical, physical and engineering sciences to such professional service or creative work as consultation, investigation, evaluation, planning, design and supervision of construction for the purpose of assuring compliance with

the specifications and design, in conjunction with structures, buildings, machines, equipment, works or processes.

**F. Definitions beginning with the letter “F”:**

(1)

“**Foundation**” means the base upon which a structure or wall rests, typically constituted by masonry, concrete, or stone, and typically located at least partially underground.

(2) **“Fuel**

**burning appliance**” means any natural gas, LP gas, wood, coal, or other similar organic fuel burning device or appliance, including but not limited to fireplaces, whether masonry or factory built; fireplace inserts and stoves, woodstoves (room heaters), central furnaces, and combinations of said devices or appliances.

(2) (3) **Function**”

means the action for which an item, component, or system is specially fitted or used, or for which an item, component, or system exists.

(3) (4)

“**Functional**” means the ability of an item, component, or system to perform its function.

(4) (5)

“**Functional drainage**” means the act or ability of a drain to empty in a reasonable amount of time without overflowing when another fixture is drained simultaneously.

(5) (6)

“**Functional flow**” means a reasonable flow at the highest fixture in a dwelling when another fixture is operated simultaneously.

(6) (7) **“Further**

**evaluation**” means examination and analysis by a qualified professional, tradesman, or service technician beyond that provided by a home inspection. Further evaluation may provide additional clarification, provide needed repairs, or discover additional adverse conditions that need modifications or repairs for the component or system to perform its normally intended function or operation provided by an appropriately licensed or qualified individual.

**G. Definitions**

**beginning with the letter “G”:**

**“Generally established practice”**

means a practice of or pertaining to one or more of the following: the historically or conventionally applied and acknowledged methods of installation, assembly, and operation or use of residential systems and their related materials and components. Generally established practices may vary based on whether they were applicable at the time of construction or whether modifications to the property were made after the original construction.

**H. Definitions**

**beginning with the letter “H”:**

(1) **“Home**

**inspection**”, as defined by Subsection E of Section 61-24D-2 NMSA 1978, means a noninvasive, nondestructive examination by a person of the interior and exterior components of a residential real property, including the property’s structural components, heating, foundation and roof, for the purposes of providing a professional written opinion regarding the site aspects and condition of the property and its attached or detached carports, garages and reasonably accessible installed components. “Home inspection” includes the examination of the property’s heating, cooling, plumbing and electrical systems, including the operational condition of the systems’ controls that are normally operated by a property owner.

(2) **“Home**

**inspector**”, as defined by Subsection F of Section 61-24D-2 NMSA 1978, means a person who performs home inspections for compensation.

**I. Definitions**

**beginning with the letter “I”:**

(1)

“**Identify**” means to describe a specific system or component by its type and to distinguish it by characteristics such as general or specific materials, energy sources, etc., which differentiate that system of components from other similar systems and components.

(2) **“Inspected**

**Property**” means the readily

accessible areas of the buildings, site, items, components and systems included in the Home Inspection.

(3) **“Inter-**

**NACHI examination**” means the examination offered, conducted, and proctored by the International Association of Certified Home Inspectors (Inter-NACHI).

**J. Definitions**

**beginning with the letter “J”:**

[RESERVED]

**K. Definitions**

**beginning with the letter “K”:**

[RESERVED]

**L. Definitions**

**beginning with the letter “L”:**

(1)

**“Licensure by [credentials]**

**credentials**” means the process by which an individual applicant applies for a license as a home inspector in New Mexico on the basis of the applicant’s pre-existing license in another jurisdiction.

(2)

**“Licensure by training and**

**examination**” means the process by which an individual applicant applies for a license in New Mexico as a home inspector on the basis of the applicant’s education, training, and passage of the [national home-inspector examination] National Home Inspector Examination (NHIE) or the proctored Inter-NACHI examination.

(3)

**“Licensure by experience and**

**examination**” means the process by which an individual applicant applies for a license in New Mexico as a home inspector on the basis of the applicant’s previous work in New Mexico as a home inspector in each of the 24 months immediately preceding January 1, 2020, the applicant’s performance of at least 100 home inspections for compensation in the 24 months immediately preceding January 1, 2020, and the applicant’s passage of a [national home-inspector examination, whether the NHIE or the proctored Inter-NACHI examination] of a board-approved home inspector examination.

**M. Definitions**

**beginning with the letter “M”:**

[RESERVED]



**N. Definitions****beginning with the letter “N”:**

(1) “[national-home-inspector-examination]

**National Home Inspector****Examination National**” or “NHIE”

means the examination offered, conducted, and proctored by the [examination-board-of-professional-home-inspectors] Examination Board of Professional Home Inspectors (EBPHI).

(2) “Normal operating controls” means thermostats, switches, valves, and other devices intended by design and manufacture to be used by homeowners or occupants in the normal and regular day-to-day operation of systems or components.

(3) “Normally intended function or operation” means the customary or conventional purpose or use for which a system or component is installed and for which it is designed or intended by its manufacturer.

**O. Definitions****beginning with the letter “O”:**

(1) “On-site water supply quality” means water quality based on the bacterial, chemical, mineral, and solids content of the water.

(2) “On-site water supply quantity” means the rate of flow of water.

**P. Definitions****beginning with the letter “P”:**

(1) “Permanently installed” means an item, system, or component designed or intended to remain where originally placed, not easily moved, and which is attached, connected, or set in place for use so as to render moving or removing the item, system, or component impossible without the use of tools or equipment.

(2) “Pre-inspection agreement” means a signed agreement between the home inspector and their client executed prior to the commencement of the inspection detailing the services that the home inspector will provide.

[(2)] (3)

“Proctored examination” means a

test taken under the supervision of testing staff. The proctor’s function is to ensure procedural integrity and security of the examination in a secure environment. Examination passage must be in writing and written by the organization or entity that administered the examination.

[(3)] (4)

“Professional liability insurance” means [general liability insurance;] errors and omissions insurance.

**Q. Definitions****beginning with the letter “Q”:**

“Qualified” means having the training, skills, knowledge, expertise, competence and any special tools or equipment necessary to address adverse conditions and routine maintenance conditions and, where applicable, holding all required licenses and meeting all applicable industry standards and all governmental and statutory requirements.

**R. Definitions****beginning with the letter “R”:**

(1) “Reactivation” means the process and board act of reactivating an inactive or expired license, thereby permitting the licensee to engage in the practice of home inspection.

(2) “Readily accessible” means visually observable and able to be examined without requiring destructive measures; without risk to the inspector or others; without risk of damage to any item of personal or real property; without requiring the inspector to move, remove, damage, or disturb any wall, floor, ceiling, or window coverings; or any interior or exterior claddings or finish treatments; to move, remove, damage, disturb, climb upon, climb over, or straddle any item of personal property; to move, remove, damage, or disturb any landscape elements; or to interrupt the business of occupants, and not requiring disassembly or the use of any special protective clothing or special tools or equipment.

(3) “Readily openable access panel” means a panel located within normal reach or from a four-foot stepladder, and which is not blocked by stored items,

furniture, or building components, provided for homeowner inspection and maintenance that has removable or operable fasteners or latch devices in order to be lifted off, swung open, or otherwise removed by one person, and its edges and fasteners are not painted in place, but not including electrical panel board enclosure dead front covers.

(4)

“Residential recreational facilities” means residential spas, saunas, steam baths, swimming pools, exercise, entertainment, athletic, playground and other similar equipment, and associated accessories that are installed at the inspected property.

(5)

“Reinstatement” means the process and board act of reinstating a suspended or revoked license, thereby permitting the licensee to engage in the practice of home inspection either with or without future conditions.

(6)

“Representative number” means all readily accessible identical components such as windows, electric switches and electric receptacles that serve as a typical or characteristic example of the items or components inspected. When one or a number of components or systems has identified “adverse conditions,” the report should indicate further evaluation of all identical components by qualified personnel.

(7) “Roof

drainage systems” means gutters, downspouts, leaders, splash blocks, and similar components used to carry water off a roof and away from a building.

(8) “Routine

maintenance” means typical, regular, ongoing, and expected maintenance that is part of an ongoing and prudent overall property and building systems upkeep program.

**S. Definitions****beginning with the letter “S”:**

(1) “Safety glazing” means tempered glass, laminated glass, or rigid plastic.

(2) “Shut down” means a piece of equipment whose safety switch or circuit breaker

is in the “off” position, or its fuse is missing or blown, or a system that cannot be operated by the device or control that a homeowner should normally use to operate it.

**(3) —“Solid fuel heating device”** means any wood, coal, or other similar organic fuel-burning device, including but not limited to fireplaces, whether masonry or factory build, fireplace inserts and stoves, woodstoves (room heaters), central furnaces, and combinations of these devices;}

**(4) (3) “Structural component”** means a component that supports non-variable forces or weights (dead loads) and variable forces or weights (live loads). For purposes of this definition, a dead load is the fixed weight of a structure or piece of equipment, such as a roof structure on bearing walls, and a live load is a moving variable weight added to the dead load or intrinsic weight of a structure.

**(5) (4) “System”** means a permanently installed group of interacting, interrelated, or interdependent components historically and conventionally designed and intended to perform one or more specific functions.

**T. Definitions beginning with the letter “T”:**  
**“Technically exhaustive”** means a comprehensive and detailed examination beyond the scope of a real estate home inspection that would involve or include, but would not be limited to: dismantling, specialized knowledge or training, special equipment, measurements, calculations, testing, research, analysis, or other means.

**U. Definitions beginning with the letter “U”:**  
**[RESERVED]**

**V. Definitions beginning with the letter “V”:**  
**[RESERVED]**

**W. Definitions beginning with the letter “W”:**

**(1) “Wall cladding”** means a protective or insulating layer fixed to the outside of a building such as aluminum, brick, EIFS, stone, stucco, vinyl, or wood.

**(2) “Wiring method”** means the identification of electrical conductors or wires by their general type, such as nonmetallic sheathed cable, armored cable, and knob and tube.

[16.66.1.7 NMAC – N, 1/15/2021; A, XX/XX/2023]

**16.66.1.8 OFFICES:** The office of the New Mexico home inspectors board will be located in Albuquerque, New Mexico.  
 [16.66.1.8 NMAC – N, 1/15/2021]

**16.66.1.9 TELEPHONIC MEETING ATTENDANCE:** A board member may participate in a board meeting by means of a conference telephone or similar communications equipment only when it is difficult or impossible for the board member to physically attend the meeting. A board member attending by means of conference telephone or similar communications equipment must attest in open session during the meeting that his or her in-person attendance was difficult or impossible.  
 [16.66.1.9 NMAC – N, 1/15/2021]

**16.66.1.10 ADVISORY COMMITTEES:** To assist and advise the board in its functions and mission, the board may, at its discretion, utilize advisory committees consisting of board members, volunteers, or both. Any committee serving the board shall have a purely advisory role and shall not have any policymaking authority of any kind. The board has absolute discretion with respect to the number of individuals who may serve on a committee, provided that in no case shall a quorum of the members of the board serve on a committee. The committees the board may create and utilize include, but are not necessarily limited to, the following:

**A. Rules committee:**  
 The board may utilize a rules committee to study the board’s rules and provide nonbinding recommendations as to future changes and improvements.

**B. Complaint committee:** The board may utilize a complaint committee to review disciplinary complaints against licensees and unlicensed practitioners and provide recommendations as to the final disposition of those complaints.

**C. Application committee:** The board may utilize an application committee to review applications for licensure and provide recommendations as to whether the board should grant or deny those applications.

**D. Continuing Education Committee:** The board may utilize a continuing education committee for the purpose of providing nonbinding recommendations as to whether to accept a proposed continuing education course towards licensees’ continuing education requirements.  
 [16.66.1.10 NMAC – N, 1/15/2021]

#### **16.66.1.11 LISTS AND STATEMENTS:**

**A.** The board staff shall maintain a list of the names and addresses of all licensees.

**B.** The board staff shall maintain a list of all persons whose licenses have been suspended or revoked in that particular calendar year.

**C.** The board staff shall maintain a statement of all funds received and a statement of all disbursements.  
 [16.66.1.11 NMAC – N, 1/15/2021]

**16.66.1.12 SIGNATURES:** A record, contract, or other document requiring a signature from an authorized person on behalf of the board may be signed by the Chair, Vice-Chair, or Board Administrator.  
 [16.66.1.12 NMAC – N, 1/15/2021]

#### **16.66.1.13 RULE IMPLEMENTATION PERIOD:**

**A.** Within six months of the effective date of these rules, any individual engaged in the practice of home inspection in New Mexico shall be required to obtain a license issued by the board as a condition

of engaging in the future practice of home inspection in New Mexico.

(1) On the date falling six months after the effective date of these rules or on the date declared by the Board in the event of a state of emergency as provided in subsection (2) of this rule, whichever is later, any individual engaged in the unlicensed practice of home inspection in New Mexico shall be subject to disciplinary action by the board. The board may also, as it deems appropriate, request the attorney general or district attorney of the judicial district in which the person resides or in which the violation is occurring or has occurred to maintain an action in the name of the state to prosecute the unlicensed practitioner or to enjoin the act or practice.

(2) Extension of Implementation Period due to State of Emergency: In the event that the Governor declares a state of emergency due to the spread of an infectious disease that extends beyond the six months provided for in this rule, the Board may vote at an open meeting to extend the rule implementation period beyond those initial six months if, in the opinion of the Board, the state of emergency hinders prospective applicants from completing the necessary prerequisites to licensure. Any extension of the rule implementation period shall last no longer than 30 days after the expiration of the state of emergency declared by the Governor.

**B.** Nothing in this rule permits any person engaged in the practice of home inspection, whether licensed or unlicensed, to violate the code of ethics or standards of conduct as adopted by the board, nor does it permit such a person to violate the Home Inspector Licensing Act. Any action in violation of these rules or the Home Inspector Licensing Act may be considered by the board as part of an individual's application for licensure. [16.66.1.13 NMAC – N, 1/15/2021]

**HISTORY OF 16.66.1 NMAC;**  
**[RESERVED]**

## **TITLE 16 OCCUPATIONAL AND PROFESSIONAL LICENSING**

### **CHAPTER 66 HOME INSPECTOR LICENSING PART 3 APPLICATIONS AND LICENSES**

#### **16.66.3.1 ISSUING**

**AGENCY:** New Mexico home inspectors board.

[16.66.3.1 NMAC – N, 1/15/2021]

**16.66.3.2 SCOPE:** All licensed home inspectors, license applicants, other agencies, professional associations, and any member of the general public affected by or interested in home inspectors. [16.66.3.2 NMAC – N, 1/15/2021]

#### **16.66.3.3 STATUTORY**

**AUTHORITY:** These rules are promulgated pursuant to the Home Inspector Licensing Act, Sections 61-24D-1 through 16 NMSA 1978 (2019).

[16.66.3.3 NMAC – N, 1/15/2021]

#### **16.66.3.4 DURATION:**

Permanent.

[16.66.3.4 NMAC – N, 1/15/2021]

#### **16.66.3.5 EFFECTIVE**

**DATE:** January 15, 2021, unless a later date is cited at the end of a section.

[16.66.3.5 NMAC – N, 1/15/2021]

#### **16.66.3.6 OBJECTIVE:**

The objective of Part 3 of Chapter 66 is to set forth provisions governing applications for licensure as a home inspector and examinations.

[16.66.3.6 NMAC – N, 1/15/2021]

#### **16.66.3.7 DEFINITIONS:**

Refer to Definitions, 16.66.1.7

NMAC.

[16.66.3.7 NMAC – N, 1/15/2021]

#### **16.66.3.8 APPLICATION FOR LICENSURE BY TRAINING AND EXAMINATION:**

**A.** The board shall issue a license to an applicant for licensure by training and examination if the applicant fulfills the following

requirements and provides the following information and evidence:

- (1) Completion of the board-issued application form;
- (2) payment of the non-refundable application fee in full as provided in Part 2;
- (3) provision to the board of the applicant's fingerprints and all information necessary for the board to complete a state and national criminal background check;
- (4) provision to the board of sufficient documentation to establish that the applicant is at least 18 years of age [and a legal resident of the United States];
- (5) completion of at least 80 hours of classroom training:
  - (a) The cumulative total of 80 hours of classroom training must include all of the following subjects:
    - (i) site characteristics and exterior;
    - (ii) structural components;
    - (iii) roofing;
    - (iv) plumbing;
    - (v) electrical;
    - (vi) heating, cooling, and air conditioning;
    - (vii) interiors, appliances, and garages;
    - (viii) insulation and ventilation;
    - (ix) fireplaces and fuel burning appliances;
    - (x) New Mexico standards of practice and code of ethics;
    - (xi) business practices, including New Mexico rules and regulations, pre-inspection agreements, and report writing.
  - (b) All 80 hours of classroom training must be obtained through an educational course that satisfies one of the following criteria:



(i) The course is approved or accepted by another governmental state home inspector licensing authority;

(ii) the course is approved by the United States department of education or the New Mexico department of education; or

(iii) the course is designated as pre-licensing education and is certified or approved by any society, institute, council, or association of home inspectors;

(c) all 80 hours of classroom training may be completed online;

(6) passage of the [~~national home inspector examination~~] National Home Inspector Examination (NHIE); or the proctored home inspector examination of the International Association of Certified Home Inspectors (Inter-NACHI);

(7) completion of a total of at least 80 hours of field training spent conducting a minimum of 30 parallel home inspections, evidenced by documents including, but not necessarily limited to, a completed board-issued inspection log, pre-inspection agreements, notarized affidavits, and other similarly-reliable evidence;

(8) satisfactory evidence that the applicant has errors and omissions insurance coverage meeting the minimum terms and conditions required by 16.66.8 NMAC; and

(9) satisfactory evidence that the applicant has professional liability insurance coverage meeting the minimum terms and conditions required by 16.66.8 NMAC.

**B.** For the purposes of this rule, parallel home inspections mean inspections that are either:

(1) Conducted in New Mexico prior to the effective date of this rule; or

(2) those home inspections at which the applicant, for observational, experiential, and

educational purposes, accompanied another home inspector who:

(a) is legally engaged in the practice and profession of home inspection in the jurisdiction in which the home inspection is conducted;

(b) has at least two years of experience in the profession of home inspection; and

(c) has previously completed at least 100 home inspections for compensation. [16.66.3.8 NMAC – N, 1/15/2021; A, XX/XX/2023]

#### 16.66.3.9 APPLICATION FOR LICENSURE BY EXPERIENCE AND EXAMINATION:

**A.** An individual is eligible for licensure by experience and examination if the individual satisfies both of the following criteria:

(1) The applicant worked as a home inspector in each of the 24 months immediately preceding January 1, 2020; and

(2) the applicant performed at least 100 home inspections for compensation in the 24 months immediately preceding January 1, 2020.

**B.** The board shall issue a home inspector license to applicant for licensure by experience and examination if the applicant fulfills the following requirements and provides the following information and evidence:

(1) Completion of the board-issued application form;

(2) payment of the non-refundable application fee in full as provided in Part 2;

(3) provision to the board of the applicant’s fingerprints and all information necessary for the board to complete a state and national criminal background check;

(4) provision to the board of sufficient documentation to establish that the applicant is at least 18 years of age and a legal resident of the United States;

(5) passage of a board approved national home inspector examination. For the purposes of this rule, the applicant must either have passed the [~~national home inspector examination~~] National Home Inspector Examination (NHIE), [~~have passed prior to the date falling 6 months after the effective date of these rules~~] InterNACHI’s Home-Inspector Exam] or the proctored home inspector examination of the International Association of Certified Home Inspectors (Inter-NACHI); subject to the following limitations:

(a) Evidence of the applicant’s examination passage must be in writing and written by the organization or entity that administered the examination; and

(b) the examination must have been proctored and the applicant must provide evidence as to this requirement.

(6) Satisfactory evidence that the applicant has errors and omissions insurance coverage and professional liability insurance coverage meeting the minimum terms and conditions required by 16.66.8 NMAC; and

(7) provision to the board of sufficient documentation and evidence to establish the applicant’s home inspector activities in the 24 months immediately preceding January 1, 2020. Such documentation may include, but is not limited to, tax records, notarized affidavits from persons other than the applicant, pre-inspection agreements, and other [~~similarly reliable~~] similarly reliable evidence of the applicant’s home inspection activities in the 24 months immediately preceding January 1, 2020.

**C.** For the purposes of this rule, the phrase “worked as a home inspector in each of the 24 months immediately preceding January 1, 2020” means having personally conducted any business activity directly associated with the profession of home inspection but is not limited to having conducted an

actual home inspection. To qualify for licensure by experience and examination, an individual does not need to have personally conducted a home inspection in each of the 24 months immediately preceding January 1, 2020, if that individual conducted another business activity directly associated with the profession of home inspection during each of the 24 months.  
[16.66.3.9 NMAC – N, 1/15/2021; A, XX/XX/2023]

### **16.66.3.10 APPLICATION FOR LICENSURE BY CREDENTIALS:**

**A.** An applicant who holds a license in good standing to practice as a home inspector in another state may be granted a license by virtue of the applicant's credentials if the applicant's resident state license requirements are the same as or similar to the requirements set forth in the Home Inspector Licensing Act as determined by the board.

**B.** An applicant applying for licensure on the basis of the applicant's credentials as described in subsection A of this rule shall be required to provide to the board:

- (1) Completion of the board-issued application form;
- (2) payment of the non-refundable application fee in full as provided in Part 2;
- (3) provision to the board of the applicant's fingerprints and all information necessary for the board to complete a state and national criminal background check;
- (4) provision to the board of sufficient documentation to establish that the applicant is at least 18 years of age ~~[and a legal resident of the United States];~~
- (5) a certificate, letter, or other documentation from the licensing authority in the applicant's resident state attesting to the fact that the applicant holds a license in good

standing to practice as a home inspector in that state;

(6) satisfactory evidence that the applicant has errors and omissions insurance coverage meeting the minimum terms and conditions required by 16.66.8 NMAC; and

(7) satisfactory evidence that the applicant has professional liability insurance coverage meeting the minimum terms and conditions required by 16.66.8 NMAC.

**C.** Pursuant to the Home Inspector Licensing Act, the board may negotiate agreements with other states or licensing jurisdictions to allow for reciprocity regarding licensure. A license granted pursuant to a reciprocity agreement shall be issued upon:

- (1) completion of the board-issued application form;
- (2) payment of the non-refundable application fee in full as provided in Part 2;
- (3) provision to the board of the applicant's fingerprints and all information necessary for the board to complete a state and national criminal background check;
- (4) provision to the board of sufficient documentation to establish that the applicant is at least 18 years of age ~~[and a legal resident of the United States];~~
- (5) the applicant's provision to the board of a certificate, letter, or other documentation from the licensing authority in the applicant's resident state attesting to the fact that the applicant holds a license in good standing to practice as a home inspector in that state.

(6) Satisfactory evidence that the applicant has errors and omissions insurance coverage meeting the minimum terms and conditions required by 16.66.8 NMAC; and

(7) satisfactory evidence that the applicant has professional liability insurance coverage meeting the minimum terms

and conditions required by 16.66.8 NMAC.  
[16.66.3.10 NMAC – N, 1/15/2021]

### **16.66.3.11 EXAMINATIONS:**

**A.** Licensure by training and examination: All applicants for licensure by training and examination must either pass the ~~[national home inspector examination]~~ National Home Inspector Examination (NHIE) or the proctored examination of the International Association of Certified Home Inspectors (Inter-NACHI) ~~[following the date of application for licensure with the board or have previously passed the national home inspector examination (NHIE)]~~ prior to the date of the applicant's application for licensure.

**B.** Licensure by experience and examination: All applicants for licensure by experience and examination must either:

- (1) Pass the ~~[national home inspector examination]~~ National Home Inspector Examination (NHIE); or
- (2) ~~[have passed prior to the date falling six months after the effective date of these rules]~~ Pass the proctored home inspector examination of the International Association of certified home inspectors (Inter-NACHI) subject to the following limitations:

(a) Evidence of the applicant's examination passage must be in writing and written by the organization or entity that administered the examination; and

(b) the examination must have been proctored and the applicant must provide evidence as to this requirement.

**C.** Licensure by credentials: Applicants for licensure by licensure by credentials are not required to provide the Board with evidence as to prior examination passage. However, the board will consider whether the applicant's prior licensing jurisdiction requires the passage of a national examination in determining whether the prior

licensing jurisdiction's standards are substantially equivalent to those in New Mexico.

**D.** It is the applicant's responsibility to make all arrangements with the [examination board of professional home inspectors] Examination Board of Professional Home Inspectors (EBPHI) to take the NHIE or with Inter-NACHI to take the proctored Inter-NACHI home inspectors examination.

**E.** The applicant shall send the applicant's examination score to the board, provided that the examination score must be in a document originally written by the organization or entity that administered the examination.

**F.** Any applicant who fails the NHIE may retake the exam at the next available opportunity. [16.66.3.11 NMAC – N, 1/15/2021; A, XX/XX/2023]

**16.66.3.12 EXPEDITED LICENSURE FOR MILITARY SERVICE MEMBERS, SPOUSES, CHILDREN, AND VETERANS:**

[A.——Pursuant to Section 61-1-34 of the Uniform Licensing Act, any individual who is a military service member, spouse, or child, or who is a recent veteran having received an honorable discharge or separation from military service within the three years immediately preceding the date of the individual's application, is entitled to expedited licensure as provided herein.

**B.** Such an individual eligible for expedited licensure shall submit:

(1) An application for licensure on a form provided by the Regulation and Licensing Department;

(2) Satisfactory evidence that the applicant holds a license that is current and in good standing, issued by another jurisdiction, including a branch of an armed forces of the United States, whose licensure standards are substantially equivalent to those set forth in these rules and the Home Inspector Licensing Act;

(3) Proof of honorable discharge, military identification card, proof of marriage for spousal status, or proof of the individual's parentage so as to qualify for an expedited license pursuant to Section 61-1-34 of the Uniform Licensing Act; and

(4) Satisfactory evidence that the applicant has errors and omissions insurance coverage and professional liability insurance coverage meeting the minimum terms and conditions required by 16.66.8-NMAC.

C. An individual eligible for expedited licensure shall not be required to pay an application fee or an initial three-year license fee.]

**A.** Application requirements:

(1) Applications for licensure shall be completed on a form provided by the home inspectors board.

(2) The applicant shall provide a complete application that includes the following information:

(a) Applicant's full name;

(b) current mailing address;

(c) current electronic mail address, if any;

(d) date of birth;

(e) background check, if required; and

(f) proof as described in Subsection C below.

(3) The applicant shall provide the following satisfactory evidence as follows:

(a) Applicant is currently licensed and in good standing in another jurisdiction, including a branch of the United States armed forces;

(b) applicant has met the minimal licensing requirements in that jurisdiction and the minimal licensing requirements in that jurisdiction

are substantially equivalent to the licensing requirements for New Mexico; and

(c) the following documentation:

(i) For military service member: a copy of military orders;

(ii) for spouse of military service members: copy of military service member's military orders, and copy of marriage license;

(iii) for spouses of deceased military service members: copy of decedent's DD 214 and copy of marriage license;

(iv) for dependent children of military service members: a copy of military service member's orders listing dependent child, or a copy of military orders and one of the following: a copy of birth certificate, military service member's federal tax return or other governmental or judicial documentation establishing dependency;

(v) for veterans (retired or separated): a copy of DD 214 showing proof of honorable discharge.

(4) The license shall be issued by the board as soon as practicable but no later than thirty days after a qualified military service member, spouse, dependent child, or veteran files a complete application and provides a background check if required for a license, and any required fees.

(5) Military service members and veterans shall not pay and the board shall not charge a licensing fee for the first three years for a license issued pursuant to this rule.

(6) A license issued pursuant to this section shall be valid for the time period that is specified in the Home Inspectors Licensing Act.

**B.** Renewal requirements:

(1) A license issued pursuant to this section shall not be renewed unless the license holder satisfies the requirements for

renewal set forth in 16.66.4.8 NMAC pursuant to 61-24D-8 NMSA 1978.

(2) As a courtesy, the board will send via electronic mail license renewal notifications to licensees before the license expiration date to the last known email address on file with the board. Failure to receive the renewal notification shall not relieve the licensee of the responsibility of timely renewal on or before the expiration date.

[16.66.3.12 NMAC – N, 1/15/2021; A, XX/XX/2023]

**16.66.3.13 ~~INITIAL LICENSE LENGTH (RULE IN EFFECT UNTIL DECEMBER 31, 2021):~~**

A. A new license issued pursuant to these rules shall be valid for no more than three years. Until the close of business on December 31, 2021, initial license expiration dates shall be staggered and initial licenses shall be issued for durations of one, two, or three years for the purposes of ensuring an orderly expiration period and the continuity of professional home inspector services in New Mexico. The durations of licenses shall be determined at random by Board staff. Each new license shall expire either after one, two, or three years.

B. Following the expiration of each initial license, the licensee shall be issued a license for a duration of three years.

C. This rule shall automatically, without further rulemaking action on the part of the Board, expire as of the close of business on December 31, 2021.]

[RESERVED]

[16.66.3.13 NMAC – N, 1/15/2021; Repealed, XX/XX/2023]

**16.66.3.14 LICENSURE PROCEDURE:**

A. Upon receipt of a completed application, including all required documentation and fees, the Board's application committee, should the Board choose in its discretion to utilize such a committee, may provide a non-binding and

purely advisory recommendation as to whether the Board should grant or deny the application.

B. No license may be issued until the applicant has paid the non-refundable, but potentially prorated as provided in these rules, initial license fee in full.  
[16.66.3.14 NMAC – N, 1/15/2021]

**16.66.3.15 CRIMINAL CONVICTIONS:**

A. Convictions for any of the following offenses, or their equivalents in any other jurisdiction, are disqualifying criminal convictions that may disqualify an applicant from receiving or retaining a license issued by the board. This includes conviction of an offense which if committed in this state, would be deemed a felony under either state or federal law, without regard to its designation elsewhere. The term "conviction" shall include a finding or verdict of guilt, a plea of guilty, or a plea of nolo contendere in a criminal proceeding, regardless of whether the adjudication of guilt or sentence is withheld or not entered thereon, or an appeal of the conviction has been sought.

(1) Homicide, voluntary or involuntary manslaughter;

(2) trafficking in controlled substances, manufacturing of controlled substances or distribution of controlled substances;

(3) human trafficking, kidnapping, false imprisonment, aggravated assault or aggravated battery;

(4) rape, criminal sexual penetration, criminal sexual contact, incest, indecent exposure, or other related felony sexual offenses;

(5) crimes involving adult abuse, neglect, or financial exploitation;

(6) crimes involving child abuse or neglect;

(7) crimes involving robbery, larceny, extortion, burglary, possession of burglary tools, destruction of property, criminal damage to property, unlawful or

dangerous uses of explosives, breaking and entering, arson, making a bomb scare, tampering with evidence or receiving stolen property;

(8) financial crimes involving fraud, forgery, embezzlement, credit card fraud.

B. The board shall not consider the fact of a criminal conviction as part of an application for licensure unless the conviction in question is one of the disqualifying criminal convictions listed in Subsection A of this rule.

C. The board shall not deny, suspend or revoke a license on the sole basis of a criminal conviction unless the conviction in question is one of the disqualifying criminal convictions listed in Subsection A of this rule.

D. Nothing in this rule prevents the board from denying an application or disciplining a licensee on the basis of an individual's conduct to the extent that such conduct violated the Home Inspector Licensing Act, regardless of whether the individual was convicted of a crime for such conduct or whether the crime for which the individual was convicted is listed as one of the disqualifying criminal convictions listed in Subsection A of this rule.

E. In connection with an application for licensure, the board/ commission shall not use, distribute, disseminate, or admit into evidence at an adjudicatory proceeding criminal records of any of the following:

(1) An arrest not followed by a valid conviction;

(2) a conviction that has been sealed, dismissed, expunged or pardoned;

(3) a juvenile adjudication; or

(4) a conviction for any crime other than the disqualifying criminal convictions listed in Subsection A of this rule.

[16.66.3.15 NMAC – N, XX/XX/2023]

**HISTORY OF 16.66.3 NMAC:**  
[RESERVED]



**TITLE 16 OCCUPATIONAL AND PROFESSIONAL LICENSING**  
**CHAPTER 66 HOME INSPECTOR LICENSING**  
**PART 7 STANDARDS OF PRACTICE**

**16.66.7.1 ISSUING**

**AGENCY:** New Mexico home inspectors board.

[16.66.7.1 NMAC – N, 1/15/2021]

**16.66.7.2 SCOPE:** All licensed home inspectors, license applicants, other agencies, professional associations, and any member of the general public affected by or interested in home inspectors.  
 [16.66.7.2 NMAC – N, 1/15/2021]

**16.66.7.3 STATUTORY**

**AUTHORITY:** These rules are promulgated pursuant to the Home Inspector Licensing Act, Sections 61-24D-1 through 16 NMSA 1978 (2019).

[16.66.7.3 NMAC – N, 1/15/2021]

**16.66.7.4 DURATION:**

Permanent.

[16.66.7.4 NMAC – N, 1/15/2021]

**16.66.7.5 EFFECTIVE**

**DATE:** January 15, 2021, unless a later date is cited at the end of a section.

[16.66.7.5 NMAC – N, 1/15/2021]

**16.66.7.6 OBJECTIVE:** The objective of Part 7 of Chapter 66 is to set forth minimum and uniform standards of practice governing all home inspector licensees.

[16.66.7.6 NMAC – N, 1/15/2021]

**16.66.7.7 DEFINITIONS:**

Refer to Definitions, 16.66.1.7 NMAC.

[16.66.7.7 NMAC – N, 1/15/2021]

**16.66.7.8 STANDARDS OF PRACTICE:**

This Part sets forth the minimum and uniform standards of practice applicable to all New Mexico home inspector licensees.

[16.66.7.8 NMAC – N, 1/15/2021]

**16.66.7.9 HOME INSPECTIONS DO NOT DETERMINE CONFORMITY WITH STATE AND LOCAL BUILDING CODE REQUIREMENTS:**

A licensee shall not, as part of a home inspection, determine whether the home or components and/or systems of the home that have been inspected conform to local or state building code requirements. A home inspection report shall not contain a determination of whether the home or components and/or systems of the home that have been inspected conform to local or state building code requirements.

[16.66.7.9 NMAC – N, 1/15/2021]

**16.66.7.10 PRE-INSPECTION AGREEMENTS:**

Prior to the commencement of any home inspection, a licensee shall enter into a pre-inspection agreement with the client. Any pre-inspection agreement must contain, at a minimum, all of the following:

- A.** The date and time of the inspection;
- B.** the name and license number of the licensee home inspector who will be conducting the home inspection;
- C.** the compensation fee and terms of payment for services;
- D.** a statement that the inspection shall be performed in accordance with the Board's rules and standards of practice;
- E.** a statement summarizing the scope of work to be performed by the licensee, provided that this scope of work may be modified by subsequent written agreement executed by the licensee and client prior to commencement of the home inspection;
- F.** the date upon which the licensee shall deliver the home inspection report to the client;
- G.** the following statement, in its entirety and in all capital letters: "THE HOME INSPECTOR WILL NOT DETERMINE AND THE REPORT PROVIDED UPON COMPLETION OF THE HOME INSPECTION

WILL NOT CONTAIN A DETERMINATION OF WHETHER THE HOME OR COMPONENTS AND/OR SYSTEMS OF THE HOME THAT HAVE BEEN INSPECTED CONFORM TO LOCAL OR STATE BUILDING CODE REQUIREMENTS."

[16.66.7.10 NMAC – N, 1/15/2021]

**16.66.7.11 HOME**

**INSPECTIONS:** The licensee shall, as part of any home inspection, inspect all of the readily accessible and permanently installed systems and components listed in 16.66.7.12 NMAC, 16.66.7.13 NMAC, 16.66.7.14 NMAC, 16.66.7.15 NMAC, 16.66.7.16 NMAC, 16.66.7.17 NMAC, 16.66.7.18 NMAC, 16.66.7.19 NMAC, 16.66.7.20 NMAC, 16.66.7.21 NMAC, 16.66.7.22 NMAC, and 16.66.7.23 NMAC.

**A.** Home inspections must be conducted by a licensee. A trainee may conduct parallel inspections and write portions of a home inspection report alongside and under the supervision of a licensee, provided that the licensee shall be responsible for compliance with these rules and regulations in all circumstances. Only a licensee may sign a home inspection report. Office staff may conduct scheduling and bookkeeping functions without a license.

**B.** Recommendations: Any decision to seek repair, further evaluation, or cost estimates for repair of any reported adverse condition observed and described in a home inspection report is reserved to the parties to the contract for sale and purchase of the home. All such repairs, evaluations, and cost estimates must be provided by a qualified and, if required, licensed contractor and may include tests, measurements, and adjustments outside of the scope of a normal home inspection and may lead to the discovery of additional adverse conditions which may have additional repair costs that may not have been obvious to the home inspector. Any individual engaged in construction,

or a trade related to contracting or making code determinations in New Mexico must be licensed by the appropriate state agency, if required. [16.66.7.11 NMAC – N, 1/15/2021]

**16.66.7.12 SITE CHARACTERISTICS AND EXTERIOR:**

**A.** The licensee shall inspect:

- (1) Wall cladding materials, flashing, and trim;
- (2) eaves, soffits, and fascia where accessible and observable from the ground level;
- (3) exterior doors and windows;
- (4) attached and adjacent decks, balconies, stairs, steps, stoops, stairways, and porches and the associated railings, guards, and handrails;
- (5) vegetation, grading, surface drainage, and retaining structures that, as determined by the licensee, adversely affect the building;
- (6) attached and adjacent walkways and exterior stoops, landings, and patios;
- (7) adjacent driveways and other paved, masonry, or hardscape areas;
- (8) attached portals and ramadas;
- (9) garages and carports.

**B.** In the home inspection report, the licensee shall describe at least the wall cladding.

**C.** The licensee is not required to inspect:

- (1) Storm windows, storm doors, screening, shutters, awnings, and similar seasonal accessories;
- (2) items that are not visible or readily accessible from the ground, including window and door flashing;
- (3) fencing, privacy walls, and retaining walls, unless as determined by the licensee to adversely affect the subject building.
- (4) erosion control and other earth stabilization measures;

- (5) soil or geological conditions, site engineering, property boundaries, encroachments, or easements;
- (6) adequacy of retaining walls, sea walls, waterfront bulkhead, docks, and piers;
- (7) ponds, fountains, or decorative water features;
- (8) safety glazing;
- (9) integrity of multiple-pane window glazing or thermal window seals;
- (10) recreational facilities;
- (11) [Outbuildings] Additional structures other than attached garages and carports; and one detached garage or carport utilized as the primary vehicle structure in proximity to the subject home;
- (12) swimming pools and spas.

[16.66.7.12 NMAC – N, 1/15/2021; A, XX/XX/2023]

**16.66.7.13 STRUCTURAL COMPONENTS:**

**A.** The licensee shall inspect all structural components, including but not limited to foundation and framing.

**B.** In the home inspection report, the licensee shall describe at least the following:

- (1) Methods used to inspect basements, underfloor crawlspaces and attics;
- (2) foundation;
- (3) floor structures;
- (4) wall structures;
- (5) ceiling structures; and
- (6) roof structures.

**C.** The licensee is not required to:

- (1) Provide engineering or architectural services or analysis;
- (2) offer an opinion about the adequacy of structural systems and components;

- (3) enter underfloor crawlspace areas that have less than 24 inches of vertical clearance between components and the ground or that have an access opening smaller than 16 inches by 24 inches;
- (4) enter attics or crawlspaces when access is obstructed or when entry could damage the property;
- ~~[(5) Enter attics or crawlspaces when the licensee suspects dangerous or adverse situations;]~~
- ~~[(6) (5) traverse attic load-bearing components that are concealed by insulation or by other materials;~~
- ~~[(7) (6) move insulation.~~

[16.66.7.13 NMAC – N, 1/15/2021; A, XX/XX/2023]

**16.66.7.14 ROOFING:**

**A.** The licensee shall inspect:

- (1) [Roofing] covering materials;
- (2) roof drainage systems;
- (3) flashing;
- (4) skylights, chimneys, and roof penetrations.

**B.** In the home inspection report, the licensee shall describe at least the following:

- (1) roof materials; and
- (2) methods used to examine the roof as well as any general area of the roof that was not examined and the reason the area was not examined.

**C.** The licensee is not required to:

- (1) Perform a water test;
- (2) warrant or certify the roof or predict the service life expectancy;
- (3) remove snow, ice, debris, or other conditions that prohibit the observation of the roof surfaces;
- (4) inspect antennae, satellite dishes, lightning

arresters, de-icing equipment, or similar attachments;  
 (5) confirm proper fastening or installation of any roof-covering material.  
 [16.66.7.14 NMAC – N, 1/15/2021; A, XX/XX/2023]

**16.66.7.15 PLUMBING:**

**A.** The licensee shall inspect:

(1) Interior water supply and distribution systems, including fixtures and fixture trim components (faucets, valves, drain stops, shower arms and showerheads, flush handles, etc.);

(2) interior drain, waste, and venting systems, including fixtures;

(3) [~~water-heating equipment and hot water supply systems;~~ domestic potable water heating equipment and hot water distribution systems;

(4) vent systems, flues, and chimneys;

(5) fuel storage and fuel distribution systems;

(6) sewage ejectors, sump pumps, and related piping; and

(7) functional flow at each fixture group.

**B.** In the home inspection report, the licensee shall describe at least the following:

(1) Interior water supply, drain, waste, and vent piping materials;

(2) water heating equipment, including energy sources;

(3) location of main water supply shut-off valve; and

(4) location of main fuel supply shut-off valve.

**C.** The licensee is not required to inspect:

(1) Interiors of vent systems, flues, and chimneys that are not readily accessible;

(2) sewage drain waste systems;

(3) on-site (septic) waste disposal systems;

(4) wells, well pumps, and water storage related equipment;

(5) on-site (well) water supply quantity and quality;

(6) water conditioning systems;

(7) solar, geothermal, and other renewable energy water heating systems;

(8) manual and automatic fire extinguishing and sprinkler systems;

(9) landscape irrigation systems;

(10) clothes-washing machine connections;

(11) refrigerator or ice maker water connections.

**D.** The licensee is not required to:

(1) Light or ignite pilot flames;

(2) operate any shut-off or manual stop valves, except water closet flush valves and fixture valves;

(3) test shower pans, tub, and shower surrounds or enclosures for leakage or functional overflow protection;

(4) operate automatic safety controls;

(5) inspect or test for gas or fuel leaks or indications thereof.

**E.** The licensee is not required to determine:

(1) capacity, temperature, life expectancy, or adequacy of the water heater;

(2) adequacy of combustion air components;

(3) whether water supply and waste disposal systems are public or private;

(4) water supply with respect to flow rate, volume, pressure, temperature, quantity, and quality;

(5) effectiveness of anti-siphon devices.  
 [16.66.7.15 NMAC – N, 1/15/2021; A, XX/XX/2023]

**16.66.7.16 ELECTRICAL:**

**A.** The licensee shall inspect:

(1) Service drop (overhead) or the readily

accessible components of the service lateral (underground);

(2) service entrance conductors and cables;

(3) service equipment and main disconnects;

(4) service and system grounding;

(5) interior Components of service distribution panelboards and secondary panelboards by removing the panelboards dead front cover.

(a) When, as determined by the licensee, primary electrical distribution panelboards or secondary panelboards and their related dead front covers and fasteners are readily accessible, the inspector will remove the dead front covers of such panelboards in order to examine readily accessible components installed on their interiors.

(b) Use of tools to remove dead front covers is specifically excluded when dead front covers or their fasteners are painted or otherwise sealed into place or when they cannot be removed with a standard, non-power-assisted slot head or Phillips head screwdriver or hex head nut driver.

(c) Exception for home inspector safety: The home inspector is not required to remove the covers of the service and distribution panels when hazardous conditions are present. The home inspector should use caution whenever removing the covers of service and distribution panels. Before touching the fasteners and cover, the home inspector should use available voltage test tools to verify if the panel assembly, panel dead front, and fasteners have live voltage conditions. Example tools include voltage sniffers, neon bulb testers, three light testers or voltmeters.

(6) Conductors (wiring methods);

(7) overcurrent protection devices;

(8) presence of labeling of overcurrent protection devices;



(9) ground fault circuit interrupter (“GFCI”) protection devices;

(10) arc fault circuit interrupter (“AFCI”) protection devices;

(11) a representative number of installed lighting fixtures, switches, and receptacles; and

(12) the polarity and grounding of all readily accessible receptacles within six feet of interior plumbing fixtures, in the garage or carport, and on the exterior of inspected structures.

**B.** In the home inspection report, the licensee shall describe at least the following:

(1) Service location type: overhead service drop or underground service lateral;

(2) amperage and voltage rating of the service;

(3) service and system grounding and bonding (i.e., concrete encased, ground rod, equipotential cold-water metal pipe);

(4) location of main service entry and distribution panelboards and the associated disconnects;

(5) predominant branch circuit wiring methods;

(6) presence or absence of smoke detectors and alarms;

(7) presence or absence of carbon monoxide detectors and alarms;

(8) presence or absence of ground fault circuit interrupter (“GFCI”) protection devices;

(9) presence or absence of arc fault circuit interrupter (“AFCI”) protection devices;

(10) any unused circuit-breaker panel opening that was not filled;

(11) the presence of solid conductor aluminum branch-circuit wiring;

(12) any tested receptacle in which power was not present, polarity was incorrect, the cover was not in place, the GFCI

devices were not properly installed or did not operate properly, there was evidence of arcing or excessive heat, or where the receptacle was not grounded or was not secured to the wall;

(13) wiring methods which are not consistent with generally established practices such as terminations, multiple tapping of hot and neutral conductors, insulation, improper color-coding of conductor insulation, over-stripping, securing and protection of conductors, and bonding of components.[-etc.-];

(14) condition of visible conductors and insulation (damaged, scorched, burned, or melted insulation; nicked conductors; cut off strands of multiple strand conductors, anti-oxidant compound on aluminum conductors, etc.);

(15) corrosion on components; and

(16) the presence a utility interactive system (i.e., solar, wind turbine, and electric vehicle charging systems).

**C.** The licensee is not required to inspect:

(1) Remote control devices;

(2) Low voltage wiring systems and components;

(3) Ancillary wiring systems and components not a part of the primary electrical power distribution system;

(4) Private or emergency electrical supply systems;

(5) [Spark] Surge protection devices or lightning arrestors.

**D.** The licensee is not required to:

(1) Operate electrical systems that are shut down;

(2) test or operate overcurrent protection devices except ground fault and arc fault circuit interrupters;

(3) test or operate any overcurrent device or safety device in the electrical service panel or elsewhere that may adversely affect the personal property or activity of the resident;

(4) determine the accuracy of the labeling of all overcurrent protection devices;

(5) calculate or measure amperage, voltage, and impedance;

(6) determine (present or future) service capacity amperage, voltage, or the capacity, when not readily accessible, of the electrical system or main service equipment;

(7) determine the age and type of smoke alarms and carbon monoxide alarms;

(8) test or determine the interconnectivity or effectiveness of smoke alarms and carbon monoxide alarms;

(9) verify that smoke or carbon monoxide alarms are interconnected or suitable for the hearing-impaired;

(10) insert any tool, probe, or testing device inside panels or dismantle any electrical device or control other than to remove the primary electrical distribution panelboards or secondary panelboards and their related dead front covers and fasteners when no hazard conditions exist and when readily accessible;

(11) remove the covers of junction, fixture, receptacle, or switch boxes unless specifically required by this standard; and

(12) the home inspector is not required to remove electrical device covers when removal would damage or mar any painted surface or covering materials. [16.66.7.16 NMAC – N, 1/15/2021; A, XX/XX/2023]

**16.66.7.17 HEATING:**

**A.** The licensee shall open readily openable access panels provided by the manufacturer or installer for routine homeowner maintenance.

**B.** The licensee shall inspect:

(1) Permanently installed heating equipment and distribution systems, using normal operating controls; and

(2) vent systems, flues, and chimneys.

C. In the home inspection report, the licensee shall describe at least the following:

- (1) Energy sources; and
- (2) heating systems.

D. The licensee is not required to inspect:

- (1) Interior of vent systems, flues, and chimneys that are not readily accessible;
- (2) heat exchangers;
- (3) humidifiers and dehumidifiers;
- (4) electric air cleaning and sanitizing devices;
- (5) portable heating equipment;
- (6) heating systems using ground-source, water-source, solar, and renewable energy technologies;
- (7) heat-recovery and similar whole-house mechanical ventilation systems;
- (8) fuel tanks or underground or concealed fuel supply systems.

E. The licensee is not required to:

- (1) Light or ignite pilot flames and burners;
- (2) operate automatic safety controls.

F. The licensee is not required to determine:

- (1) Uniformity, temperature, flow, balance, distribution, size, capacity, British thermal unit ("BTU"), or supply adequacy of the heating system;
- (2) adequacy of combustion air components.

[16.66.7.17 NMAC – N, 1/15/2021]

#### 16.66.7.18 COOLING AND AIR CONDITIONING:

A. The licensee shall open readily openable access panels provided by the manufacturer or installer for routine homeowner maintenance.

B. The licensee shall inspect central and permanently installed cooling equipment and

distribution systems, using normal operating controls.

C. In the home inspection report, the licensee shall describe at least the following:

- (1) Energy sources; and
- (2) cooling systems.

D. The licensee is not required to:

- (1) Operate cooling systems when weather conditions or other circumstances may cause equipment damage;
- (2) operate automatic safety controls;
- (3) inspect electric air cleaning and sanitizing devices;
- (4) inspect cooling units that are not permanently installed or that are installed in windows;
- (5) inspect cooling systems using ground-source, water-source, solar, and renewable energy technologies;
- (6) determine the uniformity, temperature, flow, balance, distribution, size, capacity, BTU, or supply adequacy of the cooling system.

[16.66.7.18 NMAC – N, 1/15/2021]

#### 16.66.7.19 INTERIORS:

A. The licensee shall inspect:

- (1) Walls, ceilings, and floors;
- (2) steps, stairways, balconies, and the associated railings, guards, and handrails;
- (3) countertops and a representative number of permanently installed cabinets; and
- (4) a representative number of doors and windows.

B. In the home inspection report, the licensee shall describe at least the following:

- (1) Absence of performing emergency escape and rescue openings in all sleeping rooms;

(2) observed indications of active water penetration on building components; and

(3) observed indications of active or abnormal condensation on building components.

C. The licensee is not required to inspect:

- (1) Safety glazing;
- (2) coatings on and the hermetic seals between panes of window glass;
- (3) security bar release and opening mechanisms;
- (4) paint, wallpaper and other finish treatments on the interior walls, ceilings, and floors;
- (5) floor coverings or carpeting;
- (6) draperies, blinds, or other window treatments; and
- (7) recreational equipment or facilities.

D. The licensee is not required to move personal items, furniture, equipment, or plant life that obstructs access or visibility.

[16.66.7.19 NMAC – N, 1/15/2021]

#### 16.66.7.20 GARAGES:

A. The licensee shall inspect:

- (1) Walls and ceilings adjoining living space;
- (2) doors entering living space from the garage;
- (3) presence of burners, burner ignition devices, or heating elements permanently installed in the garage;
- (4) presence of vehicle barrier when heating or water heating units are in the path of the vehicle;
- (5) scuttle access to attics, including pull-down stairs inside the garage;
- (6) garage vehicle door;
- (7) vehicle door automatic operator and safety features present.

B. In the home inspection report, the licensee shall describe at least the following:

(1) Damage, unsealed penetrations, and openings to walls and ceilings adjoining living spaces;

(2) presence of heating or cooling supply or return ductwork inside the garage space;

(3) burners, burner ignition devices, and other heating elements, switches, and thermostats that may generate a glow, spark, or flame capable of igniting flammable vapors that are installed less than 18 inches above the floor above the garage floor, unless the unit is listed for garage floor installation; and

(4) vehicle door operation.

C. The licensee is not required to:

(1) Verify or certify automatic operator remote control operation;

(2) verify or certify the proper operation of any pressure-activated auto-reverse or related safety feature of a garage door;

(3) inspect or operate equipment housed in the garage, except as otherwise noted;

(4) move personal items, furniture, or equipment which obstructs access or visibility; and

(5) burners, burner ignition devices, or heating elements, switches, and thermostats that are not a minimum of 18 inches above the lowest garage floor elevation, unless the unit is listed for garage floor installation.  
[16.66.7.20 NMAC – N, 1/15/2021]

**16.66.7.21 INSULATION AND VENTILATION:**

A. The licensee shall inspect:

(1) Insulation and vapor retarders in unfinished spaces;

(2) ventilation of unfinished spaces, including attics, enclosed rafter spaces, crawlspaces, and foundation areas; and

(3) kitchen, bathroom, laundry, and similar exhaust systems.

B. In the home inspection report, the licensee shall describe at least the following:

(1) Insulation and vapor retarder in unfinished spaces;

(2) ventilation of unfinished spaces; and

(3) absence of insulation in unfinished spaces at conditioned surfaces.

C. The licensee is not required to:

(1) Disturb insulation;

(2) determine the adequacy of ventilation;

(3) report on concealed insulation, vapor retarders, or venting equipment which is integral with household appliances.  
[16.66.7.21 NMAC – N, 1/15/2021]

**16.66.7.22 FIREPLACES AND FUEL BURNING APPLIANCES:**

A. The licensee shall inspect:

(1) Fuel-burning fireplaces, stoves, and fireplace inserts;

(2) fuel-burning accessories installed in fireplaces; and

(3) chimneys and vent systems.

B. In the home inspection report, the licensee shall describe at least the following:

(1) Fuel-burning fireplaces, stoves, and fireplace inserts;

(2) fuel-burning accessories installed in fireplaces;

(3) presence or lack of a smoke detector in same room of fuel-burning fireplaces, stoves, or fireplace inserts; and

(4) presence or lack of a carbon monoxide detector in same room of fuel-burning fireplaces, stoves, and fireplace inserts.

C. The licensee is not required to inspect:

(1) Interiors of vent systems, flues, and chimneys that are not readily accessible;

(2) fire screens and doors;

(3) seals and gaskets;

(4) mantles and fireplace surrounds;

(5) combustion air components;

(6) heat distribution assists (gravity feeds and fan assisted);

(7) automatic fuel feed devices;

(8) fuel-burning fireplaces and appliances located outside the inspected structures.

D. The licensee is not required to:

(1) Ignite pilot flames;

(2) ignite or extinguish fires;

(3) determine the adequacy of drafts or draft characteristics;

(4) move fireplace inserts, stoves, or firebox contents.  
[16.66.7.22 NMAC – N, 1/15/2021]

**16.66.7.23 BUILT-IN APPLIANCES:**

A. The licensee shall inspect:

(1) Kitchen, using normal operating controls:

(a) Dishwashers through a cycle of the licensee's choosing;

(b) ovens, ranges, and surface cooking appliances;

(c) trash compactors;

(d) food waste grinders;

(e) permanently installed kitchen ventilation equipment; and

(f) permanently installed microwave oven.

(2) Laundry:

(a) Dryer hookup energy sources; and

(b) dryer ventilation or exhaust system.

**B.** In the home inspection report, the licensee shall describe at least the permanently installed appliances that the licensee did not operate and the reason why the appliance was not operated.

**C.** The licensee is not required to inspect:

- (1) Installed and free-standing kitchen and laundry appliances that are not listed in Subsection A of this rule;
- (2) appliances in use or appliances on which personal items are located;
- (3) appliance thermostats, including their calibration, adequacy of heating elements, self-cleaning oven cycles, indicator lights, door seals, timers, clocks, timed features, and other specialized features of the appliance;
- (4) microwave oven heating function or microwave leakage;
- (5) refrigerators, ice makers, or freezers;
- (6) laundry washers with respect to operation or performance;
- (7) laundry dryers with respect to operation or performance;
- (8) central vacuum systems;
- (9) clocks, timers, self-cleaning oven functions, or thermostats for calibration or automatic characteristics of operation;
- (10) any system, component, or appliance that does not respond to normal user controls;
- (11) any system, component, or appliance that requires use of special codes, keys, combinations, or devices;
- (12) elevators or stairlifts.

**D.** The licensee is not required to:

- (1) Remove personal items in or on the appliance;
- (2) operate or confirm the operation of every control and feature of an inspected appliance.

[16.66.7.23 NMAC – N, 1/15/2021]

**16.66.7.24 LIMITATIONS AND EXCLUSIONS:**

**A.** General limitations:

- (1) The requirements, obligations, and standards in this Part apply to residential buildings with four or fewer dwelling units and their attached and detached garages and carports.
- (2) As part of a particular home inspection, licensees are not required to perform actions or make determinations or recommendations beyond those identified in this Part.
- (3) Home inspections performed by licensees are not expected to be technically exhaustive.
- (4) Home inspections performed by licensees are not required to identify or report on concealed, latent, or intermittent conditions.

**B.** In general, the licensee is not required to inspect:

- (1) Underground items including, but not limited to, lawn irrigation systems or underground storage tanks and other underground indications of their presence, whether abandoned or active;
- (2) items that are not permanently installed;
- (3) permanently installed decorative items;
- (4) items in areas that the licensee does not enter, as provided in this Part;
- (5) detached structures other than garages and carports;
- (6) common elements and common areas in multi-unit housing, such as condominium properties and cooperative housing;
- (7) all occurrence of multiple similar components, provided that the licensee may be required to inspect one such component;
- (8) outdoor cooking appliances.

**C.** In general, the licensee is not required to:

- (1) Ignite or extinguish fires, pilot lights, burners, and other open flames that require manual ignition;
- (2) dismantle systems and components, except as required by this Part;
- (3) operate any system or component which is shut down or otherwise inoperable;
- (4) operate any system or component which does not respond to normal operating controls;
- (5) operate shut-off valves and manual stop valves;
- (6) reset, reprogram, or otherwise adjust devices, systems, and components affected by the home inspection required by this part;
- (7) probe surfaces that would be damaged or where no deterioration is visible or presumed to exist;
- (8) use specialized tools;
- (9) disturb insulation, move personal items, furniture, equipment, plant life, soil, snow, ice, or debris which obstructs access or visibility;
- (10) enter areas that will, as determined by the licensee, likely be dangerous to the licensee or to other persons or likely to damage the property or its systems and components;
- (11) enter any area or perform any procedure which may damage the property or its components or be dangerous to the licensee or other persons;
- (12) enter under-floor crawlspaces and attics that are not readily accessible;
- (13) identify and report cosmetic imperfections that do not affect a component's normally intended function or operation;
- (14) describe or report on systems or components that are not included in this Part and that were not inspected;
- (15) offer warranties or guarantees of any kind;
- (16) offer or

perform any engineering services;  
 (17) offer or perform any trade or professional service other than home inspection.

**D.** In general, the licensee is not required to determine:

(1) Compliance with local codes, ordinances or regulations, the legality of property and its present use, conditions of title, boundaries and easements, and location in earthquake, flood, mining, or any other hazard zones;

(2) whether any permits were required or obtained for any work performed on the subject property;

(3) whether grandfathering applies to any condition in a system or component;

(4) condition of systems and components not readily accessible;

(5) strength, adequacy, effectiveness, and efficiency of systems and components;

(6) causes of adverse conditions observed and reported;

(7) methods, materials, and costs of corrections;

(8) future conditions, including but not limited to failure of systems and components;

(9) the age of installation of any system, structure, or component of a building;

(10) the remaining life expectancy of systems and components;

(11) whether items, materials, conditions, and components are subject to recall, controversy, litigation, product liability, and other adverse claims and conditions;

(12) operating costs of systems and components;

(13) acoustical properties of systems and components;

(14) presence of plants, animals, and other life forms and substances that may be hazardous or harmful to humans including, but not limited to, wood destroying

organisms, molds, and mold-like substances;

(15) presence of environmental hazards including, but not limited to, allergens, toxins, carcinogens, electromagnetic radiation, noise, radioactive substances, and contaminants in building materials, soil, water, and air;

(16) effectiveness of permanently installed systems and methods used to control or remove suspected hazardous plants, animals, and environmental hazards;

(17) soil conditions relating to geotechnical or hydrologic specialties;

(18) advisability of purchasing of the property being inspected;

(19) insurability of the property;

(20) marketability or market value of the property;

(21) suitability of the property for specialized uses.  
 [16.66.7.24 NMAC – N, 1/15/2021]

**16.66.7.25 INSPECTION REPORTS:** Following any home inspection, the licensee shall provide the client with a written inspection report.

**A.** Inspection reports must state, at a minimum, the following:

(1) The systems and components of the home that, as determined by the licensee, are not performing their normally intended function or operation or are not consistent with generally established practices regarding the historically or conventionally applied and acknowledged methods of installation, assembly, operation or use;

(2) recommendations as to the need to correct, observe, or check for further correction the adverse conditions reported pursuant to Subsection A of this rule or any other items requiring further evaluation;

(3) such reasoning and explanation as necessary to identify and clarify

the nature of the adverse conditions reported pursuant to Subsection A of this rule;

(4) the systems and components of the home designated for inspection under the board's rules which were present at the time of the home inspection but not inspected, along with the reasons for the lack of inspection;

(5) the following statement, in its entirety and in all capital letters: "THE HOME INSPECTOR DID NOT DETERMINE AND THIS REPORT DOES NOT CONTAIN A DETERMINATION OF WHETHER THE HOME OR COMPONENTS AND/OR SYSTEMS OF THE HOME THAT HAVE BEEN INSPECTED CONFORM TO LOCAL OR STATE BUILDING CODE REQUIREMENTS."

**B.** Although all pre-inspection agreements must state the date upon which the licensee shall deliver the home inspection report to the client, if the pre-inspection agreement does not set forth such a date, the home inspector shall provide the report to the client no later than five days after the home inspection was performed.  
 [16.66.7.25 NMAC – N, 1/15/2021]

**HISTORY OF 16.66.7 NMAC:**  
**[RESERVED]**

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



## 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.

### CULTURAL AFFAIRS, DEPARTMENT OF STATE LIBRARY DIVISION

#### TITLE 4 CULTURAL RESOURCES CHAPTER 5 STATE LIBRARY PART 10 RURAL LIBRARIES ENDOWMENT GRANTS

**4.5.10.1 ISSUING AGENCY:** Cultural Affairs Department - State Library Division. [4.5.10.1 NMAC - N, 1/1/2023]

**4.5.10.2 SCOPE:** Rural established public and tribal libraries, rural developing public and tribal libraries, and rural public and tribal libraries to be established. [4.5.10.2 NMAC - N, 1/1/2023]

**4.5.10.3 STATUTORY AUTHORITY:** Section 18-18-1, NMSA 1978 (2019) establishes the rural libraries endowment fund established in the state treasury to support the preservation, development and establishment of rural libraries throughout the state by providing funding for rural libraries' operational and capital needs and funding for the delivery of specialized services to rural libraries. Subsection A of Section 18-18-2, NMSA 1978 directs the state librarian to provide grants directly benefiting developing rural libraries and established rural libraries and grants for the establishment of developing rural libraries in cities, towns and villages without libraries. Section 18-18-2 further directs the state librarian to use money allocated for specialized services to rural libraries from the rural libraries endowment fund to provide specialized services to rural libraries. Subsection D of Section 18-18-4, NMSA 1978 (2019) defines

specialized services as professional development opportunities, program support, information technology support and other capacity building services, as defined by the state librarian.

[4.5.10.3 NMAC - N, 1/1/2023]

**4.5.10.4 DURATION:** Permanent. [4.5.10.4 NMAC - N, 1/1/2023]

**4.5.10.5 EFFECTIVE DATE:** January 1, 2023, unless a later date is cited at the end of a section. [4.5.10.5 NMAC - N, 1/1/2023]

**4.5.10.6 OBJECTIVE:** The objective of this rule is to carry out the provisions of the rural library endowment grant programs. The rural library endowment grant programs shall assist in the establishment of libraries in rural cities, towns and villages without libraries and provide financial assistance to established and developing rural libraries, for the purpose of creating effective local libraries, and promoting collaborative rural library services amongst rural libraries. [4.5.10.6 NMAC - N, 1/1/2023]

#### **4.5.10.7 DEFINITIONS:**

**A. "Annual report"** has the same meaning as in 4.5.2 NMAC.

**B. "Basic library services"** has the same meaning as in 4.5.2 NMAC.

**C. "Developing rural library"** has the same meaning as in Section 18-18-4, NMSA 1978 (2019).

**D. "Established rural library"** has the same meaning as in Section 18-18-4, NMSA 1978 (2019).

**E. "Fiscal year"** means July 1 through June 30.

**F. "Grant recipient"** means a public library or developing library that the state librarian selects to receive a rural library program grant.

**G. "Local funding authority"** has the same meaning as in 4.5.8 NMAC

**H. "Public library"** has the same meaning as in 4.5.2 NMAC

**I. "Rural library"** has the same meaning as in Section 18-18-4, NMSA 1978 (2019).

**J. "Rural libraries program grant"** means grants directly benefiting developing rural libraries and established rural libraries. Rural library program grants include grants for developing and established rural libraries and grants for establishing rural libraries. Rural library program grants for the establishment of a developing rural library are grants given to a local funding authority, Indian Nation or non profit corporation in order to assist in the establishment of a developing rural library.

**K. "Specialized services"** means professional development opportunities, program support, information technology support and other capacity-building services, as defined by the state librarian.

**L. "Specialized Services Allocation"** means rural endowment funds allocated for the purpose of professional development opportunities, program support, information technology support and other capacity-building services, as defined by the state librarian. [4.5.10.7 NMAC - N, 1/1/2023]

**4.5.10.8 GRANT AVAILABILITY:** Funds are available annually in the form of grants directly benefiting

developing rural libraries, established rural libraries and grants for the establishment of developing rural libraries in cities, towns and villages without libraries.

[4.5.10.8 NMAC - N, 1/1/2023]

#### **4.5.10.9 FUNDING**

**SOURCE:** Rural library program grants and specialized services program grants for rural libraries shall be funded from the rural library endowment fund in accordance with Section 18-18-1 NMSA 1978.

[4.5.10.9 NMAC - N, 1/1/2023]

#### **4.5.10.10 RURAL LIBRARIES ENDOWMENT FUND**

**A. PURPOSE:** The rural library endowment fund is for the purpose of preservation, development and establishment of rural libraries' operational and capital needs.

##### **B. DESCRIPTION.**

The rural library program grant funds shall be used for library collections, library staff salaries, library staff training, library equipment, or other operational or capital expenditures associated with delivery of basic library services to rural libraries. Specialized services program funds shall be used for the delivery of specialized services to rural libraries.

[4.5.10.10 NMAC - N, 1/1/2023]

#### **4.5.10.11 LIMITATION ON FUNDING.**

**A.** Grant amounts may vary by year and are dependent upon the amount of the gross distribution to the state library. The annual gross distribution is determined in accordance with the provisions of Subsection C of Section 18-18-1, NMSA 1978 (2019).

**B.** Public and developing libraries shall expend all grant funds during the fiscal year in which they are awarded.

**C.** Should a library cease providing basic library services prior to or within thirty days of funding; grant funds shall revert to the state library and be re-allocated to other rural libraries.

[4.5.10.11 NMAC - N, 1/1/2023]

#### **4.5.10.12 GRANTS FOR ESTABLISHING DEVELOPING RURAL LIBRARIES:**

If sufficient funding is available to offer grants to establish developing rural libraries, the state librarian shall issue an official grant for establishing developing rural libraries announcement and a rural libraries program grant announcement and provide grant guidelines.

**A. PURPOSE:** Grants for establishing developing rural libraries are grants to assist in the establishment of public or tribal rural libraries in cities, towns and villages without libraries.

##### **B. GUIDELINES:**

The grant guidelines for establishing rural developing libraries shall be established by the state librarian and include the following considerations:

##### **(1)**

Description of the grants for establishing developing rural libraries grant program;

##### **(2) Eligibility**

factors for the Program;

##### **(3) Grant**

application for interested applicants;

##### **(4) Grant**

Application deadlines;

##### **(5) Applicable**

rules and regulations; and

##### **(6) Selection**

criteria for grant award recipients.

**C. SELECTION:** A committee made up of five members selected by the state librarian shall award grants for the establishment of developing rural libraries based on the selection criteria specified in the grant guidelines.

[4.5.10.12 NMAC - N, 1/1/2023]

#### **4.5.10.13 GRANTS FOR DEVELOPING RURAL LIBRARIES AND ESTABLISHED RURAL LIBRARIES:**

Grants for developing rural libraries and established rural libraries under the rural libraries grant program shall be those grants awarded pursuant to Subsection A of Section 18-18-2 NMSA 1978. When sufficient funding is available, as determined by the state librarian, to offer rural library program grants under this

section, the state librarian shall issue an official rural library program grant announcement and provide the grant guidelines.

**A. CRITERIA FOR AWARDING GRANTS FOR DEVELOPING LIBRARIES UNDER THE RURAL LIBRARY GRANT PROGRAM:** Receipt of a rural libraries program grant under this section shall not exclude eligibility for an award under the state grants in aid grant program established in 4.5.2 NMAC. The state library shall award developing rural libraries a grant where the developing rural library has met, or exceeded, the following criteria:

##### **(1) timely**

submission of an annual report to the state library;

##### **(2) continuous**

operation for at least nine months;

##### **(3)**

maintenance of adequate financial and other records to support the library's eligibility for receiving library grants; the state library may audit such records annually, or as needed, as determined in the state library's sole discretion;

##### **(4) compliance**

with all state statutes and rules;

##### **(5) compliance**

with requirements for developing rural library grants;

##### **(6)**

employment of a designated director;

##### **(7) creation of**

a library board that meets at least two times a year and adheres to the state's open meetings law;

##### **(8) successful**

expenditure of all developing rural library grant funds during the prior fiscal year, if applicable.

**B. CRITERIA FOR AWARDING GRANTS TO ESTABLISHED RURAL LIBRARIES UNDER THE RURAL LIBRARY GRANT PROGRAM.** Receipt of a rural libraries grant under this section shall not exclude eligibility for an award under the state grants in aid grant program established in 4.5.2 NMAC. The state library shall award established rural libraries a rural library program grant



where an established rural library has met, or exceeded, the following criteria:

- (1) timely submission of an annual report with the state library for the current year and a minimum of two years prior;
- (2) continuous operation for at least one year;
- (3) receipt of a minimum of three consecutive developing rural library grants;
- (4) demonstration of receipt of financial support from sources other than the state; in particular, matching funds in relation to the population of the library's legal service area shall be at least \$1.50 per person;
- (5) maintenance of adequate financial and other records to support the library's eligibility for receiving library grants; the state library may audit such records annually, or as needed, as determined in the state library's sole discretion;
- (6) compliance with all state statutes and rules;
- (7) compliance with requirements for library grants for established rural libraries;
- (8) formation of a strategic plan that the public library reviews, updates, and files with the state library every five years, and a community analysis and needs assessment, and a collection development policy that the public library reviews, updates, and files with the state library every five years;
- (9) maintain a library board that meets at least two times a year and adheres to the state open meetings law;
- (10) employment of a designated director;
- (11) successful expenditure of all public library grant funds during the prior fiscal year.

**C. DISTRIBUTION OF FUNDS:** The state library division shall distribute grants in the following manner:

- (1) Application: The annual report submitted for the immediate prior year shall serve as the developing

or established public library's application.

(2) Allocation: The state library shall award one share of the allocation to each established rural library and each developing rural library.

(3) Notification: After annual reports are submitted, the state library shall calculate the grant award for each library in accordance with paragraph (2) above. The state library shall notify all eligible public libraries informing them of the amount of their grant.

(4) Request for payment: Each library shall return the signed grant agreement to the state library within 60 days of receipt of the agreement measured from the postmark or electronic postmark. Upon timely receipt of the grant agreement, the state library shall process a payment request form. If a library does not submit the grant agreement within the required time period, it forfeits the grant award.

(5) Maintenance of effort: A grant recipient's local government funding sources shall not be reduced as a result of the grant recipient's receipt of a rural library program grant or funding for specialized services. Upon demonstrated evidence that such a reduction has occurred, the grant recipient shall be ineligible to receive a rural library program grant or funding for specialized services for one year after the reduction occurs. [4.5.10.13 NMAC - N, 1/1/2023]

**4.5.10.14 AGREEMENT:** Rural library program grants shall only transfer to the grant recipient after the grant recipient executes an agreement containing the terms required of award recipients. [4.5.10.14 NMAC - N, 1/1/2023]

**4.5.10.15 REPORTING:**  
A. Recipients of a grant for establishing a developing rural library under the rural library grant program shall report expenditures as requested by the state librarian and/or required under the

recipients contractual agreement.

B. Recipients of a rural libraries program grant shall ensure that received funds are accounted for separately from other state funds on the annual report and in accordance with the recipient's agreement. [4.5.10.15 NMAC - N, 1/1/2023]

#### **4.5.10.16 APPEAL OR WAIVER:**

A. In the event that any library is denied a grant by the state library, or does not meet a requirement of this rule, that library may appeal the decision of the state library or request a variance from the requirement.

B. Such appeal or variance shall be made in writing to the state librarian within 10 days of notification of denial of funds or within 10 days of discovery of non-compliance with a requirement. The appeal or variance shall state all relevant facts and conditions.

C. The state librarian shall consider each appeal or request for variance and respond in writing to the appealing or requesting party with a decision within 30 days. The state librarian shall consider the recommendation of the Commission for matters on appeal. The state librarian's decision is the department of cultural affairs' final action on the matter. [4.5.10.16 NMAC - N, 1/1/2023]

**HISTORY OF 4.5.10 NMAC: [RESERVED]**

### **ENVIRONMENT DEPARTMENT AIR QUALITY BUREAU**

**TITLE  
20 ENVIRONMENTAL  
PROTECTION  
CHAPTER 2 AIR QUALITY  
(STATEWIDE)  
PART 101 CARBON  
DIOXIDE EMISSION  
STANDARDS FOR COAL-FIRED  
ELECTRIC GENERATING  
FACILITIES**

**20.2.101.1 ISSUING**

**AGENCY:** Environmental Improvement Board.

[20.2.101.1 NMAC – N, 01/01/2023]

**20.2.101.2 SCOPE:** All

geographic areas within the jurisdiction of the Environmental Improvement Board.

[20.2.101.2 NMAC – N, 01/01/2023]

**20.2.101.3 STATUTORY**

**AUTHORITY:** Environmental Improvement Act, Section 74-1-1 to 74-1-16 NMSA 1978, including specifically Paragraph (4) of Subsection A of Section 74-1-8 NMSA 1978, and Air Quality Control Act, Sections 74-2-1 to 74-2-22 NMSA 1978, including specifically Subparagraph (b) of Paragraph (1) of Subsection B of Section 74-2-5 NMSA 1978.

[20.2.101.3 NMAC - N, 01/01/2023]

**20.2.101.4 DURATION:**

Permanent.

[20.2.101.4 NMAC - N, 01/01/2023]

**20.2.101.5 EFFECTIVE**

**DATE:** January 1, 2023, except where a later date is cited at the end of a section.

[20.2.101.5 NMAC - N, 01/01/2023]

**20.2.101.6 OBJECTIVE:** The

objective of this Part is to establish a carbon dioxide (CO<sub>2</sub>) emission standard for coal-fired electric generating facilities with an original installed capacity exceeding three hundred megawatts.

[20.2.101.6 NMAC - N, 01/01/2023]

**20.2.101.7 DEFINITIONS:**

In addition to the terms defined in 20.2.2.7 NMAC (Definitions), as used in this Part, the following terms apply:

**A. “Affected Electric Generating Facility or Affected EGF”** means a new or existing electric generating facility with an original installed capacity exceeding 300 megawatts and that uses coal as a fuel source.

**B. “Continuous emission monitoring system or CEMS”** means the equipment

used to sample, analyze, measure, and provide, by means of readings recorded at least once every 15 minutes (using an automated data acquisition and handling system), a permanent record of CO<sub>2</sub> emissions or stack gas volumetric flow rate.

**C. “Department”** means the New Mexico environment department.

**D. “Electric generating facility (EGF)”** means a facility that generates electricity and includes all appurtenances and pollution control devices, and including, but not limited to all processes and equipment used to separate, compress, and transport CO<sub>2</sub> or other pollutants to offsite locations. A facility may include one or more electric generating units (EGU) at the same location.

**E. “Megawatt-hour (MWh)”** means the net generation from the affected EGU as determined by 40 CFR Part 60.5540.

**F. “Operating day”** means a calendar day during which any fuel is combusted in the affected EGU at any time.

**G. “Operator”** means the person or persons responsible for the overall operation of an affected EGF.

**H. “Owner”** means the person or persons who own all or part of an affected EGF.

**I. “Rolling average”** means the weighted average of all data, meeting quality assurance and quality control requirements normalized pursuant to this Part, collected during the applicable averaging period. A 365-operating-day rolling average is calculated by adding the hourly mass emissions over the previous 365 operating days and dividing that sum by the hourly generation (MWh-net) during the same period. A 30-operating-day rolling average is calculated by adding the hourly mass emissions over the previous 30 operating days and dividing that sum by the hourly generation (MWh-net) during the same period.

[20.2.101.7 NMAC - N, 01/01/2023]

**20.2.101.8 SEVERABILITY:**

If any provision of this Part, or the application of this provision to any person or circumstance is held invalid, the remainder of this Part, or the application of this provision to any person or circumstance other than those as to which it is held invalid, shall not be affected thereby.

[20.2.101.8 NMAC - N, 01/01/2023]

**20.2.101.9**

**CONSTRUCTION:** This Part shall be liberally construed to carry out its purpose.

[20.2.101.9 NMAC - N, 01/01/2023]

**20.2.101.10 SAVINGS**

**CLAUSE:** Repeal or supersession of prior versions of this Part shall not affect administrative or judicial action initiated under those prior versions.

[20.2.101.10 NMAC - N, 01/01/2023]

**20.2.101.11 COMPLIANCE WITH OTHER REGULATIONS:**

Compliance with this Part does not relieve a person from the responsibility to comply with other applicable federal, state, or local laws, rules, or regulations, including more stringent controls.

[20.2.101.11 NMAC - N, 01/01/2023]

**20.2.101.12 DOCUMENTS:**

Documents incorporated and cited in this Part may be viewed at the New Mexico environment department air quality bureau.

[20.2.101.12 NMAC - N, 01/01/2023]

[The Air Quality Bureau is located at 525 Camino de los Marquez, Suite 1, Santa Fe, New Mexico 87505.]

**20.2.101.13-20.2.101.110**

**[RESERVED]**

**20.2.101.111 APPLICABILITY:**

This Part shall apply to new and existing affected electric generating facilities.

[20.2.101.111 NMAC - N, 01/01/2023]

**20.2.101.112 EMISSION**

**STANDARD:** After January 1, 2023, the owner or operator of an affected EGF shall limit CO<sub>2</sub>

emissions from the EGF to no more than 1,100 pounds per megawatt-hour on a 365-operating-day rolling average basis. The calculation shall be performed within 15 days of the end of each calendar month. The calculation of pounds of CO<sub>2</sub> emitted must include all CO<sub>2</sub> emitted during the compliance period, including but not limited to emissions during startup, shutdown, maintenance, and malfunction. The calculation of megawatt-hours generated during the compliance period must include all net megawatt-hours generated by the affected EGF.

[20.2.101.112 NMAC - N,  
01/01/2023]

### **20.2.101.113 MONITORING REQUIREMENTS:**

**A.** Owners or operators of an affected EGF shall prepare a monitoring plan to quantify the hourly CO<sub>2</sub> mass emission rate in tons per hour (tph) in accordance with the applicable provisions of this Section and 40 CFR Part 75.53(g). The monitoring plan shall be submitted to the Department and in place prior to reporting emission data and the results of the monitoring system certification test under Subsection A of 20.2.101.113 NMAC. The monitoring plan shall be updated as appropriate.

**B.** Owners or operators shall determine the hourly CO<sub>2</sub> mass emissions in pounds or tons from each affected electric generating unit (EGU) according to paragraphs (1) through (5) of Subsection B of 20.2.101.113 NMAC.

**(1)** Owners or operators shall install, certify, operate, maintain, and calibrate a CO<sub>2</sub> continuous emission monitoring system (CEMS) to directly measure and record the hourly average CO<sub>2</sub> concentration in the affected EGU exhaust gas emitted to the atmosphere, and a flow monitoring system to measure hourly average stack gas flow rates, in accordance with 40 CFR Part 75.10(a)(3)(i). As an alternative to direct measurement of the CO<sub>2</sub> concentration, provided that the affected EGU does not

employ carbon separation (e.g., carbon capture and storage), owners or operators may use data from a certified oxygen (O<sub>2</sub>) monitor to calculate the hourly average CO<sub>2</sub> concentration in accordance with 40 CFR Part 75.10(a)(3)(iii). If the CO<sub>2</sub> concentration is measured on a dry basis, owners or operators shall also install, certify, operate, maintain, and calibrate a continuous moisture monitoring system, in accordance with 40 CFR Part 75.11(b). Alternatively, owners or operators may either use an appropriate fuel-specific default moisture value from 40 CFR Part 75.11(b) or submit a petition to the Department for a site-specific default moisture value.

**(2)** For each CEMS used to comply with this Part, owners or operators shall meet the applicable certification and quality assurance procedures in 40 CFR Part 75.20 and Appendices A and B of 40 CFR Part 75.

**(3)** Owners or operators shall use only unadjusted exhaust gas volumetric flow rates to determine the hourly CO<sub>2</sub> mass emission rate from each affected EGU. Owners or operators shall not apply the bias adjustment factors described in Section 7.6.5 of Appendix A to 40 CFR Part 75 to the exhaust gas flow rate data.

**(4)** Owners or operators shall select an appropriate reference method to set up the flow monitor and perform the ongoing Relative Accuracy Test Audit (RATA), in accordance with 40 CFR Part 75. If owners or operators use a Type-S pitot tube or a pitot tube assembly for the flow RATA, owners or operators shall calibrate the pitot tube or pitot tube assembly. Owners or operators may not use the 0.84 default Type-S pitot tube coefficient specified in Method 2.

**(5)** Owners or operators shall calculate the hourly CO<sub>2</sub> mass emissions (in tons) as described in Subparagraphs (a) through (c) of Paragraph (5) of Subsection B of 20.2.101.113 NMAC. Owners and operators shall only perform this calculation for valid operating hours, as defined in 40 CFR Part 60.5540(a)(1).

**(a)**  
Begin with the hourly CO<sub>2</sub> mass emission rate (tons/hour), obtained either from Equation F-11 of Appendix F of 40 CFR Part 75 (if the CO<sub>2</sub> concentration is measured on a wet basis), or by following the procedure in section 4.2 of Appendix F of 40 CFR Part 75 (if the CO<sub>2</sub> concentration is measured on a dry basis).

**(b)**  
Next, multiply each hourly CO<sub>2</sub> mass emission rate by the EGU or stack operating time in hours (as defined in 40 CFR Part 72.2), to calculate the tons of CO<sub>2</sub>.

**(c)**  
The hourly CO<sub>2</sub> emission rate and the EGU (or stack) operating hours used to calculate the CO<sub>2</sub> emission rate shall be recorded under 20.2.101.114 NMAC and shall be reported as required under 20.2.101.115 NMAC.

**C.** Owners or operators shall install, calibrate, maintain, and operate a sufficient number of watt meters to continuously measure and record the hourly net electric output from each affected EGU. These measurements shall be performed using 0.2 class electricity metering instrumentation and calibration procedures as specified under ANSI Standards No. C12.20 (see 40 CFR Part 60.17).

**D.** Consistent with 40 CFR Part 60.5520, if two or more affected EGUs serve a common electric generator, the owners or operators shall apportion the combined hourly net energy output to the individual affected EGU according to the fraction of the total steam load contributed by each EGU. Alternatively, if the EGUs are identical, owners or operators may apportion the combined hourly net electrical load to the individual EGUs according to the fraction of the total heat input contributed by each EGU.

**E.** In accordance with 40 CFR Part 60.13(g) and 40 CFR Part 60.5520, if an owner or operator of two or more affected EGUs that utilize the CEMS provisions in Subsection B of 20.2.101.113 NMAC share a common exhaust stack, the

owners or operators may monitor the hourly CO<sub>2</sub> mass emissions at the common stack, in lieu of monitoring each EGU separately. If an owner or operator chooses this option, the hourly net generation shall be the sum of the hourly net generation for each individual affected EGU, and the owner or operator shall express the operating time as “stack operating hours” (as defined in 40 CFR Part 72.2). If an owner or operator demonstrates compliance with the emission standard of this Part at the common exhaust stack, each affected EGU utilizing the stack shall be determined to be in compliance.

**F.** In accordance with 40 CFR Part 60.13(g) and 40 CFR Part 60.5520, if an owner or operator of an affected EGU utilizing the CEMS provisions in Subsection B of 20.2.101.113 NMAC has exhaust gas that is emitted to the atmosphere through multiple stacks (or if the exhaust gases are routed to a common stack through multiple ducts and owners or operators elect to monitor the ducts), the owner or operator shall monitor the hourly CO<sub>2</sub> mass emissions and the “stack operating time” (as defined in 40 CFR Part 72.2) at each stack or duct separately. Owners or operators shall determine compliance with the emission standard of this Part by summing the CO<sub>2</sub> mass emissions measured at the individual stacks or ducts and dividing by the total net generation for the affected EGU.

**G.** Operating hours in which CO<sub>2</sub> mass emission rates are calculated using maximum potential values are not “valid operating hours” (as defined in 40 CFR Part 60.5540(a)(1)) and shall not be used in the compliance determinations under 40 CFR Part 60.5540. [20.2.101.113 NMAC - N, 01/01/2023]

#### **20.2.101.114 RECORDKEEPING REQUIREMENTS:**

**A.** Owners or operators shall maintain records of the information used to demonstrate compliance with this Part as specified in 40 CFR Parts 60.7(b) and 40

CFR Part 60.7(f) and shall comply with the applicable recordkeeping requirements of subpart F of 40 CFR Part 75. Owners or operators not subject to the requirements of 40 CFR Part 75 shall, at minimum, keep the records required under 40 CFR Part 60.5560(b)(2).

**B.** Owners or operators shall keep records of the calculations performed to determine the hourly and daily total CO<sub>2</sub> mass emissions in tons for:

(1) Each operating day for each affected EGU; and

(2) Each monthly rolling 30-operating-day period.

**C.** Consistent with 40 CFR Part 60.5520, owners or operators shall keep records of the applicable data recorded and the calculations performed and used to determine the gross energy output for each operating month for each affected EGU.

**D.** Owners or operators shall keep records of the calculations performed to determine any site-specific carbon-based F-factors used in the emissions calculations (if applicable).

**E.** Owners or operators shall maintain records of the information used to demonstrate compliance with Section 114, of 20.2.101 NMAC and as specified in 40 CFR Part 60.5560.

**F.** Owners or operators shall comply with the following requirements for record retention:

(1) records shall be in a form suitable and readily available for review;

(2) owners or operators shall maintain each record for ten years after the date of conclusion of each compliance period; and

(3) Owners or operators shall maintain a record onsite for at least 5 years after the date of each measurement, maintenance, corrective action, report, or record, according to 40 CFR Part 60.7. Records that are accessible from a central location by a

computer or other means that instantly provide access at the site meet this requirement. Owners or operators may maintain the records offsite for the remaining year as required by Subsection F of 20.2.101.114 NMAC. [20.2.101.114 NMAC - N, 01/01/2023]

#### **20.2.101.115 REPORTING REQUIREMENTS:**

**A.** Owners or operators shall comply with the following reporting requirements:

(1) Owners or operators shall submit electronic quarterly reports. For the first 12 months, owners or operators shall submit an electronic quarterly report no later than 30 days after the end of each quarter. Thereafter, owners or operators shall submit a report for each subsequent calendar quarter, no later than 30 days after the end of the quarter.

(2) Owners or operators shall include the following information in each quarterly report:

(a) each rolling average CO<sub>2</sub> mass emission rate for which the last (twelfth) operating month in a 12-operating-month compliance period falls within the calendar quarter. Except as provided in this part, owners or operators shall calculate each average CO<sub>2</sub> mass emission rate for the compliance period according to the procedures in 40 CFR Part 60.5540. Owners or operators shall report the dates (month and year) of the first and twelfth operating months in each compliance period for which owners or operators performed a CO<sub>2</sub> mass emission rate calculation. Owners or operators shall identify compliance periods that ended in each quarterly report;

(b) if one or more compliance periods end in the quarter, owners or operators shall identify each operating month in the calendar quarter where owners or operators of an affected EGU violated the emission standard of this Part;

(c) if one or more compliance periods end in the quarter and there are no



violations for an affected EGF, the owners or operators shall include an affirmative compliance statement in the quarterly report; and

(d)

the percentage of valid operating hours in each 12-operating-month compliance period (i.e., the total number of valid operating hours (as defined in 40 CFR Part 60.5540(a) (1)) in that period divided by the total number of operating hours in that period and multiplied by one hundred percent).

(3) In the final quarterly report for each calendar year, owners or operators shall include the potential electric output of the affected EGU and the net energy output over the four quarters of the calendar year, in accordance with 40 CFR Part 60.5520.

B. Owners or operators shall meet all applicable reporting requirements under subpart G of 40 CFR Part 75 with reporting beginning January 1, 2023, or the date on which the EGF becomes an affected facility under this Part.

C. If any required monitoring system has not been provisionally certified by the applicable date on which emissions data reporting is required to begin under paragraph 40 CFR Part 60.55(c) (3), the maximum (or in some cases, minimum) potential value for the parameter measured by the monitoring system shall be reported until the required certification testing is successfully completed, in accordance with 40 CFR Part 75.4(j), 40 CFR Part 75.37(b), or section 2.4 of Appendix D of 40 CFR Part 75 (as applicable).  
[20.2.101.115 NMAC - N, 01/01/2023]

**HISTORY OF 20.2.101 NMAC:**  
**[RESERVED]**

## HEALTH, DEPARTMENT OF

The New Mexico Department of Health, based on its 08/17/2022 public hearing has decided to repeal 7.4.6

NMAC, Vital Records and Statistics - filed 12/15/2016 and replace it with 7.4.6 NMAC, Vital Records and Statistics adopted 11/16/2022 and effective 11/29/2022.

## HEALTH, DEPARTMENT OF

### TITLE 7 HEALTH CHAPTER 4 DISEASE CONTROL PART 6 REQUIREMENTS GOVERNING THE HARM REDUCTION/SYRINGE EXCHANGE PROGRAM

**7.4.6.1 ISSUING AGENCY:** Department of Health, Public Health Division, Bureau of Infectious Diseases.

[7.4.6.1 NMAC - Rp, 7.4.6.1 NMAC, 11/29/2022]

**7.4.6.2 SCOPE:** These regulations govern the operation of harm reduction programs for the purpose of reducing overdose mortality and other negative health consequences associated with substance use.

[7.4.6.2 NMAC - Rp, 7.4.6.2 NMAC, 11/29/2022]

**7.4.6.3 STATUTORY AUTHORITY:** The statutory authority for adopting these rules is found in Subsection E of Section 9-7-6 NMSA 1978, The Harm Reduction Act, Section 24-2C-1 to 24-2C-6 NMSA 1978, the Public Health Act, Section 24-1-3 NMSA 1978, and Section 30-31-25.1 NMSA 1978 of the Controlled Substances Act.  
[7.4.6.3 NMAC - Rp, 7.4.6.3 NMAC, 11/29/2022]

**7.4.6.4 DURATION:** Permanent.  
[7.4.6.4 NMAC - Rp, 7.4.6.4 NMAC, 11/29/2022]

**7.4.6.5 EFFECTIVE DATE:** November 29, 2022, unless a later date is cited at the end of a section.

[7.4.6.5 NMAC - Rp, 7.4.6.5 NMAC, 11/29/2022]

**7.4.6.6 OBJECTIVE:** These Regulations implement the requirements of the Harm Reduction Act to establish and regulate the harm reduction program for the purpose of reducing overdose mortality and other negative health consequences of substance use, including preventing the transmission of infectious diseases and encouraging drug users to seek treatment.

[7.4.6.6 NMAC - Rp, 7.4.6.6 NMAC, 11/29/2022]

**7.4.6.7 DEFINITIONS:** as used in these regulations:

A. **“Blood borne pathogens”** means the hepatitis B virus (HBV), hepatitis C virus (HCV), the human immunodeficiency virus (HIV) and any other blood borne disease.

B. **“Department”** means the New Mexico Department of Health.

C. **“Harm Reduction Act”** means Section 24-2C-1 to 24-2C-6, NMSA 1978.

D. **“Harm Reduction ID Code”** means a unique alpha-numeric code assigned to a participant through the process determined by the harm reduction program, this code shall not bear the participant’s full name.

E. **“Harm Reduction Participant Card”** means a card issued to a participant by the department of health or HRP’s which verify the participant is enrolled in the harm reduction program, this card shall contain the Harm Reduction ID Code and an expiration date.

F. **“Harm Reduction Provider (HRP)”** means a public health office, community agency, service provider, individual, or other location which has applied and been accepted by the New Mexico department of health to provide harm reduction activities in accordance with the requirements of the Harm Reduction Act, these regulations and department of health protocols and guidelines.

**G. “Harm Reduction Specialist”** means an employee or volunteer of an HRP who has completed the department approved harm reduction certification curriculum.

**H. “Hepatitis and Harm Reduction Program”** means the team of staff members within the department public health division who have the primary responsibility to regulate and implement the provisions of the Harm Reduction Act, these regulations, and related department protocols and guidelines.

**I. “Participant”** means anyone enrolled for services at any Harm Reduction Provider and may receive supplies, devices or any other service provided by the Harm Reduction Provider.  
[7.4.6.7 NMAC - Rp, 7.4.6.7 NMAC, 11/29/2022]

#### **7.4.6.8 GENERAL PROVISIONS GOVERNING THE HRP APPLICATION APPROVAL AND REVOCATION PROCESSES:**

**A.** Any entity, other than HRPs already designated herein, seeking to become a HRP must submit an application to the hepatitis and harm reduction program. The application must include, at a minimum:

- (1) name of the entity;
- (2) primary contact information, including: name, telephone number and email address;
- (3) mailing address;
- (4) definition of the geographic area to be served;
- (5) a statement confirming that if approved, the entity will participate in training and evaluation activities as required by the harm reduction program;
- (6) relevant experience in providing disease prevention services, health care services, social services or substance use treatment services to individuals injecting substances; and
- (7) any other information required by the harm reduction program.

**B.** The hepatitis and harm reduction program shall review applications to determine whether they meet the statutory and regulatory requirements. Upon approval of the application, the entity will be authorized by the harm reduction program as an HRP.

**C.** All organizations that provide direct services to individuals who use substances, including law enforcement, emergency medical response, medical providers, substance use treatment programs, and correctional institutes shall be considered an HRP for the sole purpose of providing fentanyl test strips or other devices approved by the department to check for potential adulterants. Organizations utilizing this limited option do not need to meet the HRP requirements outlined in section 7.4.6.9 of these rules.  
[7.4.6.8 NMAC - Rp, 7.4.6.8 NMAC, 11/29/2022]

#### **7.4.6.9 HARM REDUCTION PROVIDER REQUIREMENTS:**

**A.** The HRP shall maintain regular and consistent hours of service to ensure participant engagement.

**B.** The HRP may cancel a harm reduction session in the event of unforeseen circumstances which may impact service delivery such as lack of staffing, severe weather, threats or acts of violence, or other unforeseen emergencies which may create an unsafe environment.

**C.** The HRP must make available educational materials related to improving the health of individuals who use substances including information on substance use treatment, disease transmission and prevention, and overdose prevention strategies.

**D.** The HRP must notify the hepatitis and harm reduction program within 72 hours of any concerns or complaints received by community members about the HRP.

**E.** The HRP must have at least two staff members or volunteers present, or within voice

or a direct line-of-sight visual signal range, or one staff member present and one staff member or volunteer able to communicate in real-time via telephone, radio, internet or other means at all times during harm reduction sessions. Staff members and volunteers may not be impaired during harm reduction sessions.

**F.** All harm reduction specialists shall be fully vaccinated against viral hepatitis or other transmissible disease in accordance with centers for disease control and prevention and department guidelines.

**G.** Staff and volunteers shall follow these regulations and the United States department of labor occupational safety and health administration standards and hepatitis and harm reduction program guidelines with regard to the proper handling and legal disposal of biohazardous material.

**H.** The HRP must record harm reduction activities conducted utilizing the forms approved by the hepatitis and harm reduction program and submit the forms to the hepatitis and harm reduction program.

**I.** The HRP must develop and maintain an accidental needle stick protocol. If a person experiences a needle stick accident, the HRP accidental needle stick protocol should be followed.

**J.** The HRP must report all unexpected harm reduction session cancellations, needle stick accidents, violent acts, incidents involving law enforcement agents, and arrests of participants or staff during a harm reduction session within 24 hours of the incident via email or phone.

**K.** The HRP must cooperate with the department in data collection, site visits and inspections, quality assurance, and other efforts to evaluate harm reduction activities.

(1) The HRP must keep all forms used to record and report activities either electronically or in hard copy for three years.

(2) All HRP must provide the harm reduction

program with the with forms used to record and report activities monthly in a format determine by the hepatitis and harm reduction program.

**L.** The HRP must adhere to all other hepatitis and harm reduction guidelines related to program operation.

**M.** The HRP must comply with these regulations, including safety requirements, participant enrollment procedures, and confidentiality of participant information. Failure to do so is grounds for revocation of the authorization to conduct harm reduction activities.  
[7.4.6.9 NMAC - Rp, 7.4.6.9 NMAC, 11/29/2022]

#### **7.4.6.10 SUPPLIES PROVIDED:**

Supplies which are permitted to be provided by the HRP, listed below, include items which have been determined by the department to reduce negative health consequences associated with substance use, to prevent overdose mortality, and items designed to encourage participant engagement in other programming designed to improve overall community health. These items shall include:

**A.** Safer smoking supplies limited to screens, pipe covers, wooden pushers, copper scrub pads, uncoated foil, cured foil, or any other type of aluminum foil and straws designed to inhale substances.

**B.** Safer snorting supplies limited to clean spoons for measurement, clean plastic razors, clean flat surfaces.

**C.** Safer injecting supplies limited to syringes and needles, metal containers for cooking substances, cotton pellets or other filtration devices, twist ties, tourniquets, sterile water and saline, ascorbic acid, and biohazard containers for disposal of used syringes and needles.

**D.** Supplies or devices used for testing controlled substances or controlled substance analogs for potentially dangerous adulterants,

including fentanyl test strips.  
[7.4.6.10 NMAC - N, 11/29/2022]

#### **7.4.6.11 PARTICIPANT ENROLLMENT:**

**A.** Each new participant who enrolls for services at an HRP shall be provided a harm reduction Participant card which shall have an expiration date of two years from the initial enrollment.

**B.** If a participant loses or misplaces their harm reduction participant card they shall be issued a new harm reduction participant card with an expiration date of two years from the day it was issued.

**C.** Once participants are enrolled at any HRP they enrolled in the statewide program and can participate with any HRP in the state of New Mexico. Participants do not need to re-enroll at each HRP where they seek services.

**D.** If a participant loses or misplaces their harm reduction participant card, they shall be issued a new harm reduction participant card with an expiration date of two years from the day it was re-issued. At the time of enrollment and re-enrollment participant should be instructed the harm reduction participant card is only for the use of the person to whom the card was issued.

**E.** Participants shall be informed harm reduction program participation will not prohibit their arrest or prosecution for the possession of residue in the supplies used to consume substances.

**F.** Individuals do not need to be enrolled as a HRP participant to receive testing supplies or testing devices from a HRP.

[7.4.6.11 NMAC - Rp, 7.4.6.10 NMAC, 11/29/2022]

#### **7.4.6.12 HARM REDUCTION PROGRAM PARTICIPANT REQUIREMENTS:**

**A.** Participants must provide their harm reduction participant card code to staff in order to supplies from the program.

**B.** Follow the hepatitis and harm reduction program and HRP guidelines, as informed by HRP staff,

with regard to handling and disposing of potentially biohazardous material.

**C.** Participant must not carry weapons on them during a harm reduction session.

**D.** Refrain from threatening behavior and acts of violence at a harm reduction session. Failure to do so may result in suspension from the program.  
[7.4.6.11 NMAC - Rp, 7.4.6.12 NMAC, 11/29/2022]

#### **HISTORY OF 7.4.6 NMAC:**

##### **History of Repealed Material:**

7.4.6 NMAC, Requirements Governing the Harm Reduction/ Syringe Exchange Program, filed 09/17/1999 - Repealed effective 12/30/2016.

7.4.6 NMAC, Requirements Governing the Harm Reduction/ Syringe Exchange Program, filed 12/15/2016 - Repealed effective 11/29/2022.

##### **OTHER:**

7.4.6 NMAC, Requirements Governing the Harm Reduction/ Syringe Exchange Program, filed 09/17/1999 and replaced by 7.4.6 NMAC, Requirements Governing the Harm Reduction/Syringe Exchange Program effective 12/30/2016.

7.4.6 NMAC, Requirements Governing the Harm Reduction/ Syringe Exchange Program, filed 12/15/2016 and replaced by 7.4.6 NMAC, Requirements Governing the Harm Reduction/Syringe Exchange Program effective 11/29/2022.

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### **HUMAN SERVICES DEPARTMENT MEDICAL ASSISTANCE DIVISION**

**This is an amendment to 8.280.500 NMAC, Sections 8, 9, 11 and 23, effective 12/1/2022.**

**8.280.500.8 [RESERVED]**

**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.

[8.280.500.8 NMAC - N, 12/1/2022]

#### 8.280.500.9 NEED

**DETERMINATION:** Eligibility for PACE is determined prospectively. Applicants/recipients must meet, or expect to meet, all financial eligibility criteria in the month for which a determination of eligibility is made. Applicants for and recipients of medicaid through PACE must apply for, and take all necessary steps to obtain, any income or resources to which they may be entitled. Such steps must be taken within ~~[thirty (30)]~~ 30 days of the date the human services department (HSD) furnishes notice of the potential entitlement. Failure or refusal to apply for and take all necessary steps to determine eligibility for other benefits after notice is received results in an applicant/recipient becoming ineligible for medicaid.

**A.** Applicants/recipients who have elected a lower ~~[VA]~~ veterans affairs (VA) payment do not need to reapply for veteran's administration improved pension (VAIP) benefits.

**B.** Crime victims are not required to accept victim's compensation payments from a state-administered fund as a condition of medicaid eligibility.

[8.280.500.9 NMAC - Rp, 8 NMAC 4.PAC.500, 12/1/2006; A, 12/1/2022]

#### 8.280.500.11 APPLICABLE RESOURCE STANDARDS:

An applicant/recipient is eligible for medicaid on the factor of resources if countable resources do not exceed ~~[two thousand dollars (\$2,000)]~~ \$2,000. See 8.281.500.11 NMAC.

[8.280.500.11 NMAC - Rp, 8 NMAC 4.PAC.511, 12/1/2006; A, 12/1/2022]

#### 8.280.500.23 MEDICAL CARE CREDIT:

There are medical care credits in PACE only when a PACE recipient enters a nursing facility. See [8.281.500.23] 8.281.500.22 NMAC.

[8.280.500.23 NMAC - Rp, 8 NMAC 4.PAC.530, 12/1/2006; A, 12/1/2022]

### HUMAN SERVICES DEPARTMENT MEDICAL ASSISTANCE DIVISION

**This is an amendment to 8.281.400 NMAC, Sections 12 and 15, effective 12/1/2022.**

#### 8.281.400.12 ENUMERATION:

An applicant or recipient must furnish ~~[his or her]~~ their social security number in accordance with 8.200.410.10 NMAC.

[8.281.400.12 NMAC - Rp, 8.281.400.12 NMAC, 1/1/2019; A, 5/1/2021; A, 12/1/2022]

#### 8.281.400.15 SPECIAL RECIPIENT REQUIREMENTS:

**A. Institutional care medicaid:** To be eligible for institutional care medicaid an applicant or recipient must be aged, blind, or disabled as defined by the social security administration (SSA). Recipients of institutional care medicaid in New Mexico are terminated from assistance if they are transferred to, or choose to move to, a long term care facility out-of-state. New Mexico medicaid does not cover NF services furnished to applicants or recipients in out-of-state facilities with the exception of out-of-state long-term care facilities that are not available in the state of New Mexico in accordance with Subsection F of 8.302.4.12 NMAC.

**B. Intermediate care facilities for individuals with intellectual disabilities (ICF/IID):** To be eligible for an ICF/IID, applicants or recipients must obtain a match letter from the department of health to confirm that ~~[he or she meets]~~ they meet the definition of an individual with a developmental disability as determined by the department of health/developmental disabilities supports division, in accordance with 8.290.400.10 NMAC.

[8.281.400.15 NMAC - Rp, 8.281.400.15 NMAC, 1/1/2019; A, 5/1/2021; A, 12/1/2022]

### HUMAN SERVICES DEPARTMENT MEDICAL ASSISTANCE DIVISION

**This is an amendment to 8.281.500 NMAC, Sections 7, 8, 10, 12-23, effective 12/1/2022.**

#### 8.281.500.7 DEFINITIONS:

~~[A. Actuarially sound:~~ With respect to an annuity or promissory note, the payments made to the beneficiary must not exceed their life expectancy and returns to the beneficiary an amount at least equal to the amount used to establish the contract.

~~B. Annuity:~~ A financial instrument, usually sold by a life insurance company, that pays out a regular income at fixed intervals for a certain period of time, often beginning at a certain age and continuing for the life of the owner.

~~C. Asset limit:~~ An applicant or recipient may be eligible for a MAP category of institutional care on the factor of resources if countable resources do not exceed \$2,000.

~~D. Assets:~~ All income and resources of an applicant or recipient and their spouse, if applicable.

~~E. Authorized representative:~~ The individual designated to represent and act on the applicant's or recipient's behalf during the eligibility process. The applicant or recipient or their authorized representative must provide formal documentation authorizing the named individual or individuals to access the identified case information 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 any other individual or individuals designated in writing by the claimant.

**F. — Bona fide:** A bona fide agreement is made in good faith and is legally valid.

**G. — Community spouse:** The spouse of an institutionalized applicant or eligible recipient who is residing in the community and is not in an institution.

**H. — Community spouse resource allowance (CSRA):** An amount of a married couple's resources that is set aside for the community spouse when the eligible recipient is institutionalized. There is a MAD minimum and a federal maximum amount of resources that can be set aside for the community spouse.

**I. — Encumbrance:** A general term for any claim or lien on a parcel of real property, including mortgages, deeds of trust and abstracts of judgments.

**J. — Fair market value:** An estimate of the value of an asset, if sold at the prevailing price at the time it was actually transferred. Value is based on criteria used in appraising the value of assets for the purpose of determining a MAP category of eligibility.

**K. — Home equity:** (Also known as equity value.) The value of a home minus the total amount owed on it in mortgages, liens and other encumbrances.

**L. — Income:** Anything that an applicant or recipient receives in cash or in kind that they can use to meet their needs for food and shelter. In-kind income is not cash, but is actual food or shelter, or something that the applicant or recipient can use to get one of these.

**M. — Institutionalized spouse:** An applicant or recipient who is in an acute care hospital, nursing facility, intermediate care facility for individuals with intellectual disabilities (ICF-IID), swing bed or certified in-state inpatient rehabilitation center.

**N. — Life estate:** An interest in property that exists for the life of a person. For example, an individual gives a life estate in a house to person A and the remainder

to person B. Person A has a life estate and person B has a remainder interest until person A dies.

**O. — Liquid resource:** Cash or something that can easily be converted to cash within 20 business days.

**P. — Loan:** A transaction in which one party advances money to, or on behalf of another party, who promises to repay the lender in full, with or without interest.

**Q. — Long-term Care Insurance Policy:** A type of insurance developed specifically to cover the costs of nursing homes, assisted living, home health care and other long-term care services as specified in the individual's policy.

**R. — Lookback period:** A period of time in the past through which the ISD caseworker may examine all financial transactions for asset transfers.

**S. — Minimum monthly maintenance needs allowance:** A minimum level of income that the federal government allows to be set aside for the support of the community spouse when the other spouse is in an institution.

**T. — Negotiable agreement:** An agreement (i.e., a loan) in which the ownership of the agreement and the whole amount of money can be transferred from one person to another.

**U. — Non-liquid resource:** An asset such as real property, which cannot be easily converted to cash within 20 days.

**V. — Promissory note:** A promissory note is a written, unconditional agreement in which one person promises to pay a specified sum of money at a specified time to another person.

**W. — Protected Asset Limit:** Protected assets up to the amount of qualified long-term care insurance partnership (QLTCPI) benefit payments made to or on the behalf of individual. This is the applicant's or recipient's protected asset limit (PAL).

**X. — Qualified state long-term care insurance**

**partnership (QLTCIP) program:** A partnership program that joins MAD with private insurance companies that offer long-term care insurance policies. The MAP eligibility requirements are adjusted to provide financial incentives for eligible recipients to purchase private QSLTCIP coverage.

**Y. — Relative:** Relative is defined as a spouse, son or daughter; grandson or granddaughter; step-son or step-daughter; in-laws; mother or father; step-mother or step-father; half-sister or half-brother; grandmother or grandfather; aunt or uncle; sister or brother; step-brother or step-sister; and niece or nephew.

**Z. — Remainder/remainder man:** An interest in property that occurs after a life estate. For example, an individual gives a life estate in a house to person A and the remainder to person B. Person A has a life estate and Person B has a remainder interest until person A dies. Person B is also called the remainderman.

**AA. — Resources:** Cash or other liquid assets and any real or personal property that applicant or recipient (or spouse if any) owns and could convert to be used for their support and maintenance.

**BB. — Restricted coverage:** An eligible recipient who has restricted coverage may access medically necessary MAD benefits except for long-term care services in a nursing facility.

**CC. — Reverse mortgage:** A loan against home equity providing cash advances to a borrower and requiring no repayment until a future date.

**DD. — Sole benefit of:** A transfer is considered for the sole benefit of a spouse, blind or disabled child, or a disabled individual if the transfer is arranged in such a way that no individual or entity except the spouse, blind, or disabled child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.

**EE. — Spouse:** For purposes of this rule, a spouse is an

individual who is legally married under the laws of a state, a territory, or a foreign jurisdiction in which the marriage was celebrated.

**FF. Transfer:** To change over the possession, control or ownership of something.]

**A. Definitions beginning with "A":**

**(1)**

**Actuarially sound:** With respect to an annuity or promissory note, the payments made to the beneficiary must not exceed their life expectancy and returns to the beneficiary an amount at least equal to the amount used to establish the contract.

**(2) Annuity:**

A financial instrument, usually sold by a life insurance company, that pays out a regular income at fixed intervals for a certain period of time, often beginning at a certain age and continuing for the life of the owner.

**(3) Asset**

**limit:** An applicant or recipient may be eligible for a MAP category of institutional care on the factor of resources if countable resources do not exceed \$2,000.

**(4) Assets:**

All income and resources of an applicant or recipient and their spouse, if applicable.

**(5)**

**Authorized representative:** The individual designated to represent and act on the applicant's or recipient's behalf during the eligibility process. The applicant or recipient or their authorized representative must provide formal documentation authorizing the named individual or individuals to access the identified case information 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 any other individual or individuals designated in writing by the claimant.

**B. Definitions**

**beginning with "B": Bona fide:** A bona fide agreement is made in good faith and is legally valid.

**C. Definitions beginning with "C":**

**(1)**

**Community spouse:** The spouse of an institutionalized applicant or eligible recipient who is residing in the community and is not in an institution.

**(2)**

**Community spouse resource allowance (CSRA):** An amount of a married couple's resources that is set aside for the community spouse when the eligible recipient is institutionalized. There is a MAD minimum and a federal maximum amount of resources that can be set aside for the community spouse.

**D. Definitions**

**beginning with "D": [RESERVED]**

**E. Definitions**

**beginning with "E": Encumbrance:**

A general term for any claim or lien on a parcel of real property, including mortgages, deeds of trust and abstracts of judgments.

**F. Definitions**

**beginning with "F": Fair market**

**value:** An estimate of the value of an asset, if sold at the prevailing price at the time it was actually transferred. Value is based on criteria used in appraising the value of assets for the purpose of determining a MAP category of eligibility.

**G. Definitions**

**beginning with "G": [RESERVED]**

**H. Definitions**

**beginning with "H": Home equity:**

(Also known as equity value.) The value of a home minus the total amount owed on it in mortgages, liens and other encumbrances.

**I. Definitions**

**beginning with "I":**

**(1) Income:**

Anything that an applicant or recipient receives in cash or in kind that [he or she] they can use to meet their needs for food and shelter. In-kind income is not cash, but is actual food or shelter, or something that the applicant or recipient can use to get one of these.

**(2)**

**Institutionalized spouse:** An applicant or recipient who is in an acute care hospital, nursing

facility, intermediate care facility for individuals with intellectual disabilities (ICF-IID), swing bed or certified in-state inpatient rehabilitation center.

**J. Definitions**

**beginning with "J": [RESERVED]**

**K. Definitions**

**beginning with "K": [RESERVED]**

**L. Definitions**

**beginning with "L":**

**(1) Life**

**estate:** An interest in property that exists for the life of a person. For example, an individual gives a life estate in a house to person A and the remainder to person B. Person A has a life estate and person B has a remainder interest until person A dies.

**(2) Liquid**

**resource:** Cash or something that can easily be converted to cash within 20 business days.

**(3) Loan:**

A transaction in which one party advances money to, or on behalf of another party, who promises to repay the lender in full, with or without interest.

**(4) Long-**

**term Care Insurance Policy:** A type of insurance developed specifically to cover the costs of nursing homes, assisted living, home health care and other long-term care services as specified in the individual's policy.

**(5) Lookback**

**period:** A period of time in the past through which the ISD caseworker may examine all financial transactions for asset transfers.

**M. Definitions**

**beginning with "M": Minimum monthly maintenance needs**

**allowance:** A minimum level of income that the federal government allows to be set aside for the support of the community spouse when the other spouse is in an institution.

**N. Definitions**

**beginning with "N": [RESERVED]**

**(1) Negotiable**

**agreement:** An agreement (i.e., a loan) in which the ownership of the agreement and the whole amount of money can be transferred from one person to another.

**(2) Non-**

**liquid resource:** An asset such as real property, which cannot be easily converted to cash within 20 days.

**O. Definitions**

**beginning with “O”:** [RESERVED]

**P. Definitions**

**beginning with “P”:**

**(1)**

**Promissory note:** A promissory note is a written, unconditional agreement in which one person promises to pay a specified sum of money at a specified time to another person.

**(2) Protected**

**Asset Limit:** Protected assets up to the amount of qualified long-term care insurance partnership (QLTCPI) benefit payments made to or on the behalf of individual. This is the applicant's or recipient's protected asset limit (PAL).

**Q. Definitions**

**beginning with “Q”:** **Qualified state long-term care insurance partnership (QSLTCIP) program:** A partnership program that joins MAD with private insurance companies that offer long-term care insurance policies. The MAP eligibility requirements are adjusted to provide financial incentives for eligible recipients to purchase private QSLTCIP coverage.

**R. Definitions**

**beginning with “R”:**

**(1) Relative:**

Relative is defined as a spouse, son or daughter; grandson or granddaughter; step-son or step-daughter; in-laws; mother or father; step-mother or step-father; half-sister or half-brother; grandmother or grandfather; aunt or uncle; sister or brother; step-brother or step-sister; and niece or nephew.

**(2)**

**Remainder/remainder man:** An interest in property that occurs after a life estate. For example, an individual gives a life estate in a house to person A and the remainder to person B. Person A has a life estate and Person B has a remainder interest until person A dies. Person B is also called the remainderman.

**(3)**

**Resources:** Cash or other liquid assets and any real or personal

property that applicant or recipient (or spouse if any) owns and could convert to be used for their support and maintenance.

**(4) Restricted**

**coverage:** An eligible recipient who has restricted coverage may access medically necessary MAD benefits except for long-term care services in a nursing facility.

**(5) Reverse**

**mortgage:** A loan against home equity providing cash advances to a borrower and requiring no repayment until a future date.

**S. Definitions**

**beginning with “S”:**

**(1) Sole**

**benefit of:** A transfer is considered for the sole benefit of a spouse, blind or disabled child, or a disabled individual if the transfer is arranged in such a way that no individual or entity except the spouse, blind, or disabled child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.

**(2) Spouse:**

For purposes of this rule, a spouse is an individual who is legally married under the laws of a state, a territory, or a foreign jurisdiction in which the marriage was celebrated.

**T. Definitions**

**beginning with “T”:** **Transfer:** To change over the possession, control or ownership of something.

**U. Definitions**

**beginning with “U”:** [RESERVED]

**V. Definitions**

**beginning with “V”:** [RESERVED]

**W. Definitions**

**beginning with “W”:** [RESERVED]

**X. Definitions**

**beginning with “X”:** [RESERVED]

**Y. Definitions**

**beginning with “Y”:** [RESERVED]

**Z. Definitions**

**beginning with “Z”:** [RESERVED]  
[8.281.500.7 NMAC - Rp,  
8.281.500.7 NMAC, 8/15/2015; A,  
3/1/2018; A, 12/1/2022]

**8.281.500.8 [RESERVED]**

**MISSION:** 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.

[8.281.500.10 NMAC - N, 12/1/2022]

**8.281.500.10 RESOURCE**

**STANDARDS:** A “resource” is defined as cash or liquid assets and real or personal property which is owned and can be used either directly, or by sale or conversion, for the applicant's or recipient's support and maintenance. Resources may be liquid or non-liquid and may be excluded from the eligibility determination process under certain conditions. A liquid resource is an asset which can readily be converted to cash. A non-liquid resource is an asset or property which cannot readily be converted to cash.

**A. Resource**

**determination:** The resource determination for a MAP category of eligibility for institutional care is made as of the first moment of the first day of the month. An applicant or recipient is ineligible for any month in which [his or her] their countable resources exceed the allowable resource standard as of the first moment of the first day of the month. Changes in the amount of countable resources during a month do not affect eligibility or ineligibility for that month.

**B. Distinguishing**

**between resources and income:**

Resources must be distinguished from income to avoid counting a single asset twice. As a general rule, ownership of a resource precedes the current month while income is received in the current month. Income held by an applicant or recipient until the following month becomes a resource.

[8.281.500.10 NMAC - Rp,  
8.281.500.10 NMAC, 8/15/2015; A,  
12/1/2022]

**8.281.500.12 COUNTABLE**

**RESOURCES:** Before a resource can be considered countable, the three criteria listed below must be met.



**A. Ownership**

**interest:** An applicant or recipient must have an ownership interest in a resource for it to be countable. The fact that an applicant or recipient has access to a resource, or has a legal right to use it, does not make it countable unless the applicant or recipient also has an ownership interest in it.

**B. Legal right to**

**convert resource to cash:** An applicant or recipient must have the legal ability to spend the funds or to convert non-cash resources into cash.

**(1) Physical**

**possession of resource:** The fact that an applicant or recipient does not have physical possession of a resource does not mean it is not ~~[his or her]~~ their resource. If ~~[he or she has]~~ they have the legal ability to spend the funds or convert the resource to cash, the resource is considered countable. Physical possession of savings bonds is a legal requirement for cashing them.

**(2)**

**Unrestricted use of resource:** An applicant or recipient is considered to have free access to the unrestricted use of a resource even if ~~[he or she]~~ they can take those actions only through an agent, such as a representative payee, guardian, conservator, trustee, or another authorized representative. If there is a legal bar to the sale of a resource, the resource is not countable. However, if a co-owner of real property can bring an action to partition and sell the property, ~~[his or her]~~ their interest in the property is a countable resource.

**C. Legal ability to**

**use a resource:** If a legal restriction exists which prevents the use of a resource for the applicant's or recipient's own support and maintenance, the resource is not countable.

**D. Joint ownership**

**of resources:** If an applicant or recipient owns either liquid or non-liquid resources jointly with others, ~~[he or she has]~~ they have 30 calendar days from the date requested by the ISD worker to submit all

documentation required to verify ~~[his or her]~~ their claims regarding ownership of, access to, and legal ability to use the resource for personal support and maintenance. Failure to do so results in the presumption that the resource is countable and belongs to the applicant or recipient.

**(1) Jointly**

**held property:** If jointly held property is identified during review of an active case, the ISD worker must:

**(a)**

determine whether the property is a countable resource;

**(b)**

determine whether the value of the jointly held property plus the value of other countable resources exceeds the allowable resource maximum; and

**(c)**

if the value of countable resources exceeds the allowable maximum, advance notice is furnished to the applicant or recipient of the intent to close ~~[his or her]~~ their case and ~~[his or her]~~ their right to verify claims regarding ownership of, access to, and legal ability to use the property for personal support and maintenance.

**(i)**

If the applicant or recipient fails to provide required information or respond within the advance notice period, ~~[his or her]~~ their case is closed.

**(ii)**

If, after expiration of the advance notice period but prior to the end of the month in which the advance notice expires, the applicant or recipient provides the required evidence to show the property is not a countable resource, or is countable in an amount which, when added to the value of other countable resources, does not exceed the maximum allowable limit, and eligibility continues to exist on all other factors, the case is reinstated for the next month.

**(2) Joint**

**bank accounts:** If liquid resources are in a joint bank account of any type, the applicant's or recipient's ownership interest, while the parties to the account are alive, is presumed to be proportionate to the applicant's or recipient's contributions to the total resources on deposit.

**(a)**

The applicant or recipient is presumed to own a proportionate share of the funds on deposit unless ~~[he or she presents]~~ they present clear and convincing evidence that the parties to the account intended the applicant or recipient to have a different ownership interest.

**(b) To**

establish the applicant's or recipient's ownership interest in a joint account, the following are required:

**(i)**

statement by the applicant or recipient regarding contributions to the account; reasons for establishing the account; who owns the funds in the account; and any supporting documentation; plus

**(ii)**

corroborating statements from the other account holder(s);

**(iii)**

if either the applicant or recipient or the other account holder is not capable of making a statement, the applicant or recipient or an authorized representative must obtain a statement from a third party who has knowledge of the circumstances surrounding the establishment of the joint account.

**(c)**

Failure to provide required documentation within 30 calendar days of the date requested by the ISD worker results in a determination that the entire account amount belongs to the applicant or recipient.

**(d)**

If the existence of a jointly held bank account is identified during the review of an active case, the ISD worker requests evidence of ownership and accessibility. If the evidence is not furnished within 30 calendar days of the request, ~~[his or her]~~ their case is closed.

**(3) Life**

**estate:** A life estate interest in the applicant's or recipient's own home will count as a resource if the applicant or recipient has not resided on the property continuously for at least 12 months from the date of the life estate purchase. For a purchase of a life estate in the home of another, see Subsection D of ~~[Section]~~ 8.281.500.14 NMAC.



**(a)**

The “unisex life estate and remainder interest tables” are used to determine the value of a life estate. See [Section] 8.200.520 NMAC. The value is computed by multiplying the current fair market value by the percentage reduction on the unisex table under the column for the applicant’s or recipient’s age.

**(b)**

If an applicant or recipient feels the value calculated based on this method is overstated, [he or she] they can obtain a valuation of the life estate in the area for use as documentation of lesser value.

**E. The home as a countable resource:** If the applicant or recipient or [his or her] their authorized representative states the applicant or recipient does not intend to return to the home and it is not the residence of applicant’s or recipient’s spouse or dependent relative, the home is considered a countable resource. If the applicant or recipient or [his or her] their authorized representative puts the home up for sale and it is not the primary residence of the applicant’s or recipient’s spouse or a dependent relative, the home is considered a countable resource. A dependent relative is a minor child or adult disabled child of the applicant, recipient, or community spouse.

**F. Value of property:**

The applicant or recipient must supply HSD with written documentation regarding the fair market value of the property from a real estate agent, title company or mortgage insurance company familiar with the area in which the property is located in addition to any encumbrances against the property. The ISD worker determines the equity value of the property by subtracting the amount of the encumbrances from the fair market value of the property.

**G. Hardship:**

Applicants or recipients who are on restricted coverage due to excess equity in their homes may request an undue hardship waiver based on the criteria specified in [Section] 8.281.500.24 NMAC.

**H. Real property:****(1)**

If an applicant or recipient is the sole owner of real property, other than the applicant’s or recipient’s or [his or her] their primary residence and has the right to dispose of it, the entire equity value is included as a countable resource.

**(2)**

If an applicant or recipient owns property with one or more individuals and the applicant or recipient has the right, authority or power to liquidate the property or [his or her] their pro-rata share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource to applicant or recipient. The applicant or recipient must provide a copy of the legal document which indicates [his or her] their interest in the property.

**I. Vehicles:** One automobile is totally excluded regardless of value if it is used for transportation for the applicant or recipient or a member of applicant’s or recipient’s household. Any other automobiles are considered to be non-liquid resources. Recreational vehicles and boats are considered household goods and personal effects rather than vehicles.

**J. Household goods and personal effects:** Household goods and personal effects are considered countable resources if the items were acquired or are held for their value or are held as an investment. Such items can include but are not limited to gems and jewelry that is not worn or held for family significance, or collectibles.

**K. Promissory notes:**

If an applicant or recipient holds or owns a promissory note and the note is negotiable, it is a countable resource. The value is the outstanding principal balance due at the time of the applicant’s or recipient’s MAP application, unless the applicant or recipient proves that it has a lower value.

**(1)**

A promissory note held by the applicant or recipient must be a bona fide loan. This means that it must be legally

valid and made in good faith. The ISD worker must evaluate the note and determine whether or not it is a bona fide loan. In order to determine if the note is a bona fide loan, the ISD worker should obtain documentation of the applicant’s or recipient’s receipt of payments on the note at the time of application and at re-certification. If the applicant or recipient sells or transfers the promissory note, then [he or she] they may be subject to a penalty for a transfer of assets for less than fair market value.

**(2)** If the promissory note is non-negotiable, and the applicant or recipient receives payments on the note that could be used for food or shelter, then the amount of the payment retained in the month following receipt is a resource to the applicant or recipient.

**(3)** If an applicant or recipient purchases a promissory note, loan or mortgage, the repayment terms must be actuarially sound, provide for equal payment amounts with no deferral or balloon payments, and it must contain a provision that prohibits cancellation of the balance upon the death of the lender. A promissory note not meeting these requirements shall be treated as a transfer of assets for less than fair market value. If a promissory note does not meet these requirements, the value of the note, loan or mortgage is the outstanding balance due on the date of the applicant’s or recipient’s MAP application.

**L. Pension funds:**

A pension fund, if accessible to the applicant or recipient, is a countable resource. Any fees for withdrawal of the funds are subtracted from the balance and the remainder is a countable resource.

**M. Individual retirement accounts (IRA):** An IRA is a tax-deductible savings account that sets aside money for retirement. Funds in an IRA are counted as an asset in their entirety less the amount of penalty for early withdrawal.

**N. Keogh plan:** A Keogh plan is a retirement plan established by a self-employed

applicant or recipient alone or for the self-employed applicant or recipient and ~~his or her~~ their employees. If the Keogh plan was established for the self-employed applicant or recipient alone, the funds in the plan are counted as an asset in their entirety less the amount of penalty for early withdrawal. If the Keogh plan was established for employees other than the spouse of the applicant or recipient, the funds do not count as an asset.

**O. Loans:** In some circumstances a loan may be a countable resource.

**(1) Negotiable** loan. If an applicant or recipient owns a loan agreement or is a lender and the agreement is a negotiable, bona fide loan:

**(a)** the outstanding principal balance is a resource of the applicant or recipient;

**(b)** the cash provided to the borrower is no longer the applicant or recipient lender's resource because ~~he or she~~ they cannot access it for ~~his or her~~ their own use; the loan agreement replaces the cash as the applicant or recipient lender's resource;

**(c)** payments that the applicant or recipient lender receives from the borrower against the loan principal are conversions of a resource, not income; if retained, the payments are counted as the applicant or recipient lender's resource starting in the month following the month of receipt; and

**(d)** interest income received by the applicant or recipient lender is unearned income.

**(2) Non-**negotiable loan. If the applicant or recipient owns a loan agreement or is a lender and the loan agreement is not a bona fide loan or is not negotiable:

**(a)** the agreement is not a resource of the applicant or recipient lender;

**(b)** payments against the principal are income to the applicant or recipient lender, not conversion of a resource;

**(c)** the cash specified in the agreement may be a resource if the applicant or recipient lender can access it for ~~his or her~~ their own use; and

**(d)** interest income received by the applicant or recipient lender is unearned income.

**(3) Bona fide** loan. If the applicant or recipient is the borrower and the agreement is a bona fide loan:

**(a)** the loan agreement itself is not a resource for the applicant or recipient; and

**(b)** the cash provided by the applicant or recipient lender is not income, but is the borrower's resource if retained in the month following the month of receipt.

**(4) Not a bona fide** loan. If the applicant or recipient is the borrower and the agreement is not a bona fide loan:

**(a)** the loan agreement itself is not a resource of the applicant or recipient; and

**(b)** the cash provided by the applicant or recipient lender is income in the month received and is a resource if retained in the month following the month it was received.

**(5) Informal** loan. If the agreement is an agreement between applicants or recipients who are not in the business of lending money or providing credit, it is an informal loan. An informal loan is bona fide if it meets all of the following criteria:

**(a)** the agreement is enforceable under state law;

**(b)** the agreement is in effect at the time that the cash is provided to the borrower; money given to an applicant or recipient with no obligation to repay cannot become a loan at a later date;

**(c)** the obligation to repay the loan must be acknowledged by both the

applicant or recipient lender and the borrower; when money or property is given and accepted based on any understanding other than it is to be repaid by the receiver, there is no loan;

**(d)** the agreement must include a plan or schedule for repayment, and the borrower's express intent to repay by pledging real or personal property or anticipated future income (such as social security insurance (SSI) benefits);

**(e)** the repayment plan or schedule must be feasible; in determining the plan's feasibility, consider the amount of the loan, the applicant's or recipient's resources and income and the applicant's or recipient's living expenses;

**(f)** if the applicant or recipient is the borrower, the loan proceeds are a resource if they are retained in the month following the month of receipt; the resource value is the amount of the proceeds that the applicant or recipient still holds in the month following the month of receipt;

**(g)** if the applicant or recipient is the lender, the agreement is a countable resource starting in the month after the month that the applicant or recipient lender provides the proceeds to the borrower; and

**(h)** the agreement's resource value is the outstanding principal balance unless the applicant or recipient lender provides evidence that the loan has a lower value.

**P. Other financial instruments:** Other financial instruments will be evaluated by HSD to determine if they are a countable resource.

**Q. Continuing care retirement community, assisted living, life care community or like living arrangement:** The portion of initial fees paid upon signing a contract for housing and care that has a potential to be refunded to the applicant or recipient is countable.

**R. Other countable resources:** Other liquid or non-liquid resources must be considered in the calculation of total countable resources. The following non-liquid resources may be included in the calculation of countable resources if they cannot be excluded pursuant to [Section] 8.281.500.13 NMAC:

- (1) burial funds;
  - (2) burial spaces;
  - (3) life insurance and other insurance products such as annuities;
  - (4) income-producing property; and
  - (5) other financial investment products.
- [8.281.500.12 NMAC - Rp, 8.281.500.12 NMAC, 8/15/2015; A, 12/1/2022]

#### 8.281.500.13 RESOURCE

**EXCLUSIONS:** Some types of resources can be excluded from the calculation of countable resources if they meet the specific criteria listed below.

##### A. Burial fund

**exclusion:** Up to [~~one thousand five hundred dollars (one thousand five hundred dollars (\$1500))~~] \$1,500 can be excluded from the countable liquid resources of an applicant or recipient if designated as [~~his or her~~] their burial fund. An additional amount of up to [~~one thousand five hundred dollars (one thousand five hundred dollars (\$1500))~~] \$1,500 can be excluded from countable liquid resources if designated as burial funds for the spouse of the applicant or recipient. The burial fund exclusion is separate from the burial space exclusion.

##### (1)

**Retroactive designation of burial funds:** An applicant or recipient can retroactively designate funds for burial back to the first day of the month in which the applicant or recipient intended the funds to be set aside for burial. The applicant or recipient must sign a statement indicating the month the funds were set aside for burial.

##### (2) Limit on

**exclusion:** An applicant or recipient can designate as much of [~~his or her~~] their liquid resources as [~~he/she wishes~~] they wish for burial purposes. However, only one burial fund allowance of up to [~~one thousand five hundred dollars (one thousand five hundred dollars (\$1500))~~] \$1,500 each for the applicant or recipient and [~~his or her~~] their spouse can be excluded from countable resources. A burial fund exclusion does not continue from one period of eligibility to another (i.e., across a period of ineligibility). For each new period of eligibility, any exclusion of burial funds must be developed as for an initial application.

##### (3) Removal

**of designation:** An applicant or recipient cannot “un-designate” burial funds, unless one of the following occurs:

##### (a)

eligibility terminates;

##### (b)

part, or all, of the funds can no longer be excluded because the applicant or recipient purchased excluded life insurance or an irrevocable burial contract which partially or totally offsets the available burial fund exclusion; or

##### (c)

the applicant or recipient uses the funds or any portion of the funds for another purpose; this action makes the funds countable; any designated burial funds used for another purpose will be counted as income in the month withdrawn and as a resource thereafter.

##### (4) Reduction

**of burial fund exclusion:** The [~~one thousand five hundred dollars (one thousand five hundred dollars (\$1500))~~] \$1,500 burial fund exclusion is reduced by the following:

##### (a)

the face value of excluded life insurance policies;

##### (b)

assets held in irrevocable burial trusts; irrevocable means the value paid cannot be returned to the applicant or recipient;

##### (c)

assets that are not burial space items held in irrevocable burial contracts;

##### (d)

assets held in other irrevocable burial arrangements; and

##### (e)

assets held in an irrevocable trust available to meet burial expenses.

##### (5) Interest

**from burial fund:** Interest derived from a burial fund is not considered a countable resource or income if all the following conditions exist:

##### (a)

the original amount is excluded;

##### (b)

the excluded burial fund is not commingled with non-excluded burial funds;

##### (c)

the interest earned remains with the excluded burial funds.

##### (6)

##### Commingling of burial funds:

Burial funds cannot be commingled with non-burial funds. If only part of the funds in an account are designated for burial, the burial fund exclusion cannot be applied until the funds designated for burial expenses are separated from the non-burial funds. Countable and excluded burial funds can be commingled.

##### (7) Life

##### insurance policy designated as burial fund:

An applicant or recipient can designate a life insurance policy as a burial fund at the time of application. The ISD caseworker must first analyze Subsection H of [Section] 8.281.500.13 NMAC [~~of this rule~~].

##### (8) Burial

**contracts:** If an applicant or recipient has a prepaid burial contract, the ISD caseworker determines whether it is revocable or irrevocable and whether it is paid for. Until all payments are made on a burial contract, the amounts paid are considered burial funds and no burial space exclusions apply.

##### (a)

An applicant or recipient may have a burial contract which is funded by a life insurance policy. The life insurance may be either revocably or irrevocably assigned to a funeral director or mortuary.

(b)  
A revocable contract exists if the value can be returned to the applicant or recipient. An irrevocable contract exists when the value cannot be returned. If the contract or insurance policy assignment is revocable, the following apply.

(i)  
If the burial contract is funded by a life insurance policy, the policy is the resource which must be evaluated. The burial contract itself has no value. It exists only to explain the applicant's or recipient's burial arrangements.

(ii)  
No exclusions can be made for burial space items because the applicant or recipient does not have a right to them if the contract is not paid for or the policy is not paid up.

(c)  
If the assignment is irrevocable, the life insurance or burial contract is not a countable resource, because the applicant or recipient does not own it.

(i)  
The burial space exclusions can apply if the applicant or recipient has the right to the burial space items.

(ii)  
The value of the irrevocable burial arrangement is applied against the [~~one thousand five hundred dollars~~ (\$1500)] \$1,500 burial fund exclusion only if the applicant or recipient has other liquid resources to designate for burial.

**B. Burial space exclusion:** A burial space or an agreement which represents the purchase of a burial space held for the burial of an applicant or recipient, [~~his or her~~] their spouse, or any other member of [~~his or her~~] their immediate family is an excluded resource regardless of value. Interest and accruals on the value of a burial space are excluded from consideration as countable income or resources.

(1) When calculating the value of resources to be deemed to an applicant or recipient from [~~his or her~~] their parent(s) or spouse, the value of spaces held by the parent(s) or spouse which are to be used for the burial of the applicant or recipient, or any member of the

applicant's or recipient's immediate family, including the deemer parent or spouse, must be excluded.

(2) The burial space exclusion is separate from, and in addition to, the burial fund exclusion.

(3) **Burial space definitions:** "Burial space" is defined as a burial plot, gravesite, crypt, mausoleum, casket, urn, niche, or other repository customarily used for the deceased's bodily remains.

(a)  
A burial space also includes necessary and reasonable improvements or additions, such as vaults, headstones, markers, plaques, burial containers (e.g., caskets), arrangements for the opening and closing of a gravesite, and contracts for care and maintenance of the gravesite, sometimes referred to as endowment or perpetual care.

(b)  
Items that serve the same purpose are excluded once per applicant or recipient, such as excluding a cemetery lot and a casket, but not a casket and an urn.

(4) **Burial space contract:** An agreement which represents the purchase of a burial space is defined as a contract with a burial provider for a burial space held for the eligible applicant or recipient or a member of [~~his or her~~] their immediate family.

(a)  
Until all payments are made on the contract, the amounts paid are considered burial funds and no burial space exclusions apply.

(b)  
An applicant's or recipient's immediate family includes:

(i)  
spouse;

(ii)  
natural or adoptive parents;

(iii)  
minor or adult children, including adoptive and stepchildren;

(iv)  
siblings, including adoptive and stepsiblings; and

(v)  
spouse of any of the above relatives.

(c)  
If a relative's relationship to an applicant or recipient is by marriage only, the relationship ceases to exist upon the dissolution of the marriage.

(5) **Burial space "held" for an applicant or recipient:** A burial space is considered held for an applicant or recipient if:

(a)  
someone has title to or possesses a burial space intended for the use of the applicant or recipient or a member of [~~his or her~~] their immediate family; or

(b)  
someone has a contract with a funeral service company for a specified burial space for the applicant or recipient or a member of [~~his or her~~] their immediate family, such as an agreement which represents the applicant's or recipient's current right to the use of the items at the amount shown.

(6) Until the purchase price is paid in full, a burial space is not considered "held for" an applicant or recipient under an installment sales contract or similar device if:

(a)  
the applicant or recipient does not currently own the space;

(b)  
the applicant or recipient does not currently have the right to use the space; and

(c)  
the seller is not currently obligated to provide the space.

**C. Life estate exclusion:** The value of a life estate interest in the applicant's or recipient's own home or in the home of another is excluded if the applicant or recipient has continuously resided in the home for a period of 12 months or more from the date of the life estate purchase. The value of the remainderman's interest when a life estate is retained in one's own home is considered a transfer of resources to be evaluated in accordance with [Section] 8.281.500.14 NMAC.

**D. Settlement exclusions:** Agent orange settlement



payments made to applicant or recipient veterans or their survivors are excluded from consideration as resources.

(1) Payments made under the Radiation Exposure Compensation Act are excluded from consideration as resources.

(2) Payments received from a state-administered fund established to aid victims of crime are excluded for nine months beginning the month after the month of receipt.

(3) Payments under the foundation called 'remembrance, responsibility and the future', excluded from consideration as resources.

**E. Exclusions for real property and home:** A home is any shelter used by an applicant or recipient, or ~~his or her~~ their spouse, as the principal place of residence. The home is not considered a countable resource while in use by the applicant, recipient, or ~~his or her~~ their spouse as a principal place of residence. If an applicant's or recipient's home equity value exceeds the amount allowed under ~~[Section]~~ 8.200.510 NMAC, then the entire valued amount of ~~his or her~~ their home is a countable resource. An applicant or recipient with home equity of more than the amount specified shall be placed on restricted coverage for as long as ~~he or she owns~~ they own the home. The home includes any buildings and contiguous land used in the operation of the home. If the amount is equal to or less than allowed under ~~[Section]~~ 8.200.510 NMAC, then ~~his or her~~ their home is excluded during the periods when ~~he or she resides~~ they reside in an acute care or long-term care medical facility when the applicant or recipient, or ~~his or her~~ their authorized representative, states that the applicant or recipient intends to return to ~~his or her~~ their home.

**F. Exclusion of home:** If the applicant or recipient or ~~his or her~~ their authorized representative states the applicant or recipient does not intend to return to the home, but the home is the residence of the

applicant's or recipient's spouse or dependent minor child or adult disabled child, the home is an excluded resource.

**G. Income-producing property exclusion:** To be excluded from consideration as a countable resource, income-producing property that does not qualify as a bona fide business (e.g., rental property or mineral rights) must have an equity value of no more than ~~[six thousand dollars (\$6000)]~~ \$6,000 and an annual rate of return of at least six percent of the equity value. See Subsection F of ~~[Section]~~ 8.281.500.13 NMAC if the equity value exceeds ~~[six thousand dollars (\$6000)]~~ \$6,000 but the rate of return is at least six percent annually. The ~~[six thousand dollars (\$6000)]~~ \$6,000 and six percent limitation does not apply to property used in a trade or bona fide business, or to property used by an applicant or recipient as an employee which is essential to the applicant's or recipient's self-support (e.g., tools used in employment as a mechanic, property owned or being purchased in conjunction with operating a business). Existence of a bona fide business can be established by documentation such as business tax returns.

(1) **Determination of rate of return:** To calculate the annual rate of return for income producing property when the ~~[six thousand dollars (\$6000)]~~ \$6,000 and six percent limits apply, the previous year's income tax statement, or at least three months earnings is used to project the rate of return for the year.

(a) If the income is sporadic or has decreased from that needed to maintain a six percent rate of return for the coming year, the property is reevaluated at appropriate intervals.

(b) If the annual rate of return is at least six percent of the equity value but the equity value exceeds ~~[six thousand dollars (\$6000)]~~ \$6,000, only the excess equity is a countable resource.

(c) If the annual rate of return is less than six percent but the usual rate of return

is more, the property is excluded as a countable resource if all the following conditions are met:

(i) unforeseeable circumstances, such as a fire, cause a temporary reduction in the rate of return;

(ii) the previous year's rate of return, as documented by the income tax statement or several months receipts, is at least six percent; and

(iii) the property is expected to produce a rate of return of at least six percent within 18 months of the end of the year in which the adverse circumstances occurred; the ISD caseworker records in the case narrative the plan of action which is expected to increase the rate of return.

(d) The ISD caseworker notifies the applicant or recipient in writing that the property is excluded based on its expected increase in return and that it will be reevaluated at the end of the 18 month grace period. When this period ends, the property must be producing an annual rate of at least six percent to continue to be excluded as a countable resource.

(2) **Types of income-producing property:** Income-producing property includes:

(a) a business, such as a farm or store, including necessary capital and operating assets such as land and buildings, inventory or livestock; the property must be in current use or have been used with a reasonable expectation of resumed use within a year of its most recent use; the ISD caseworker must account for the cash actually required to operate the business; liquid business assets of any amount are excluded;

(b) non-business property includes rental property, leased property, land leased for its mineral rights, and property producing items for home consumption; property which produces items solely for home use is assumed to be producing an annual rate of return of at least six percent;



(c) employment-related property, such as tools or equipment; the applicant or recipient must provide a statement from ~~[his or her]~~ their employer to establish that tools or equipment are required for continued employment when the applicant or recipient leaves the institution; if the applicant or recipient is self-employed, only those tools normally required to perform the job adequately are excluded; the applicant or recipient must obtain a statement from someone in the same line of self-employment to establish what is excludable.

**H. Vehicle exclusion:**

The term “vehicle” includes any mode of transportation such as a passenger car, truck or special vehicle. Included in this definition are vehicles which are unregistered, inoperable, or in need of repair. Vehicles used solely for purposes other than transportation, such as disassembly to resell parts, racing or as an antique, are not included in this definition. Recreational vehicles and boats are classified as personal effects and are evaluated under the household goods and personal effects exclusion. One vehicle is totally excluded if regardless of value if it is used for transportation for the applicant or recipient or a member of ~~[his or her]~~ their household. Any other automobiles are considered to be non-liquid resources. Equity in the other automobiles is counted as a resource.

**I. Life insurance**

**exclusion:** The value of life insurance policies is not considered a countable resource if the total cumulative face value of all policies owned by the applicant or recipient does not exceed ~~[one thousand five hundred dollars (\$1500)]~~ \$1,500. A policy is considered to be “owned” by the applicant or recipient if the applicant or recipient is the only one who can surrender the policy for cash.

**(1)**

**Consideration of burial insurance and term insurance:** Burial insurance and term insurance are not considered when computing the cumulative face value because this insurance is redeemable only upon death.

**(2)**

**Calculation when value exceeds limit:** If the total cumulative face value of all countable life insurance policies owned by the applicant or recipient exceeds ~~[one thousand five hundred dollars (\$1500)]~~ \$1,500, the ISD caseworker:

**(a)**

verifies the total cash surrender value of all policies and considers the total amount a countable resource;

**(b)**

informs the applicant or recipient that the insurance policies can be converted to term insurance or ordinary life insurance of lower face value at ~~[his or her]~~ their option, if the cash surrender value, alone or in combination with other countable resources, exceeds the resource standard.

**J. Qualified State**

Long-term Care Insurance Partnership (QLTCIP) program: A resource exclusion equal to the amount of the qualified long-term care insurance benefit payments is made to or on the behalf of the applicant or recipient as determined during ~~[his or her]~~ their eligibility process.

**(1)** In order

to be considered a QLTCIP policy it must meet the requirements set forth in 1917(a) of the Social Security Act.

**(2)** The

applicant or recipient:

**(a)**

must have been a beneficiary of a QLTCIP that was purchased on or after August 15, 2015; or

**(b)**

must have a QLTCIP policy established in another state with a CMS approved state plan for state long-term care insurance partnerships and the beneficiary must have been a resident of such a state on the date the policy was purchased; or

**(c)**

must be a current New Mexico resident and after August 14, 2015 have purchased a long-term care policy that was converted to a QLTCIP through an endorsement, exchange, or rider.

**(3)**

Long-term care insurance does not qualify as a QSLTCIP.

**(4)** Resources

excluded in the amount of benefits paid out are also excluded in the estate recovery process.

**(5)** Resources

can be designated for protection when a MAP category of eligibility for either institutional care services or home and community based services is established, while receiving MAD benefits provided through institutional care or home and community based waiver programs, or during the estate recovery process after a recipient dies.

**(6)** An

applicant or recipient may protect assets up to the amount of QSLTCIP benefit payments made to or on the behalf of an applicant or recipient; this is the eligible applicant or recipient’s protected asset limit (PAL). If the value of protected assets exceeds the PAL, the excess value is counted against the asset limit and is not protected in estate recovery.

**(7)** The

following conditions may apply to assets protected under a QSLTCIP:

**(a)**

an applicant or recipient may keep protected resources;

**(b)**

the value of protected assets is updated each year at the MAP eligibility review; the updated value is the counted towards the PAL;

**(c)**

an applicant or recipient may transfer a protected asset to another person without a transfer penalty; a transferred asset is counted against the PAL based on the value of the asset on the day it was transferred;

**(d)**

an applicant or recipient may use a protected asset to obtain another protected asset, which then becomes the protected asset;

**(e)**

an applicant or recipient can spend or deplete a protected asset; the asset continues to be protected and is counted against the PAL even though the applicant or recipient no longer has it;

(f) once an asset is officially designated for protection, it cannot be undesignated in favor of designating another asset;

(g) changes in the status of protected assets must be reported at the recipient's annual re-determination for MAP eligibility; some examples of changes are transferring, spending, depleting, or replacing an asset; and

(h) new countable assets that are reported in-between MAP eligibility renewals must be evaluated when reported to determine if they can be protected under the QSLTCIP program's PAL;

(i) the following assets cannot be protected under the QSLTCIP program and must be made available after the death of the recipient to reimburse HSD up to the amount of the paid MAD benefits on the deceased recipient behalf;

(i) special and or supplemental needs, pooled charitable trusts, irrevocable trusts with a reversionary state interest, or income diversion trusts; and

(ii) annuity interest where HSD has been named a reminder beneficiary.

(8) Unused asset protection may result because all available asset protection was not used at the time of designation or when an applicant or recipient PAL has increased because the applicant or recipient continues to receive benefits from a QSLTCIP while receiving MAD benefits.

(9) Unused asset protection will automatically apply to protect assets already officially indicated for protection when the value of the asset has increased and there is unused asset protection.

(10) Unused asset protection may also be used to more fully cover an asset that is only partially protected, protect additional assets that have become available during a recipient's lifetime, or to

protect assets in a recipient's estate after [he or she dies] they die.

**K. Produce for home consumption exclusion:** The value of produce for home consumption is totally excluded.

**L. Exclusion of settlement payments from the federal department of housing and urban development:** Payments from the department of housing and urban development (HUD) as defined in *Underwood v. Harris* are excluded as income and resources. These one-time payments were made in the spring of 1980 to certain eligible tenants of subsidized housing (Section 236 of the National Housing Act).

(1) **Segregation of payment:** To be excluded as a resource, payments retained by an applicant or recipient must be kept separate; these payments must not be combined with any other countable resources.

(2) **Income from segregated funds:** Interest or dividend income received from segregated payment funds is not excluded from income, or, if retained, is not an excluded resource; this interest or dividend income must be kept separate from excludable payment funds.

**M. Lump sum payments exclusion:** SSI and social security lump sum payments for retroactive periods are excluded as countable resources for nine months after the month in which they are received. See Subsection B of [Section] 8.281.500.15 NMAC for instructions regarding SSI and social security lump sums which are placed into the ownership of a MAD qualifying trust. Social security lump sum payments are considered infrequent income. See Subsection C of [Section] 8.281.500.19 NMAC.

**N. Home replacement exclusion:** The proceeds from a reverse mortgage from the sale of an excluded home is excluded. Additionally, the value of a promissory note or similar installment sales contract which constitutes proceeds from the sale of an excluded home is excluded from countable

resources if all of the following conditions are met:

(1) the note results from the sale of the applicant's or recipient's home as described in Subsection E of [Section] 8.281.500.13 NMAC;

(2) within three months of receipt (execution) of the note, the applicant or recipient purchases a replacement home which meets the definition of a home in Subsection E of [Section] 8.281.500.13 NMAC;

(3) all note-generated proceeds are reinvested in the replacement home within three months of receipt;

(4) **additional exclusions:** in addition to excluding the value of the note itself, the down payment received from the sale of the former home, as well as that portion of any installment amount constituting payment on the principal are also excluded from countable resources;

(5) **failure to purchase another excluded home timely:** if the applicant or recipient does not purchase another home which can be excluded under the provisions of Subsection E of [this-section] 8.281.500.13 NMAC and the following paragraphs within three months, the value of the promissory note or similar sales contract received from the sale of an excluded home becomes a countable resource as of the first moment of the first day of the month following the month the note is executed; if the applicant or recipient purchases a replacement home after the expiration of the three month period, the value of the promissory note or similar installment sales contract becomes an excluded resource effective the month following the month of purchase of the replacement home provided that all other proceeds are fully and timely reinvested;

(6) **failure to reinvest proceeds timely:** if the proceeds from the sale of an excluded home under a promissory note or similar installment sales contract are not reinvested fully within three

months of receipt in a replacement home, the following resources become countable as of the first moment of the first day of the month following receipt of the payment:

(a)

the fair market value of the note;

(b)

the portion of the proceeds, retained by the applicant or recipient which was not timely reinvested;

(c)

the fair market value of the note remains a countable resource until the first moment of the first day of the month following the receipt of proceeds that are fully and timely reinvested in the replacement home; failure to reinvest proceeds for a period of time does not permanently preclude exclusion of the promissory note or installment sales contract; however, previously received proceeds that were not timely reinvested remain countable resources to the extent they are retained;

(7) **interest**

**payments:** if interest is received as part of an installment payment resulting from the sale of an excluded home under a promissory note or similar installment sales contract, the interest payments are considered countable unearned income in accordance with Subsection A of [Section] 8.281.500.19 NMAC;

(8) **when the**

**home replacement exclusion does not apply:** if the home replacement exclusion does not apply, the market value of a promissory note or sales contract as well as the portion of the payment received on the principal are considered countable resources.

**O. Household goods and personal effects exclusion:**

Household goods and personal effects are excluded if they meet one of the following four criteria:

(1) items of

personal property, found in or near the home, which are used on a regular basis; items may include but are not limited to furniture, appliances, recreational vehicles (i.e. boats and RVs), electronic equipment (i.e. computers and television sets), and carpeting;

(2) items

needed by the householder for maintenance, use and occupancy of the premises as a home; items may include but are not limited to cooking and eating utensils, dishes, appliances, tools, and furniture;

(3) items of

personal property ordinarily worn or carried by the applicant or recipient; items may include but are not limited to clothing, shoes, bags, luggage, personal jewelry including wedding and engagement rings, and personal care items;

(4) items

otherwise having an intimate relation to the applicant or recipient; items may include but are not limited to prosthetic devices, educational or recreational items such as books or musical instruments, items of cultural or religious significance to an applicant or recipient; or items required because of an applicant or recipient impairment.

[8.281.500.13 NMAC - Rp, 8.281.500.13 NMAC, 8/15/2015; A, 12/1/2022]

**8.281.500.14 ASSET**

**TRANSFERS:** The ISD caseworker must determine whether an applicant or recipient or ~~his or her~~ their spouse transferred assets within a specified period of time (lookback period) before applying for a MAP category of eligibility for institutional care or at any time after approval of the applicant's or recipient's application. Then the ISD caseworker must determine if the applicant or recipient or ~~his or her~~ their spouse received fair market value for the asset. If the applicant or recipient or ~~his or her~~ their spouse did not receive fair market value for the asset, then the applicant or recipient may be subject to a penalty. In the case of an asset held by the applicant or recipient in common with another individual or individuals in a joint tenancy, tenancy in common, or similar arrangement including life estate or remainderman relation, the asset (or the affected portion of such asset) is considered to be transferred by the applicant or recipient when any action

is taken, either by the applicant or recipient or by any other individual, acting on behalf of the applicant or recipient (including but not limited to a spouse, representative payee, trustee, guardian, conservator, or another authorized representative), that reduces or eliminates the applicant's or recipient's ownership or control of such asset. Any asset transferred to a community spouse in excess of the community spouse resource allowance (CSRA) is considered to be totally available to the institutionalized spouse and must be spent down before eligibility can be established.

**A. Lookback period:**

Any transfer of assets made prior to February 8, 2006, is subject to a 36-month lookback period prior to the date of the applicant's or recipient's application or at any time subsequent to the approval of an application for a MAP category of eligible for institutional care. Transfers made on or after February 8, 2006, are subject to a 60-month lookback period.

(1) The

lookback period is 60 months if the transfer occurred as the result of payments from a trust or portions of a trust that are treated as assets disposed of by the applicant or recipient.

(2) The

lookback period starts on the date the applicant or recipient applies for a MAP category of institutional care and is in an institution.

**B. Transfer of assets for less than fair market value:** If a transfer of assets occurred within the applicable lookback period, or at any time after approval of the applicant's or recipient's application, the ISD caseworker must determine whether the applicant or recipient or ~~his or her~~ their spouse received fair market value for the transferred asset(s).

(1)

**Documentation requirement:**

The applicant or recipient or ~~his or her~~ their spouse must provide documentation of the transfer, the fair market value of the asset(s) transferred, the circumstances surrounding the transfer and the amount, if any, received as

compensation for the transferred asset.

(2) If the applicant or recipient fails to provide this information without good cause within 30 calendar days from the date requested by the ISD caseworker, the ISD caseworker denies the application or closes the applicant's or recipient's case, as appropriate.

(a) Good cause is considered to exist if the applicant or recipient or ~~his or her~~ their authorized representative can show that ~~he or she was~~ they were effectively precluded from timely reporting because of legal, financial, or other reasons, or because of the existence of a health related problem including death of a family member within the specific degree of relationship during the period of time in which the applicant or recipient, or authorized representative has to report the required information. The health or other problem must have been of such severity and duration as to have effectively precluded the applicant or recipient or ~~his or her~~ their authorized representative from reporting in a timely manner. See [Section] 8.291.410 NMAC for a detailed description of degree of relationships.

(b) To document the good cause claim, the applicant or recipient or authorized representative must provide proof of the existence of the health or other problem and must explain the circumstances which precluded provision of the required information.

(c) The ISD caseworker makes the determination of good cause subject to review and approval by the county director or designee.

(3) **Restricted coverage:** If a transfer of assets occurred within the applicable lookback period, or at any time subsequent to approval for a MAP category of institutional care eligibility, for which the applicant or recipient or ~~his or her~~ their spouse did not receive fair market value, the ISD caseworker determines if a penalty period must be calculated.

The penalty for transfers of assets for less than fair market value in a MAP category of eligibility for institutional care is restricted coverage.

"Restricted coverage" means that the applicant or recipient is eligible for all MAD services except services furnished in a nursing facility or services considered to be long-term care services.

(a) Determine the current average monthly cost of nursing facilities for private patients. See [Section] 8.281.500.13 NMAC.

(b) Divide the total uncompensated value (amount) of the resources transferred for less than fair market value by the current average monthly cost of nursing facilities for private patients.

(c) The result is the number of months and partial months for which the applicant or recipient will be on restricted coverage.

(4) **Calculating restricted coverage when the transferred asset is income:** If income has been transferred as a lump sum, the period of restricted coverage is calculated based on the lump sum value. For transfers of the right to an income stream, the period of restricted coverage is calculated using the actuarial value of all payments transferred. See [Section] 8.200.520 NMAC.

**C. Transfer rules based on date of transfer:** Two sets of rules govern the calculation of penalty periods if a transfer of assets for less than fair market value has occurred. The date of transfer and approval date for the MAP category of institutional care medicaid applicant or recipient institutional care governs which set of rules is used to calculate the penalty period.

(1) **For transfers made on or after August 11, 1993:** Periods of restricted coverage are calculated as follows (Omnibus Budget Reconciliation Act of 1993):

(a) the period of restricted coverage

begins the month the resources were transferred; the total uncompensated value of the transferred assets divided by the average cost to a private patient for nursing facility services in the state at the time of the applicant's or recipient's application is the methodology used to calculate a period of restricted coverage;

(b) transfers for less than fair market value made by an institutionalized SSI applicant or recipient, or a community spouse of institutionalized applicant or recipient may subject the institutionalized applicant or recipient to a period of restricted coverage;

(c) penalty periods are now consecutive rather than concurrent; if multiple transfers occur in different months, the periods of restricted coverage begin with the month of the initial transfer and run consecutively; for example, if an applicant or recipient transfers an asset for less than fair market value in February causing four months of restricted coverage (i.e., February through May) and transfers another asset in April causing three months of restricted coverage, the second period of restricted coverage begins in June and lasts through August; and

(d) if an institutionalized applicant or recipient with a community spouse is placed on restricted coverage as the result of a transfer of assets for less than fair market value and the community spouse subsequently becomes eligible for a MAP category of eligibility for institutional care, any remaining months in the restricted coverage period must be divided equally between the spouses.

(2) **For transfers made on or after February 8, 2006:** Pursuant to the Deficit Reduction Act of 2005, otherwise eligible institutionalized recipients who transfer assets for less than fair market value after this date are penalized as follows:

(a) the period of restricted coverage begins the first day of the month in which the resources were transferred,



or the date on which the individual applicant or recipient meets a MAP category of eligibility, and would otherwise be receiving institutional level of care but for the application of the penalty period, whichever is later, and does not occur during any other period of ineligibility as a result of an asset transfer; see Subsection B of [Section] 8.281.500.14 NMAC for the methodology used to calculate a period of restricted coverage;

**(b)**

once eligibility has been determined and a penalty period has begun to run, it continues until expiration, whether or not there is a break in the institutionalized recipient's eligibility;

**(c)**

the beginning date of restricted coverage is the first day of the month in which the resources were transferred provided the applicant or recipient is institutionalized and retains [~~his or her~~] their MAP category of eligibility for institutional care; for current recipients who fail to report a transfer, the recipients will continue to receive benefits until the adverse action notice date, but HSD may seek to recover any MAD benefits paid for long-term care services during what should have been a period of restricted coverage; federal law does not provide a basis to impose a transfer penalty based on date of discovery;

**(d)**

for a non-institutionalized applicant or recipient, the date restricted coverage begins is the month in which the applicant or recipient becomes institutionalized;

**(e)**

transfers for less than fair market value made by an institutionalized SSI applicant or recipient, or a community spouse of the institutionalized applicant or recipient may subject the institutionalized applicant or recipient to a period of restricted coverage; and

**(f)**

multiple transfers occurring in different months are added together and calculated as a single period of ineligibility, that begins on the earliest date that would otherwise apply if the transfer had been made in a single lump sum.

**D. Non-excludable transfers:** Certain financial instruments must be evaluated before they can be considered a transfer of assets.

**(1) Annuities:**

Annuities belonging to the applicant or recipient or to the spouse of the applicant or recipient must be declared. Annuities must be actuarially sound with no deferral and no balloon payments. Annuities purchased or issued after February 8, 2006, must meet the following additional requirements for exclusion as a transfer of assets:

**(a)**

HSD is named as the remainder beneficiary in the first position for at least the total amount of MAD benefits paid on behalf of the institutionalized applicant or recipient; HSD may be named the remainder beneficiary in the second position if there is a community spouse, or a minor, or a disabled child and is named in the first position if the community spouse or an authorized representative of the child disposes of any such remainder for less than fair market value;

**(b)**

when HSD is a beneficiary of an annuity, issuers of annuities are required to notify MAD of any changes in the disbursement of income or principal from the annuity as well as any changes to HSD's position as remainder beneficiary; and

**(c) it**

is non-assignable and irrevocable.

**(2) Life**

**estates:** If an applicant or recipient purchases a life estate in another individual's home, the applicant or recipient must live in that home for a period of at least 12 months after the date of purchase or the transaction will be treated as a transfer of assets for less than fair market value.

**(3)**

**Promissory notes:** If an applicant or recipient uses funds to purchase a promissory note, the repayment terms must be actuarially sound, provide for equal payment amounts with no deferral or balloon payments, and it must contain a provision that

prohibits cancellation of the balance upon the death of the applicant or recipient lender. A promissory note not meeting these requirements shall be treated as a transfer of assets for less than fair market value.

**E. Excludable**

**transfers:** If certain conditions are met, an applicant or recipient is not placed on restricted coverage for transferring assets for less than fair market value.

**(1)**

**Transferred asset was home:** The asset transferred was a home and title to the home was transferred to:

**(a)**

the spouse of the applicant or recipient;

**(b)**

the son or daughter of the applicant or recipient who is under 21 years of age or who meets the social security administration's definition of disability or blindness; if the child is receiving benefits based on disability or blindness from a program other than social security or SSI, or is not receiving benefits based on disability or blindness from any program, the ISD caseworker must request a determination of disability or blindness from disability determination services;

**(c)**

sibling of the applicant or recipient who has an equity interest in the home and who was residing in the home for a period of at least one year immediately before the applicant or recipient was institutionalized; or

**(d)**

son or daughter of the applicant or recipient who was residing in the home for a period of at least two years immediately before the applicant or recipient was institutionalized; for this exclusion to apply, the ISD caseworker must determine that the son or daughter provided care to the applicant or recipient which permitted the applicant or recipient to reside at home rather than in a medical facility or nursing home.

**(2)**

**Other asset transfers:** Sufficient information must be given to the ISD caseworker to establish that either:



(a)  
the applicant or recipient intended to dispose of the asset at fair market value; or

(b) at the time of the transfer the applicant or recipient had no expectation of applying for a MAP category of eligibility and the resources were transferred exclusively for a purpose other than to qualify for a MAP category of eligibility as demonstrated by a preponderance of evidence; unless these conditions are met, the transfer is presumed to have been for the purpose of qualifying for a MAP category of eligibility; or

(c)  
HSD determines that the denial of eligibility would work an undue hardship.

(3) **Asset transferred to or for the sole benefit of the community spouse:** No transfer penalty is assessed when assets are transferred from one spouse to another (e.g., assets are transferred from an institutionalized spouse to a community spouse). Any asset transferred to a community spouse or to another individual for the sole benefit of the community spouse in excess of the CSRA is considered to be totally available to the institutionalized spouse and must be spent down before eligibility can be established. No transfer penalty is assessed when assets are transferred to another for the sole benefit of the community spouse if all of the conditions listed in Subparagraphs (a) through (c) below are met.

(a)  
a transfer is considered to be for the sole benefit of the community spouse if it is arranged in such a way that no individual or entity except the community spouse can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future;

(b)  
a transfer, or transfer instrument, that provides for funds or property to pass to a beneficiary who is not the community spouse is not considered to be established for the sole benefit of the community spouse; for a

transfer to be considered to be for the sole benefit of the community spouse, the instrument or document must provide for the spending of the funds involved for the benefit of the community spouse on a basis that is actuarially sound based on the life expectancy of the community spouse or when the instrument or document does not so provide, any potential exemption from penalty or consideration for eligibility purposes is void;

(c)  
to determine whether an asset was transferred for the sole benefit of the community spouse, ensure that the transfer was accomplished via a written instrument of transfer (e.g., a trust document) which legally binds the parties to a specified course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer; a transfer without such a document cannot be said to have been made for the sole benefit of the community spouse since there is no way to establish, without a document, that only the community spouse will benefit from the transfer.

(4) **Asset transfers to or for the sole benefit of a blind or disabled child of the institutionalized individual:** No transfer penalty is assessed when assets are transferred to a blind or disabled child of the institutionalized applicant or recipient, or to a trust established solely for the benefit of a blind or disabled child of the institutionalized applicant or recipient. For this exemption to apply, the child must meet the social security administration's definition of blindness or disability. The transfer must either meet the criteria set forth in [Section] 8.281.500.11 NMAC or meets all of the conditions listed in this section, Subparagraphs (a) through (c) below to be excluded in the eligibility determination process.

(a)  
A transfer to such a blind or disabled child is considered to be for the sole benefit of that child if the transfer is arranged in such a way that no individual or entity, except the blind

or disabled child, can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.

(b)  
A transfer, or transfer instrument, that provides for funds or property to pass to a beneficiary who is not the blind or disabled child of the institutionalized applicant or recipient is not considered to be established for the sole benefit of the blind or disabled child. For a transfer or trust to be considered to be for the sole benefit of a blind or disabled child, the instrument or document must provide for the spending of the funds involved for the benefit of the blind or disabled child on a basis that is actuarially sound based on the life expectancy of the child. When the instrument or document does not so provide, any potential exemption from penalty or consideration for eligibility purposes is void.

(c)  
To determine whether an asset was transferred for the sole benefit of the blind or disabled child of the institutionalized applicant or recipient, ensure that the transfer was accomplished via a written instrument of transfer (e.g., a trust document) which legally binds the parties to a specified course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer. A transfer without such a document cannot be said to have been made for the sole benefit of the blind or disabled child since there is no way to establish, without a document, that only the blind or disabled child will benefit from the transfer.

(5) **Asset transfers to a trust for the sole benefit of a disabled individual under age 65:** No transfer penalty is assessed when assets are transferred to a trust established for the sole benefit of an individual under age 65 who meets the social security administration's definition of disability. The transfer must either meet the criteria set forth in [Section] 8.281.500.11 NMAC or meet all of the conditions listed in Subparagraphs

(a) through (c) below to be excluded in the eligibility determination process.

(a)

A transfer is considered to be for the sole benefit of a disabled individual under age 65 as described above if the transfer is arranged in such a way that no individual or entity except the disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.

(b)

A transfer, transfer instrument, or trust that provides for funds or property to pass to a beneficiary who is not a disabled individual under age 65 as described above, is not considered to be established for the sole benefit of the disabled individual. For a transfer or trust to be considered to be for the sole benefit of the disabled individual, the instrument or document must provide for the spending of the funds involved for the benefit of the disabled individual on a basis that is actuarially sound based on the life expectancy of the disabled individual. When the instrument or document does not so provide, any potential exemption from penalty or consideration for eligibility purposes is void.

(c)

To determine whether an asset was transferred for the sole benefit of the disabled individual, ensure that the transfer was accomplished via a written instrument of transfer (e.g., a trust document) which legally binds the parties to a specified course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer. A transfer without such a document cannot be said to have been made for the sole benefit of the disabled individual since there is no way to establish, without a document, that only the disabled individual will benefit from the transfer.

(6) Assets

**transfers and qualified state long-term care insurance partnerships (QSLTCIP) protected asset limits (PAL):**

(a)

No transfer penalty is assessed if at initial determination the applicant or recipient has indicated protection of the transferred asset and there is enough of the PAL to cover the value of the resource at the time of the transfer.

(b)

No transfer of assets penalty is assessed if the applicant or recipient has previously indicated an asset for protection and there was enough of the applicant's or recipient's PAL to cover the value of the resource at the time of the transfer.

(c)

No transfer penalty is assessed for the portion of a resource which has been partially protected. The unprotected portion of the resource is subject to all assets transfer provisions outlined in ~~[this section of this rule]~~ 8.281.500.14 NMAC.

**F. Re-establishing**

**eligibility:** If an asset is transferred for less than fair market value and the applicant or recipient is placed on restricted coverage, ~~[he or she has]~~ they have options to re-establish ~~[his or her]~~ their past MAP category of eligibility.

(1)

**Reimbursement by transferee:**

The individual to whom the asset was transferred can reimburse the applicant or recipient for the asset at fair market value or liquidate or sell the asset and spend an amount equal to the uncompensated fair market value on the applicant's or recipient's care or other exempt assets as listed in ~~[Section]~~ 8.281.500.13 NMAC.

(2) Return

**asset to applicant:** The asset can be transferred back to the applicant or recipient, liquidated or sold. The applicant or recipient must determine the use of the asset; such use may include spending down the resource limit on the applicant's or recipient's care, classifying the resource as exempt as listed in ~~[Section]~~ 8.281.500.13 NMAC, or having the asset become a countable resource.

(3) If the

transferred asset is restored to an applicant or recipient, ~~[he or she]~~ they

may become totally ineligible for a MAP category of institutional care eligibility due to excess resources. The ISD caseworker must verify that the applicant's or recipient's countable assets do not exceed the standard for a MAP category of institutional care eligibility. If the transferred asset is restored to an applicant or recipient, ~~[he or she]~~ they may no longer be eligible for a MAP category of institutional care due to the excess resources. The ISD caseworker must verify that the applicant's or recipient's countable assets meet the requirements to have a MAP category of institutional care eligibility. [8.281.500.14 NMAC - Rp, 8.281.500.14 NMAC, 8/15/2015; A, 12/1/2022]

**8.281.500.15 RESOURCE STANDARDS FOR MARRIED COUPLES:**

**A. Community**

**property resource determination methodology:** Community property resource determination methodology is used in the eligibility determination for a married applicant or recipient who began institutionalization for a continuous period prior to September 30, 1989.

(1) To

determine the countable value of resources, the ISD worker must:

(a)

add the total value of all resources owned by both spouses;

(b)

exclude the separate property of the non- applicant or recipient spouse; and

(c)

attribute one-half of the total value of the community property to the applicant or recipient spouse plus the value of ~~[his or her]~~ their separate property;

(d)

the resulting figure must be less than ~~[two thousand dollars (\$2,000)]~~ \$2,000.

(2)

**Application of community property rules:** Under community property rules, all property held by either spouse is presumed to be community

property unless successfully rebutted by the applicant or recipient, or representative. To rebut community property status, the applicant or recipient, or representative must document that the property was:

- (a) acquired before marriage or after a divorce or legal separation;
- (b) designated as separate property by a judgment or decree of any court;
- (c) acquired by either spouse as a gift or inheritance; or
- (d) designated as separate property by a written agreement between the spouses, including a deed or other written agreement concerning property held by either or both spouses in which the property is designated as separate property.

(i) If one of the parties to this written agreement is incompetent, legal counsel must execute the agreement on behalf of the incompetent spouse.

(ii) Property designated as separate by written agreement is evaluated according to current rules regarding transfer of resources.

(iii) Income cannot be designated as separate by an agreement between spouses; income is considered separate only if it is derived from a resource that has been determined separate.

**B. Spousal impoverishment:** Spousal impoverishment provisions apply if one spouse of a married couple is institutionalized for a continuous period of at least 30 consecutive days beginning on or after September 30, 1989. See spousal impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988 (MCCA). No comparable treatment of resources and income is required for non-institutionalized applicants or recipients who do not have a spouse remaining in the community. These provisions cease to apply as of the month following the month an applicant or recipient is no longer

institutionalized or no longer has a community spouse. If a community spouse or other dependents apply for a MAP category of eligibility they are subject to the rules governing treatment of income and resources for the individual applicant or recipient.

(1) **Resource assessment:** A resource assessment must be completed to evaluate a couple's resources as of the first moment of the first day of the month one member of the married couple is institutionalized for a continuous period of at least 30 consecutive days beginning on or after September 30, 1989. This process is used to determine the amount of resources which may be protected for the community spouse. See Subparagraph (f) below for resources which must be included in the resource assessment. The resource assessment and computation of spousal shares occurs only once, at the beginning of the first continuous period of institutionalization beginning on or after September 30, 1989. A new resource assessment may be completed if it is later determined that the original resource assessment was inaccurate. Upon the death of the community spouse, the ISD worker may review the applicant's or recipient's resources.

(a) A MAP application does not need to be submitted at the time the assessment is requested. A reasonable fee may be charged for completing assessments which are not made in conjunction with the applications. Applications for assessments are available at the ISD offices which determine eligibility for a MAP category of institutional care. Either member of the couple or their authorized representative may request an assessment application.

(b) The ISD worker must complete a resource assessment using the following criteria:

- (i) one member of a married couple became institutionalized on or after September 30, 1989 in an acute care hospital or nursing facility for

a continuous period of at least 30 consecutive days;

(ii) the institutionalized applicant or recipient has a spouse who remains in the community in a non-institutionalized setting; and

(iii) the institutionalized spouse remains, or is likely to remain, institutionalized for a period of at least 30 consecutive days based on a written statement from ~~his or her~~ their physician and supporting medical documentation; the institutionalized applicant or recipient is considered "likely to remain" even if ~~he or she does not~~ they do not actually remain in an institution for 30 consecutive days if ~~he or she~~ they met this condition at the beginning of the period of institutionalization.

(c) The ISD worker explains exactly what verification is required to complete the assessment. If the ISD worker requires further information, the individual requesting the assessment is notified in writing and given a reasonable time period of at least 10 working days to provide the additional information.

(d) The institutionalized individual or ~~his or her~~ their spouse or an authorized representative is responsible for providing all verification necessary to complete the assessment.

(e) The ISD worker completes the resource assessment within 45 calendar days of the date of receipt of the completed and signed assessment application unless verification is still pending by the 45th day. In that case, the assessment is not completed until all necessary information is provided by the institutionalized individual or ~~his or her~~ their spouse or authorized representative.

(f) Assessments include the total value of the couple's countable resources held jointly or separately as of the first moment of the first day of the month one spouse became institutionalized for a continuous period of at least 30 consecutive days beginning on

or after September 30, 1989. The assessment form identifies the spousal shares and the CSRA. The couple is entitled to all resource exclusions allowed in [Section] 8.281.500.13 NMAC except that value limits for the exempt vehicle and household goods of the community spouse do not apply. Assets excluded under the QSLCIP program are counted in the spousal resource assessment. The disregarded assets are included in determining the amount of the CSRA. The disregarded asset is not counted in determining the applicant's or recipient's eligibility.

(g)

When the assessment is complete, the ISD worker copies all documentation used to make the determination of countable resources and retains the documents in the case record. The ISD worker also provides complete copies of the assessment forms to the following parties:

(i)

institutionalized applicant or recipient;

(ii)

community spouse; and

(iii)

authorized representative(s) if any.

(h)

When the amount of the couple's total countable resources has been determined, the resulting amount is divided by two to determine the spousal shares. The community spouse is entitled to [his or her] their spousal share or the MAD minimum resource allowance, whichever is greater, up to the applicable federal maximum standard or an amount determined at a HSD administrative hearing or an amount transferred pursuant to a district court order. The CSRA is the amount by which the greatest of the spousal shares or state minimum resource allowance exceeds the amount of resources otherwise available to the community spouse without regard to such an allowance. The CSRA remains in effect until one of the spouses dies. The remainder of the couple's total countable resources in excess of the CSRA is considered available to the institutionalized spouse. If either the institutionalized

spouse or the community spouse is dissatisfied with the computation of the spousal share of the resources, the attribution of resources or the determination of the community spouse resource allowance, ~~he or she~~ they can request a HSD administrative hearing pursuant to [Section] 8.352.2 NMAC. Refer to [Section] 8.352.2 NMAC for a detailed description of the HSD administrative hearing process.

(2) CSRA

**standards:** The state minimum resource allowance and the federal maximum standards vary based on when the applicant or recipient became institutionalized for a continuous period of at least 30 consecutive days. See [Section] 8.281.500.10 NMAC for the applicable standards.

(3) CSRA

**revision:** The CSRA can be revised if either of the following occurs:

(a)

a different amount is determined by a HSD administrative hearing final decision or district court decision; or

(b)

inaccurate information was provided to the ISD worker at the time the spousal share was calculated.

(4) Resource

**availability after computation of CSRA:** Resources of a couple remaining after the computation of the CSRA are considered available to the institutionalized spouse. These remaining resources are compared to the resource limit.

(a)

From the time of the initial determination of eligibility until the first regularly scheduled redetermination, the CSRA is not considered available to the institutionalized spouse.

(b)

The CSRA may be applied retroactively for the three months prior to the month of application and is not considered available to the institutionalized spouse until the first periodic review following initial approval.

(5) Resource

**transfer after computation of the CSRA:** When eligibility has been approved for an institutionalized spouse, resources equal to the amount of the CSRA may be transferred to the community spouse. This transfer is intended to assist the community spouse in meeting [his or her] their needs in the community. Couples should transfer resources in the amount of the CSRA to the community spouse as soon as possible after approval for a MAP category of institutional care eligibility. The institutionalized spouse or authorized representative can complete this transfer at any time between the date of the assessment and the first periodic review 12 months after approval.

(6) Resource

**transfers which exceed the CSRA:** Resources transferred to a community spouse at less than fair market value are not subject to transfer penalties. Resources transferred to the community spouse in excess of the computed CSRA are considered available to the institutionalized spouse and must be spent down to below the resource standard before eligibility can be established. Resources transferred to the community spouse may exceed the CSRA if an increased amount is ordered by any court having jurisdiction or by the MAD director as part of a HSD administrative hearing final decision.

(7) Transfer

**deadlines:** If the resource transfer is not completed by the institutionalized spouse by the end of the initial period of eligibility, the resources are considered completely available to the institutionalized spouse beginning with the first periodic review after the initial determination of eligibility.

(8) Newly

**acquired assets:** After a continuous period of institutionalization begins, newly acquired resources or increases in the value of resources owned by the institutionalized spouse are countable. Recalculations of eligibility for the institutionalized spouse based on countable resources are effective at



the beginning of the month following the month in which new resources were received or an increase occurred in the value of resources already owned.

(a)

The institutionalized spouse may transfer newly acquired resources to the community spouse without a penalty up to the difference between the CSRA and the state minimum resource standard in effect as of the date of institutionalization.

(b)

After a continuous period begins, new resources acquired by the community spouse or increases in the value of resources which are part of the CSRA are not considered available to the institutionalized spouse.

[8.281.500.15 NMAC - Rp, 8.281.500.16 NMAC, 8/15/2015; A, 3/1/2018; A, 12/1/2022]

**8.281.500.16 DEEMING**

**RESOURCES:** Deeming of resources applies only during periods when an eligible applicant/recipient under 18 years of age lives at home and during the month the eligible applicant or recipient enters an institution. After the initial month of entry into the institution, only those resources directly attributable to or available to the applicant or recipient are counted and compared to the [~~two-thousand dollars (\$2,000)~~] \$2,000 resource limit.

**A. Deeming of resources for children who are blind or have a disability:** If an applicant or recipient under 18 years of age who is blind or disabled enters an institution, the resources of the parent(s) are deemed to the applicant or recipient if the parent(s) live in the same household. If an ineligible parent receives temporary assistance to needy families (TANF), resources are not deemed to the applicant or recipient.

**B.** To determine the amount of resources deemed to the applicant or recipient, the following computation is made:

(1) determine parent(s) resources;

(2) allow

parent(s) all the resource exclusions that an eligible applicant or recipient would receive;

(3) the

remaining resources in excess of [~~two-thousand dollars (\$2,000)~~] \$2,000 for one parent or [~~three-thousand dollars (\$3,000)~~] \$3,000 for two parents are deemed to the applicant or recipient child; if there is more than one applicant or recipient child, the deemed resources are divided equally; and

(4) the deemed

resources are added to whatever countable resources the applicant or recipient child has in [~~his or her~~] their own right; the applicant or recipient child is eligible for a MAP category of institutional care eligibility on the factor of resources if countable resources do not exceed [~~two-thousand dollars (\$2,000)~~] \$2,000.

[8.281.500.16 NMAC - Rp, 8.281.500.17 NMAC, 8/15/2015; A, 12/1/2022]

**8.281.500.17 INCOME:** An applicant's or recipient's gross countable monthly income must be less than the maximum allowable monthly income standard. If an applicant's or recipient's monthly gross countable income is below [~~fifty dollars (\$50)~~] \$50, the application can still be processed; however, the applicant or the recipient must be referred to the social security administration to apply for SSI. Income may be in the form of cash, checks, and money orders, or in-kind, including personal property or food. If income is not received in the form of cash, the cash value of the item is determined and counted as income. The ISD worker verifies all income and obtains appropriate documentation. Income is counted in the month received. Income is considered available throughout the month regardless of the date received.

**A. Types of income:**

Countable income is the sum of unearned income or earned income, less disregards or exclusions, plus deemed income.

**B. Earned income:**

Earned income consists of the total gross income received by an applicant or recipient for services performed as an employee or as a result of self-employment.

(1) Royalties

earned in connection with the publication of an applicant's or recipient's work and any honorarium or fee received for services rendered are considered earned income.

(2) The self-

employed applicant or recipient must provide an estimate of [~~his or her~~] their current income based on the tax return filed for the previous year or current records maintained in the regular course of business. The estimate of net earnings for the entire previous taxable year is prorated equally among all months of the current year, even if the business is seasonal.

(a)

Consideration is given to the applicant's or recipient's explanation as to why [~~his or her believes~~] they believe the estimated net earnings for the current year vary substantially from the information shown on [~~his or her~~] their tax return for past years.

(b)

A satisfactory explanation is that the business suffered heavy loss or damage from fire, flood, burglary, serious illness or disability of the owner, or other such catastrophic events. Documentation must include copies of newspaper accounts or medical reports and must be filed in the case record to substantiate the need for a reduced estimate of current self-employment income.

**C. Unearned income:**

Unearned income consists of all other income (minus exclusions and disregards) that is not earned in the course of employment or self-employment.

**D. Deemed income:**

Deemed income is income considered available to a minor applicant or recipient from [~~his or her~~] their parents.

**E. Community**

**property income methodology:** If an applicant or recipient is married,

community property income methodology shall be used in the eligibility determination, regardless of the living arrangements, if the one spouse has less income than the other spouse or if using the community property methodology would benefit both spouses. Under this methodology, one-half of the community property income is attributed to each spouse. Income is considered separate if it is earned in and is paid from a non-community property state. Proof of separate income is the burden of the applicant or recipient, spouse, or authorized representative.

[8.281.500.17 NMAC - Rp, 8.281.500.18 NMAC, 8/15/2015; A, 12/1/2022]

#### **8.281.500.18 INCOME**

**STANDARDS:** The applicable income standard used in the determination of a MAP category of institutional care eligibility for an applicant or recipient who has not been institutionalized for a period of 30 consecutive days is the SSI federal benefit rate (FBR) for a non-institutionalized individual. Participation in the medicaid home and community based waiver program is considered institutionalization and counts toward the calculation of the 30-day period. All income, whether in cash or in-kind, shall be considered in the eligibility determination, unless such income is specifically excluded or disregarded.

**A. Institutionalization period of 30 consecutive days:** After the applicant or recipient has been institutionalized for 30 consecutive days, the application can be approved as of the first day of the 30-day period. Once an applicant or recipient has been institutionalized for 30 consecutive days, the higher income maximum as specified in [Section] 8.200.520 NMAC is used.

**B. Institutionalization period less than 30 consecutive days:** If the applicant or recipient leaves the facility before 30 consecutive days, the lower income standard (SSI FBR) is used to establish eligibility.

#### **C. Transfer or death:**

If an applicant or recipient transfers to another institution or dies prior to completing 30 consecutive days of institutionalization, the higher income maximum is used. See [Section] 8.200.520 NMAC.

##### **(1) Income**

**exclusions:** Income exclusions are applied before income disregards. Exclusions are applied in determining eligibility whether the income belongs to the applicant or recipient or to an individual from whom income is deemed.

##### **(2) Infrequent**

**or irregular income:** Exclude the first [~~thirty dollars (\$30)~~] \$30 per calendar quarter of earned income; and the first [~~sixty dollars (\$60)~~] \$60 per calendar quarter of unearned income. The following definitions apply:

##### **(a)**

“Irregular income” is income received on an unscheduled or unpredictable basis.

##### **(b)**

“Infrequent income” is income received only once during a calendar quarter from a single source and includes:

##### **(i)**

proceeds of life insurance policies;

##### **(ii)**

prizes and awards;

##### **(iii)**

gifts;

##### **(iv)**

support and alimony;

##### **(v)**

inheritances;

##### **(vi)**

interest and royalties; and

##### **(vii)**

one-time lump sum payments, such as social security.

##### **(c)**

“Frequency” is evaluated for the calendar quarter (i.e. January - March, April - June, July - September, October - December) but the dollar amount is considered in the month received.

##### **(3) Foster**

**care:** Foster care payments are totally excluded if:

##### **(a)**

the foster child is not eligible for SSI; and

##### **(b)**

the child was placed in the applicant’s or recipient’s home by a public or private nonprofit child placement or child care agency.

##### **(4)**

#### **Domestic volunteer services**

**exclusions:** Payments to volunteers under domestic volunteer services (ACTION) programs are excluded from consideration as income in the eligibility determination process. These programs include the following:

##### **(a)**

volunteers in service to America (VISTA);

##### **(b)**

university year for action (UYA);

##### **(c)**

special demonstration and volunteer programs;

##### **(d)**

retired senior volunteer program (RSVP);

##### **(e)**

foster grandparent program; and

##### **(f)**

senior companion program.

##### **(5) Census**

**bureau employment:** Wages paid by the census bureau for temporary employment related to the census bureau are excluded from consideration as income in the eligibility determination process.

[8.281.500.18 NMAC - Rp, 8.281.500.19 NMAC, 8/15/2015; A, 12/1/2022]

#### **8.281.500.19 UNEARNED**

**INCOME:** Unearned income includes all income not earned in the course of employment or self-employment. If payment is made in the name of either or both spouses and another party, only the applicant’s or recipient’s proportionate share is considered available to ~~him or her~~ them. If income is derived from property for which ownership is not established, such as unprobated property, one-half of the income is considered available to each member of a married couple.

**A. Standards for unearned income:** Unearned income is computed on a monthly basis. If there are no expenses incurred with the receipt of unearned income, such as annuities, pensions, retirement payments or disability benefits, the gross amount is considered countable unearned income.

**(1) Social security overpayments:** If the social security administration withholds an amount because of an overpayment, the gross social security payment amount is used to determine eligibility. See Subsection B of [Section] 8.281.500.22 NMAC for instructions regarding calculation of the medical care credit.

**(2) Rental income:** If an applicant or recipient has rental property, the ISD worker allows the cost of real estate taxes, maintenance and repairs, advertising, mortgage insurance and interest payments on the mortgage as deductions from the amount received as rent.

**(3) Interest on promissory note or sales contract:** The portion of the payment representing interest received from a promissory note or sales contract is considered unearned income. The market value of promissory notes or sales contracts and the portion of the payment representing payment of the principal are considered resources. See also Subsection L of [Section] 8.281.500.13 NMAC.

**(4) Income from annuities, pensions and other periodic payments:** Payments from annuities, pensions, social security benefits, disability, veterans benefits, worker compensation, railroad retirement annuities and unemployment insurance benefits and other periodic payments are counted as unearned income.

**B. Unearned income exclusions:**

**(1) Interest from an excluded burial fund:** Interest from an excluded burial fund is not considered unearned income if the interest is applied toward the fund balance. If the interest is paid to the

applicant or recipient, it is considered unearned income.

**(2) Tax refunds and earned income tax credit:** Tax refunds from any public agency for property taxes or taxes on food purchases are totally excluded. Any portion of a federal income tax return which constitutes an earned income tax credit is excluded.

**(3) Grants, scholarships and fellowships:** All grants, scholarships and fellowships used to pay tuition and fees at an educational institution, including vocational and technical schools, are totally excluded. Any portion of a grant, scholarship or fellowship used to pay any other expenses, such as food, clothing or shelter, is not excluded.

**(4) Veteran's pensions:** Allowances for aid and attendance (A&A) and unusual medical expenses (UME) are excluded from unearned income for determination of eligibility. If an applicant or recipient receives an augmented VA pension as a veteran or veteran's widow or widower, the pension amount may include an increment for a dependent. If so, the VA must be contacted to provide documentation of the portion of the pension which represents the dependent's increment. When verified, this amount of the VA pension is considered the dependent's income.

**(5) Payments by a third party:** Third party payments are excluded as income if made directly to the applicant's or recipient's creditor.

**(a)** Third party payments may include mortgage payments by credit life or credit disability insurance and installment payments by a family member on a burial plot or prepaid burial contract.

**(b)** Interest from a burial contract that is automatically applied to the outstanding balance is excluded from unearned income. If the payment or interest is sent to the applicant or recipient, it is counted as unearned

income regardless of the sender's (third party's) intentions. This applies even if the sender specifies the purpose of the payment on the check. This provision does not apply if the signature of the creditor and the applicant or recipient must both be present in order to negotiate the check (two-party check).

**(6) Indian tribe per capita payments:** Funds held in trust by the secretary of the interior for an Indian tribe and distributed on a per capita basis and any interest and investment income from these funds, are excluded as income and resources in the eligibility determination process and the computation of the medical care credit.

**(7) Plans for achieving self-support:** Income derived from, or necessary to, an approved plan for achieving self-support for a blind or disabled applicant or recipient under 65 years of age is excluded.

**(a)** For an applicant or recipient who is blind or disabled and over 65 years of age, this exclusion applies only if [~~he or she~~] they received MAD services for the month preceding [~~his or her~~] their 65th birthday.

**(b)** The self-support plan must be in writing and contain the following:

- (i)** designated occupational objective;
- (ii)** specification of any savings (resource) or earnings needed to complete the plan, such as amounts needed for purchase of equipment or for financial independence;

- (iii)** identification and segregation of any income saved to meet the occupational goal;

- (iv)** designation of a time period for completing the plan and achieving the occupational goal.

**(c)** Plans for achieving self-support are developed by vocational rehabilitation counselors. If a self-support plan is not in place, the ISD worker makes a

referral to the division of vocational rehabilitation (DVR).

(d)

The ISD worker forwards the written plan and documentation to the MAD eligibility unit. The plan must be approved by that unit.

(e)

An approved plan is valid for the following specified time periods:

(i)

initial period of no more than 18 months;

(ii)

extension period of no more than 18 months;

(iii)

final period of no more than 12 months; and

(iv)

total period of no more than 48 months.

(8) **Agent**

**orange settlement payments:** Agent orange settlement payments made to applicant or recipient veterans or their survivors are excluded from consideration as income in determining eligibility.

(9) **Radiation**

**Exposure Compensation Act payments:** Payments made under the Radiation Exposure Compensation Act are excluded from consideration as income in determining eligibility.

(10) **Victims**

**compensation payments:** Payments made by a state-administered fund established to aid victims of crime are excluded from consideration as income in determining eligibility. These payments are included as countable income when calculating the medical care credit.

(11) **Lump**

**sums for retroactive periods:** SSI lump sum payments for retroactive periods are excluded from consideration as countable income in the month received.

(12) **Life**

**insurance and other burial benefits:** Life insurance and other burial benefits are unearned income to the beneficiary (not the owner). The ISD worker must subtract the amount spent on the insured recipient's last illness or burial up to ~~[one thousand~~

~~five hundred dollars (\$1500)] \$1,500.~~ Any excess is counted as unearned income.

(13) **One**

**hundred percent state funded assistance payment:** Any one hundred percent-state-funded assistance payment based on need, such as general assistance (GA) is excluded. Any interim payments made by a state or municipality from all state or local funds while an SSI application is pending are excluded.

(14) **National**

**vaccine injury compensation program (NVICP) payment:**

The NVICP funds are excluded as income or a resource until they are actually disbursed by the issuing agent. However, they are counted as income in the month in which they are received and counted as a resource in the following months, provided that the funds in question are not specifically earmarked for medical expenses. If the payment is designated for both living expenses and medical care, a determination must be made to identify how much of the payment is for living expenses, and how much is for medical care. The only portion actually counted then is that amount which is for living expenses. Therefore, a determination must be made as to how the payment is apportioned before making an eligibility determination.

(15)

**Remembrance, responsibility and the future payments:** Payments by the remembrance, responsibility and the future foundation to individual survivors forced into slave labor by the Nazis are excluded as income in determining eligibility.

[8.281.500.19 NMAC - Rp, 8.281.500.20 NMAC, 8/15/2015; A, 12/1/2022]

**8.281.500.20 DEEMED INCOME:**

**A. Availability:**

Deemed income is income considered available to a minor applicant or recipient from ~~[his or her]~~ their parents. Deeming of resources and income applies only during periods when an applicant or recipient under

18 years of age is living with ~~[his or her]~~ their parents and during the month of entry into an institution.

**B. Situations in which**

**deeming occurs:** Deeming of income occurs:

(1) from

ineligible parent to eligible child; or

(2) if there

is both a MAP eligible parent and a MAP eligible child in the home.

**C. Computing**

**deemed income:** The ISD worker computes the total monthly amount of parental unearned and earned income and then computes the deemed income available to the applicant or recipient child. If the deemed income plus the child's separate income exceeds the applicable maximum, the child will not have a MAP category of institutional care eligibility for that month.

(1) **Parents**

**and children receiving aid:** If one of the applicant or recipient child's parents is receiving any benefit or assistance paid by a governmental agency on the basis of economic need, that benefit plus all the income of that parent is excluded from the deeming process. This exclusion applies only to the income of the parent who receives the benefit. Even if the income of one parent is excluded, that parent is still considered a member of the household for purposes of determining the parental allocation. Provisions for deeming income do not apply to benefits under temporary assistance to needy families (TANF). No income is deemed to a parent or child(ren) if that parent or child(ren) is (are) receiving TANF assistance.

(2) **Applicant**

**or recipient parent and ~~[his or her]~~**

**their child(ren):** If a household is composed of an applicant or recipient parent and an applicant or recipient child(ren), the parent's income is determined according to the methodology appropriate to the MAP category of eligibility which ~~[he or she receives]~~ they receive.

(a)

If there is enough income to make the applicant or recipient parent ineligible, the remainder of the



income is carried over to be deemed to the child(ren).

(b)

If there is more than one potentially eligible child, the deemed income is divided equally among them. If total countable income is less than the applicable maximum, the applicant or recipient has a MAP category of institutional care eligibility on the factor of income.

(c)

If an applicant or recipient is determined to meet the MAP category of institutional care eligibility, the ISD worker must recompute available income for the following month based on separate income to establish the correct medical care credit. See 8.281.500.23 NMAC, *post-eligibility/medical care credit*.

[8.281.500.20 NMAC - Rp, 8.281.500.21 NMAC, 8/15/2015; A, 12/1/2022]

**8.281.500.21 DISREGARDS:**

Income disregards are determined on an individual basis. Disregards may be applied to any appropriate month of assistance, regardless of which income maximum is used.

**A. [Twenty dollar (\$20)] \$20 disregard:** The first [twenty dollars (\$20)] \$20 of unearned or earned income received in a month is disregarded. This disregard is applied first to unearned income and, if any amount remains, to earned income. If there is no unearned income, the entire [twenty dollars (\$20)] \$20 disregard is applied to earned income. This disregard is not applied to any payment made to the applicant or recipient through government assistance programs or private charitable organizations, where payments are based on need. These payments include financial assistance, TANF, assistance from catholic charities, salvation army, bureau of Indian affairs, and VA pension (not compensation) payments.

**B. Additional earned income disregard:** After applying the [twenty dollars (\$20)] \$20 disregard as specified in Subsection A of [Section] 8.281.500.21 NMAC if appropriate, the first [sixty five dollars

(~~\$65~~) \$65 of monthly earned income plus one-half of the remainder is also disregarded.

**C. Work-related expenses of the blind:** Work-related expenses of an employed applicant or recipient or couple who are legally blind are disregarded. The dollar amount of expenses which may be disregarded must be reasonable. Expenses are disregarded when paid and must be verified.

(1) This disregard does not apply to an applicant or recipient who is blind and is 65 years or age or older, unless [~~he or she was~~] they were receiving SSI payments due to blindness in the month before turning 65 or received payments under a state aid to the blind program.

(2) Types of work-related expenses which may be disregarded include:

- (a) federal, state, and local income taxes;
- (b) social security contributions;
- (c) union dues;
- (d) transportation costs, including actual cost of bus/taxi cab fare, or [~~fifteen cents (15 cents)~~] \$0.15 per mile for private automobile;
- (e) lunches;
- (f) child care costs, if not otherwise provided;
- (g) uniforms, tools and other necessary equipment; and
- (h) special expenses necessary to enable an applicant or recipient who is blind to engage in employment, such as a seeing-eye dog or Braille instructions.

**D. Student earned income disregard:** Up to [~~one thousand two hundred dollars (\$1,200)]~~ \$1,200 per quarter or a maximum of [~~one thousand six hundred twenty dollars (\$1,620)]~~ \$1,620 per calendar year of the earned income of certain students may be disregarded. To qualify for this disregard, the applicant or recipient

must meet all of the following requirements:

- (1) under 22 years of age;
- (2) unmarried;
- (3) not head of a household; and
- (4) in regular attendance at a college or university, for at least 12 semester hours or vocational or technical training course for at least 20 hours per a calendar week.

(a) This disregard applies only to a student's own earned income and includes all payments made as compensation for services, such as wages from employment or self-employment, or payments from programs such as neighborhood youth corps or work-study.

(b) This disregard is available in addition to any exclusions applied to grants, scholarships or fellowships and in addition to any other allowable disregards.

**E. Child support payments:** One-third of the amount of child support payments made to a child applying for a MAP category of institutional care eligibility is disregarded. The remainder is considered unearned income, subject to the appropriate disregards outlined below.

[8.281.500.21 NMAC - Rp, 8.281.500.22 NMAC, 8/15/2015; A, 12/1/2022]

**8.281.500.22 POST ELIGIBILITY/MEDICAL CARE CREDIT:** Once financial eligibility for a MAP category of institutional care has been established, the ISD worker must determine the following.

**A. Medical care credit:** The medical care credit is the amount of the applicant's or recipient's income used to reduce the MAD payment to the institution where [~~he or she~~] they reside. An applicant or recipient must make this payment directly to the institution. Applicants or recipients eligible for a MAP category of institutional care due to institutionalization in an acute

care hospital or an in-state in-patient rehabilitation center are not charged a medical care credit. The amount of the medical care credit is always determined prospectively. The ISD worker computes a medical care credit starting with the first full month of institutional care. No medical care credit is required for the month the recipient enters the institution if ~~he or she is~~ they are admitted after the first moment of the first day of the month.

(1) **No medical care credit for the month of discharge or death:** An applicant or recipient is not required to pay a medical care credit for the month of discharge from the institution. The medical care credit must be paid if the applicant or recipient is transferred to another institution or makes a short visit outside the institution. No medical care credit is charged for the month in which a recipient who received MAD institutional care services dies. This will prevent a deficit for the institution when a benefit, such as social security, must be returned due to the death of a beneficiary.

(2) **Application delay:** If there is a delay between application and approval, an applicant or recipient incurs a liability for a medical care credit. The ISD worker notifies the applicant or recipient of this liability during the application process and informs ~~him or her~~ them of the amount of the medical care credit ~~he or she~~ they should pay. The applicant or recipient is encouraged to pay the medical care credit to the institution before approval of the application.

(3) **Medical care credit during retroactive months:** No medical care credits are applied for any period of retroactive eligibility under this provision.

**B. Computing the medical care credit:** The current personal needs amount (PNA) of an applicant or recipient monthly income is protected for ~~his or her~~ their personal use in a nursing facility. Each year thereafter, the amount of an applicant's or recipient's monthly income shall be adjusted according to

the consumer price index as indicated in ~~[Section]~~ 8.200.510 NMAC. The excess over the amount protected, subject to other deductions, is applied toward payment for care in the nursing facility as a medical care credit.

(1) See Paragraph (6) of Subsection B of ~~[Section]~~ 8.281.500.22 NMAC for personal needs allowance for veterans or surviving spouses.

(2) An applicant's or recipient's total income, including amounts disregarded in determining eligibility, is used to compute the medical care credit with the following exceptions:

(a) Indian tribe per capita payments (see Subsection B of ~~[Section]~~ 8.281.500.19 NMAC);

(b) German reparation payments; and

(c) social security administration overpayments.

(i) When the social security administration withholds an amount due to an overpayment, the social security gross payment amount is used to determine eligibility per Subsection A of ~~[Section]~~ 8.281.500.19 NMAC. To determine the amount used in calculating the medical care credit, the ISD worker ascertains whether a social security (Title II) overpayment is being recouped or whether an SSI overpayment is being recouped from a social security benefit check (a cross-program recoupment). Cross-program recoupments are at the recipient's option so the gross benefit amount is used to calculate the medical care credit.

(ii) Recoupment of a social security overpayment from a social security benefit check is mandatory. In such cases, the net social security benefit amount is used to calculate the medical care credit.

(d) payments from the Radiation Exposure Compensation Act.

(e) 'remembrance, responsibility and the future' payments.

(3) Dependent children at home: If an institutionalized applicant or recipient with no spouse has dependent children at home who are ineligible for TANF or assistance from any other program, or are eligible for an amount less than the TANF need standard, an allowance for each child of up to the current TANF standard of need may be deducted from the institutionalized applicant's or recipient's income which is in excess of the applicant's or recipient's personal allowance.

(4) ~~**[Health insurance premiums and non-covered medical expenses:**~~ An applicant or recipient is allowed a deduction in the medical care credit computation for the full amount of any health insurance premiums paid by the applicant or recipient. A deduction for the full amount of long-term care insurance and qualified state long-term care insurance partnership premiums are also allowed. A deduction of up to the medicare part B premium amount is allowed for medical expenses currently being paid by an applicant or recipient which are not covered by a MAP category of institutional care eligibility. This includes other medical care recognized under state law but not covered by institutional care-medicare. The deduction for medical and remedial care expenses that were incurred as the result of imposition of a transfer of assets penalty period is limited to zero.] **Expenses not subject to third party payment 42 CFR 435.725:** Amounts for incurred expenses for medical or remedial care that are not subject to payment by a third party, including:

(a) medicare and other health insurance premiums, deductibles, or coinsurance charges; and

(b) necessary medical or remedial care recognized under state law but not covered under the state medicare plan, subject to reasonable limits on

amounts of these expenses. HSD has the following reasonable limits on amounts for necessary medical or remedial care not covered under medicaid:

(i) For expenses not covered under the [State] state Plan or expenses covered under the state plan, but not paid for by medicaid, the amount of the deduction is the billed amount not to exceed the provider's usual and customary charges except for unpaid nursing facility expenses.

(ii) To be deducted, an expense must be for medically necessary medical or remedial care rendered to the applicant or beneficiary and prescribed by a health care practitioner acting within their scope of practice who meet the qualifications of an eligible medicaid provider as listed in the New Mexico Administrative Code (NMAC) ["Professional Providers, Services, and Reimbursement" section found at 8.310.3.9 NMAC;] 8.310.3.9 even if such practitioner is not a medicaid provider.

(iii) A deduction for incurred medically necessary non-covered medical or remedial care expenses will be allowed when the bill is incurred during a period which is no more than three months prior to the month of the current application. For each month of unpaid nursing facility services incurred during this period, deductions are allowed at an amount not to exceed the average monthly private rate of nursing facility services, as used to calculate asset transfer penalties and which is updated annually in 8.200.510.13 NMAC or a prorated amount of this figure, for unpaid nursing facility services that are for less than a full month.

(iv) The deduction for medical and remedial care expenses that were incurred as the result of a transfer penalty period is limited to zero.

(v) Expenses for cosmetic/elective procedures (e.g., face lifts or

liposuction etc.) are not allowed as deductions except when prescribed by a health care practitioner.

(vi) Expenses from medical or remedial procedures that were denied coverage by an insurer, including medicaid, on the basis of a lack of medical necessity are not allowed.

(5) **Court-ordered support:** A deduction for the full amount of court-ordered child or spousal support is also allowed for the applicant or recipient.

(6) **Personal needs allowance for recipients in an ICF-IID:** If an applicant or recipient who is institutionalized in an intermediate care facility for individuals with intellectual disabilities (ICF-IID) has a monthly income from employment in a sheltered workshop or other work activity program, up to the first ~~one hundred dollars (\$100)~~ \$100 of this earned income is protected for the applicant's or recipient's personal needs. This amount is in addition to the applicant's or recipient's personal needs allowance protected from income from any source. If the applicant's or recipient's income is from any other source, the personal needs allowance is set at the amount as set forth in [Section] 8.281.500.12 NMAC.

(7) **Veterans administration (VA) benefits:** The ISD worker must contact the VA on each veteran's case to verify how much of the benefit is for pension, aid and attendance (A&A) or unusual medical expenses (UME).

(a) For MAP eligible veterans with no spouse or dependent children, and for surviving spouses of veterans without dependent children who do not reside in a state veteran's home (Fort Bayard or Truth or Consequences):

(i) exclude the A&A and UME in the medical care credit computation;

(ii) allow the personal needs allowance as set forth in [Section] 8.281.500.12 NMAC;

(iii) the benefit for applicant or recipient will be reduced to ~~[ninety dollars (\$90)]~~ \$90 per month effective the latest of the following;

(iv) the last day of the calendar month in which medicaid coverage begins;

(v) the last date of the month following 60 calendar days after issuance of a reduction notice;

(vi) the earliest date on which payment may be reduced without creating an overpayment;

(vii) when the benefit is reduced to ~~[ninety dollars (\$90)]~~ \$90, recomputed the medical care credit to allow ~~[ninety dollars (\$90)]~~ \$90 for personal needs.

(b) For MAP eligible veterans with no spouse or dependent children, and for surviving spouses of veterans without dependent children who do reside in a state veteran's home (Fort Bayard or Truth or Consequences):

(i) include the A&A and UME in the medical care credit computation;

(ii) allow ~~[ninety dollars (\$90)]~~ \$90 for ~~[his or her]~~ their personal needs;

(iii) the benefit for the applicant or recipient is not reduced to ~~[ninety dollars (\$90)]~~ \$90.

(c) Benefits for the following applicants or recipients are not reduced to ~~[ninety dollars (\$90)]~~ \$90 a month, regardless of whether or not they reside in a state veteran's home:

(i) veterans who have a spouse or dependent child(ren);

(ii) surviving spouses of veterans who have dependent child(ren).

(d) The ISD worker allows these applicants or recipients the allowance as set forth in [Section] 8.281.500.12 NMAC, for personal needs.

**C. Computing medical care credits for married**

**institutionalized applicants**

**or recipients:** To calculate the medical care credit for a married institutionalized applicant or recipient, the “name-on-the-check” rule applies. The ISD worker uses only the income belonging to the institutionalized applicant or recipient to compute [his-  
or-her] their medical care credit. Total gross income before any deductions is used in this process.

(1) **Treatment of VA aid and attendance (A&A) and unusual medical expenses (UME):** Allowances for A&A and UME are considered when computing the medical credit in accordance with Subsection B of [Section] 8.281.500.22 NMAC.

(2) **Court-ordered support:** A deduction for the full amount of court-ordered child or spousal support is also allowed for the applicant or recipient.

**D. Computing medical care credits for an institutionalized couple:** To compute medical care credits for each of an eligible institutionalized couple, the ISD worker totals the couple’s gross income and divides by two. The personal needs allowance as set forth in Subsection B of [Section] 8.281.500.22 NMAC is subtracted from each amount for each applicant’s or recipient’s personal needs and added to any allowable amount(s) paid by that applicant or recipient for noncovered medical expenses.

**E. Medical care credit deductions:** The ISD worker applies the deductions listed below in the following order when determining the medical care credit:

(1) institutionalized spouse’s personal needs allowance as set forth in [Section] 8.281.500.12 NMAC;

(2) community spouse monthly income allowance (CSMIA); the CSMIA deduction is permitted only to the extent that the income is available and is actually contributed to and accepted by the community spouse or other dependent family members:

(a) the CSMIA is calculated by

starting with the minimum monthly maintenance needs allowance (MMMNA) and subtracting the community spouse’s total gross income;

(b) both spouses shall be given notice of the amount of the CSMIA;

(c) if either spouse is dissatisfied with the amount of the CSMIA, [he-  
or-she] they can request a HSD administrative hearing pursuant to [Section] 8.352.2 NMAC, to establish that the community spouse needs income above the minimum monthly maintenance needs allowance; the spouse must demonstrate that the community spouse needs the additional income above the level otherwise provided by the minimum monthly maintenance needs allowance due to exceptional circumstances resulting in significant financial duress; if the spouse establishes that the community spouse needs additional income due to exceptional circumstances resulting in significant financial duress, there shall be substituted for the CSMIA such amount as is necessary to alleviate the financial duress and for so long as the exceptional circumstances exist; if as a result of a HSD administrative hearing final decision or district court hearing, additional income is granted to the community spouse for a specified period of time, when that time expires, the original CSMIA, as calculated by the ISD worker is reinstated; the exceptional circumstances can include medical, remedial or other support expenses that jeopardize the ability of the community spouse to remain self-sufficient in the community;

(d) if as a result of a district court hearing or a HSD administrative hearing final decision, a request for a revision of the CSMIA is granted, the revised amount shall be substituted for the CSMIA calculated by the ISD worker; and

(e) when the institutionalized applicant’s or recipient’s income is insufficient to provide the minimum authorized

deduction for the community spouse, either spouse can request a HSD administrative hearing pursuant to [Section] 8.352.2.NMAC if either spouse establishes that the CSRA (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse’s income to the MMMNA, there shall be substituted, for the CSRA, an amount adequate to provide the MMMNA;

(3) an excess shelter allowance for allowable expenses of the community spouse which exceed thirty percent of the MMMNA standard up to a specified maximum; the following expenses are allowed for the primary residence of the community spouse:

(a) rent or mortgage payment, including interest or principal;

(b) home taxes and insurance;

(c) maintenance charges for a condominium or cooperative; and  
(d) amount equal to the standard utility allowance used by the food stamp program if the community spouse incurs a heating or cooling expense; utility expenses included in the rent or the basic maintenance fee for a condominium or cooperative, are not allowed.

(4) The total CSMIA and excess shelter allowance combined may not exceed the standard amount per month, unless the MAD director or a district court orders the institutionalized spouse to pay an increased amount.

(5) An allowance for each eligible family member equal to one-third of the balance obtained after deducting the family member’s gross income from the MMMNA. Family members include the couple’s minor child(ren) under the age of 18 years, disabled adult child(ren) of the couple who meet the social security administration’s definition of disability and dependent sibling(s) or parent(s) of the couple. These family members must reside with the



community spouse. The dependency requirements are met if either member of the couple could claim the family member as a dependent for tax purposes.

(6) The deductions for the community spouse and dependent family members apply only so long as there is a community spouse. Deductions for the community spouse and other family members shall cease in the first full calendar month after the community spouse dies, becomes divorced, or is institutionalized.

(7) Health insurance premiums and non-covered medical expense deduction.

**F. Reporting requirements:** An applicant or recipient, spouse, or authorized representative is required to report to the ISD worker any change in circumstances which may affect eligibility or the medical care credit amount within 10 working days after the date the change occurs. Changes which cause adjustments in an applicant's or recipient's medical care credit amount are effective the month after the change occurs. Family members receiving allowances must also report all changes of gross income and residence within 10 working days after the date the change occurs. Changes must be reported when the institutionalized spouse stops making all or part of a maintenance allowance available to the community spouse or other family member(s), or when the recipient of a maintenance allowance begins to refuse all or part of the income.

**G. Changes in income and recipient medical care credit:** Payments received by an applicant or recipient, such as social security, VA, retirement or other benefits, are applied to billing for services for the same month in which the payment is received. If the income increases, the institution must continue to collect the amount indicated on the medical care credit report in the eligible recipient's file and immediately advise the ISD worker of the change. The ISD worker processes the change, notifies the institution and the eligible recipient of the new medical care

credit amount and indicates the month in which the higher amount is to be collected. The difference between the medical care credit amounts is deposited in the eligible recipient's personal fund account until the change is effective.

[8.281.500.22 NMAC - Rp, 8.281.500.23 NMAC, 8/15/2015; A, 12/1/2022]

#### **8.281.500.23 UNDUE**

**HARDSHIP:** An applicant or recipient subject to a penalty for transfer of assets for less than fair market value may apply for a waiver of the regulation regarding transfer of assets as constituting an undue hardship. The facility where an institutionalized applicant or recipient resides may file an application for waiver of the requirement on behalf of the applicant or recipient with the applicant's or recipient's or authorized representative's consent.

**A.** The transfer must have been made to someone other than a family member. "Family member" includes son, daughter, grandson, granddaughter, step-son, step-daughter, in-laws, mother, father, step-mother, step-father, half-brother, half-sister, niece, nephew, grandmother, grandfather, aunt, uncle, sister, brother, step-sister, step-brother.

**B.** The applicant or recipient must demonstrate that the application of the transfer of assets regulation would deprive the applicant or recipient of:

(1) medical care such that the applicant's or recipient's health or life would be endangered; or

(2) food, clothing, shelter or other necessities of life.

**C.** The applicant or recipient or the facility where the applicant or recipient resides must submit any documentation to support the claim that application of the transfer of assets requirement would constitute an undue hardship within 30 calendar days of the date of the notice regarding the penalty to the ISD county office.

**D.** Undue hardship does not exist when the application of a transfer penalty causes an applicant or recipient or ~~his or her~~ their family members inconvenience or restricts their lifestyle.

**E.** The county director of the ISD office will make a decision regarding an application for waiver of the transfer of assets requirements within 30 calendar days of receipt of the application.

(1) Notice of the decision shall be mailed to the applicant or recipient or ~~his or her~~ their authorized representative.

(2) **MAD** may make payments to the nursing facility for an applicant or recipient who is a resident of the facility while an application for waiver of the requirement is pending to hold the bed for the applicant or recipient. HSD may make payments for no more than 30 calendar days.

**F.** If the applicant's or recipient's application for waiver of the transfer of assets requirement is granted, MAD shall pay for long-term care services prospective from the date of the application. MAD shall pay for long-term care services as long as the circumstances constituting the basis for waiver of the application of the requirement exist. If the applicant's or recipient's application for waiver of the transfer of assets requirement is denied, the applicant or recipient can request a HSD administrative hearing pursuant to [Section] 8.352.2 NMAC within 90 calendar days of the date of the notice of denial.

**G.** The applicant or recipient or ~~his or her~~ their authorized representative must notify the ISD worker of any change in circumstances which affects the application of the undue hardship waiver exception within 10 working days of the change in circumstances. MAD will review the change of circumstances and determine the next appropriate action, which may include withdrawal of the waiver. [8.281.500.23 NMAC - Rp, 8.281.500.24 NMAC, 8/15/2015; A, 12/1/2022]

**PROFESSIONAL  
ENGINEERS AND  
PROFESSIONAL  
SURVEYORS, BOARD OF  
LICENSURE FOR**

**This is an amendment to 16.39.2  
NMAC Section 8, effective  
12/16/2022.**

**16.39.2.8 CONTINUING  
PROFESSIONAL  
DEVELOPMENT -  
REQUIREMENTS:**

The purpose of the continuing professional development requirement is to enhance the continuing level of professional development of professional engineers and professional surveyors.

**A. Introduction**

- Every licensee shall meet the continuing professional development requirements of these regulations for professional development as a condition for license renewal.

**B. Failure to meet**

requirements - Submission of professional development hours (PDHs) shall be made concurrently with license renewal. Failure to meet the PDH requirements will result in the rejection of renewal.

**C. Requirements -**

each licensee is required to obtain 30 professional development hours (PDH) units during a biennium at least two of which shall be in ethics/business-related. If a licensee exceeds the biennial requirement in any biennial cycle, a maximum of 15 PDH units may be carried forward into the subsequent biennium in accordance with what has been previously reported to the board. PDH units may be earned from participation in qualifying activities as follows:

- (1) successful completion of college courses relevant to engineering and surveying;
- (2) successful completion of short courses, tutorials, webinar or distance-education courses offered for self-study, independent study or group study through synchronous or asynchronous delivery method such as live, correspondence, archival or the internet;

(3) presenting or attending qualifying seminars, in-house courses, workshops, or professional or technical presentations made at meetings, conventions, [or] conferences, or educational institutions;

(4) teaching or instructing in Paragraphs (1) through (3) of Subsection D of 16.39.2.8 NMAC;

(5) authoring published papers, articles, [or] books, or accepted licensing examination items;

(6) active participation in professional or technical societies;

(7) patents;

(8) active

participation in educational outreach activities, pertaining to professional licensure or the surveying/engineering professions, as a speaker, instructor, presenter or panelist.

**D. Units - the**

conversion of other units of credit to PDH units is as follows:

**D. Units - the**

conversion of other units of credit to PDH units is as follows:

(1) One college or unit semester.....45 PDH;

(2) One college or unit quarter hour...30 PDH;

(3) One continuing education unit.....10 PDH;

(4) One hour of professional development in coursework, seminars, or professional or technical presentations made at meetings, conventions, or conferences.....1 PDH;

(5) for teaching, apply multiple of two (teaching credit is valid for teaching a course or seminar for the first time only; teaching credit does not apply to full-time faculty);

(6) Publications:

(a) each published peer-reviewed paper or book in the licensee's area of professional practice.....10 PDH;

(b) each published paper or article other than Subparagraph (a) of Paragraph

(6) of Subsection E of 16.39.2.8 NMAC in the licensee's area of professional practice.....5 PDH;

(7) active participation in professional and technical societies (each organization) .....2 PDH;

(8) each patent.....10 PDH;

(9) One hour of outreach activity.....1 PDH (max [4] 6 PDH/biennium).

**E. Determination of credit - the board has final authority with respect to approval of courses, credit, PDH value for courses, and other methods of earning credit:**

(1) credit for college or community college approved courses will be based upon course credit established by the college;

(2) credit for qualifying seminars, workshops, professional conventions, and courses/activities may be recommended by the professional societies;

(3) additional criteria for credit determination shall be included in the board policy.

**F. Record keeping** - each licensee is responsible for maintaining records that support credits claimed is the responsibility of the licensee. Records required include but are not limited to:

(1) a log showing the type of activity claimed, sponsoring organization, location, duration, instructor's or speaker's name, and PDH credits earned;

(2) attendance verification records in the form of completion certificates, paid receipts or other documents supporting evidence of attendance;

(3) proof of membership in a technical organization issuing a publication as a part of its membership fee;

(4) a log indicating the medium used for a technical review, the subject of the review, the author or sponsoring organization, the date the review was conducted, a brief written summary of the contents of the reviewed material and the time spent on the review;

(5) the organization sponsoring a civic or community activity, the date and location of the activity, the subject of the activity and the licensee's involvement in the activity. These records must be maintained for a period of three years and copies may be requested by the board for audit verification purposes.

G. Exemptions - a licensee may be exempt from the professional development educational requirements for One of the following reasons:

(1) new licensees by way of examination or comity/endorsement shall be exempt for the first year directly following the issuance of their license; PDH requirements will be prorated for any remaining portion of the licensing period beyond One year from the date of initial licensure;

(2) a licensee serving on temporary active duty in the armed forces of the United States for a period of time exceeding 120 consecutive days in a calendar year may be exempt from obtaining the professional development hours required during that year; supporting documentation shall be furnished to the board;

(3) licensees experiencing physical disability, illness, or other extenuating circumstances as reviewed and approved by the board may be exempt; supporting documentation must be furnished to the board;

(4) licensees who have been approved for "retired status" by the board shall be exempt from the professional development hours required; in the event such a person elects to return to active practice of professional engineering or professional surveying, professional development hours must be earned before returning to active practice for the preceding biennial cycle.

H. Reinstatement - a licensee may bring a lapsed license to active status by obtaining all delinquent PDH units outstanding from the last biennium and complying with all other reinstatement

requirements in the Engineering and Surveying Practice Act and the board's rules and regulations; however, if the total number required to become current exceeds 30, then 30 shall be the maximum number required.

I. Comity/out-of-jurisdiction resident - licensees who are residents of other jurisdictions shall meet the continuing professional development requirements of this board. These requirements may be deemed satisfied when a non-resident licensee provides evidence of having met requirements for another state engineering/surveying licensing board that are equal to or exceed the requirements of this board.

J. Dual licensees - the number of PDH units required shall remain the same for persons who hold a dual license as a professional engineer and professional surveyor; for persons who hold a dual license, half of the PDH units shall be in each profession.

K. Forms - all renewal applications will require the number of earned PDH units. The licensee must sign the renewal application, and submit with the appropriate fee. [16.39.2.8 NMAC - Rp, 16 NMAC 39.2.8, 12/1/2001; A, 7/1/2006; A, 7/1/2015; A, 1/1/2016; A, 12/28/2017; A, 12/16/2022]

## PROFESSIONAL ENGINEERS AND PROFESSIONAL SURVEYORS, BOARD OF LICENSURE FOR

**This is an amendment to 16.39.3  
NMAC Section 8 and 12, effective  
12/16/2022.**

### 16.39.3.8 ENGINEERING DISCIPLINES:

A. Licensure is granted as a professional engineer and shall be so stated on the certificate. Although the Engineering and Surveying Practice Act makes no specific designation as to the disciplines of engineering practice on the

certificates as issued by the board, the records and roster of the board shall indicate the discipline(s) in which the licensee is competent to practice in accordance with this section. Only the discipline(s) of engineering for which the applicant has successfully been examined or approved by the professional engineering committee will be recorded.

B. Requests for engineering disciplines will be accepted from the following list; and the board's records and roster will be annotated with the corresponding alphabetical code:

(1)	architectural	A
(2)	aeronautical	B
(3)	civil	C
(4)	agricultural	D
(5)	electrical	E
(6)	and computer	F
(7)	engineer	F
(7)	geological/ <u>geotechnical</u>	G
(8)	chemical	H
(9)	industrial	I
(10)	mechanical	M
(11)	mining/ <u>mineral</u>	N
(12)	metallurgical/ <u>materials</u>	NN
(13)	petroleum	P
(14)	control	Q
(15)	systems	Q
(15)	structural	R
(16)	nuclear	T
(17)	fire	U
(17)	protection	U
(18)	environmental	V
(19)	construction	W
(20)	naval	Nm
(21)	architecture and marine	Nm
(21)	software	Sw

C. Other disciplines may be considered as reviewed and approved by the board.

D. A licensee may be listed in no more than three disciplines of engineering. Subsequent to initial licensure, a licensee may apply for licensure in another discipline of engineering. The licensee shall demonstrate competence in that discipline and may be required to appear before the board. Demonstration of competence may be accomplished by presenting evidence as follows:

(1) the licensee shall file a separate application for the additional discipline requested and pay an application fee for the additional application; and

(2) complete the application forms to indicate clearly the education, experience, and three acceptable personal references which will substantiate proficiency in the discipline for which the licensee is applying; experience and personal references must be stated;

(3) an applicant for licensure by endorsement may initially apply for up to three disciplines, provided substantial evidence is presented to the board to demonstrate competence for each requested discipline.

E. Structural discipline - except for an applicant with a B.S. degree with a structural option and a minimum of four years of post-baccalaureate structural engineering experience, listing as a structural engineer may be obtained by having gained an acceptable engineering degree which included a minimum of six hours of structural design; having licensure as a professional engineer; and having four years of structural experience gained after licensure and acceptable to the board.

(1) Passing the NCEES structural tests part I & II may be substituted for two years of the required experience.

(2) A master's degree in structures may be substituted for one year of the required experience.

(3) An applicant for licensure as a structural engineer by endorsement shall meet the requirements of Paragraphs (1) and (2) of Subsection D of 16.39.3.8 NMAC.

F. Specialty sub-disciplines - The professional engineering committee of the board may determine that the special practice of engineering within one or more of the engineering disciplines in Subsection B of 16.39.3.8 NMAC requires unique training/education and experience to adequately protect the public safety and health, and the professional engineering committee of the board shall declare this special practice of engineering to be a specialty sub-discipline. The declaration of a specialty sub-discipline shall be based on a need identified by the state or any of its political subdivisions, availability of appropriate and timely training/education within the state of New Mexico, and the ability of the identification of a specialty sub-discipline to inform the public of the needed special practice of engineering. If the professional engineering committee of the board declares a specialty sub-discipline, after a rules hearing, the requirements for the special practice of engineering shall be included in Title 16, Chapter 39 of the New Mexico administrative code for engineering and surveying:

(1) the specialty sub-discipline rules shall specify the training/education and experience requirements to obtain certification for the special engineering practice, including provisions for equivalent training when a particular course of training/education is specified; in anticipation that more than one discipline identified in Subsection B of 16.39.3.8 NMAC will qualify for the specialty sub-discipline, the rules shall identify which engineering disciplines in Subsection B of 16.39.3.8 NMAC, are most likely to qualify for the specialty sub-discipline;

(2) the board shall maintain a list of engineers who have been certified as meeting the

requirements for the specialty sub-discipline; the list shall be available to the public upon request and pursuant to the inspection of public records; the professional engineering committee of the board shall establish a form for the application to obtain a certification for the specialty sub-discipline; upon approval by the professional engineering committee of the board, the qualified licensee's name shall be added to the list of licensees having the specialty sub-discipline;

(3) a licensee's name may be removed from the list of persons certified for the specialty sub-discipline, upon determination by the professional engineering committee of the board that the licensee no longer qualifies for the certification specialty sub-discipline; such removal shall be only after the appropriate process/hearing by the professional engineering committee of the board;

(4) the failure to obtain certification for the specialty sub-discipline shall not limit the practice of engineering within any of the engineering disciplines identified in Subsection B of 16.39.3.8 NMAC, and the failure to obtain certification in the specialty sub-discipline shall not constitute practice outside the licensee's area of competence; however, the failure to obtain certification for a specialty sub-discipline and a determination by the professional engineering committee of the board of inappropriate practice of engineering within the engineering specialty may be cause for determination that the engineering practice is not within the licensee's authorized discipline, and that appropriate disciplinary action can be taken;

(5) the certification of a specialty sub-discipline shall be for a period established by the professional engineering committee of the board, but not less than two years or more than six years; renewal of the specialty sub-discipline shall be concurrent with license renewal;

(6) the professional engineering committee of the board may remove the specialty



sub-discipline from the rules for engineering and surveying, after a rules hearing, upon the finding that the training/education is no longer available or that the designation of the specialty sub-discipline is no longer needed to protect the public safety and health.

[16.39.3.8 NMAC - Rp, 16 NMAC 39.3.8, 1/01/2002; A, 7/01/2006; A, 1/01/2007; A, 7/1/2015; A, 12/28/2017; A, 12/16/2022]

#### **16.39.3.12 SEAL OF LICENSEE:**

**A.** Each licensed professional engineer shall obtain a seal/stamp, which shall appear on all final engineering design drawings, the certification page of all specifications and engineering reports prepared by the licensee in responsible charge. Adjacent to the seal/stamp shall appear the original signature of the licensee along with the date the signature was applied. Rubber stamps signatures are not acceptable. Electronic signatures as provided by law and board's policy shall be acceptable.

**B.** The seal/stamp shall be the impression type seal, the rubber type, or a computer-generated facsimile. Computer generated seals shall be bona fide copies of the actual seal/stamp specific to the work being presented.

**C.** The design of the seal/stamp shall consist of either:

(1) three concentric circles, the outermost circle being one and one-half inches in diameter, the middle circle being one inch in diameter, and the innermost circle being one-half inch in diameter. The outer ring shall contain the words, "*professional engineer*" and the licensee's name. The inner ring shall contain the words "*New Mexico*". The center circle shall contain the license number issued by the board. Any border pattern used by the manufacturer is acceptable; or

(2) a design approved by the board which contains the words "*professional engineer*", the licensee's name, "*New Mexico*",

and the license number issued by the board each in text no less than [0.2] 0.1 inches in height.

**D.** Professional engineers who were licensed prior to the enactment of these current rules and who have maintained that license without lapse, may retain and use the seals, stamps, and wall certificates previously approved.

**E.** For the purposes of the Engineering and Surveying Practice Act, a licensee of this board has "responsible charge of the work" as defined in Subsection O of Section 61-23-3 NMSA 1978 and may sign, date and seal/stamp plans, specifications, drawings or reports which the licensee did not personally prepare when plans, specifications, drawings or reports have been sealed only by another licensed engineer, and the licensee or persons directly under his personal supervision have reviewed the plans, specifications, drawings or reports and have made tests, calculations or changes in the work as necessary to determine that the work has been completed in a proper and professional manner.

**F.** The seal and signature shall be placed on work only when it is under the licensee's responsible charge. The licensee shall sign and seal only work within the licensee's area of discipline.

**G.** When the document contains more than one sheet, the first or title page shall be sealed and signed by the licensee who was in responsible charge. Two or more licensees may affix their signatures and seals provided it is designated by a note under the seal specific subject matter for which each is responsible. In addition, each sheet shall be sealed and signed by the licensee or licensees responsible for that sheet. When a firm performs the work, each sheet shall be sealed and signed by the licensee or licensees who were in responsible charge of that sheet and, in the case of multiple licensees, explicitly identify the portion of work attributable to each licensee.

**H.** An electronic signature, as an option to a permanently legible signature,

is acceptable for professional documents. The licensee shall provide adequate security regarding the use of the seal and signature. If the document contains more than one licensee and is electronically transmitted as specified under the preceding paragraph, each signature must contain an independent electronic signature.

[16.39.3.12 NMAC - Rp, 16 NMAC 39.3.12, 1/01/2002; A, 7/01/2006; A, 7/1/2015; A, 12/28/2017; A, 3/12/2022; A, 12/16/2022]

### **PROFESSIONAL ENGINEERS AND PROFESSIONAL SURVEYORS, BOARD OF LICENSURE FOR**

**This is an amendment to 16.39.5 NMAC Section 8 and 11, effective 12/16/2022.**

#### **16.39.5.8 APPLICATION - SURVEYOR INTERN AND PROFESSIONAL SURVEYOR:**

**A.** Types of application - licensure as a professional surveyor or certification as a survey intern require that an applicant present his or her qualifications on forms prescribed by this board.

**B.** Any application, to be complete, must include acceptable replies from references, official transcript(s) provided directly from the university; and if applicable, verification(s) of prior examinations taken in other state(s).

**C.** Board members shall not be used as references.

**D.** Applications for surveying intern certification will be accepted after an applicant has passed the fundamentals of surveying exam and has graduated from a board-approved, four year surveying curriculum, or if a graduate of an approved four year curriculum in a related science as defined by Subsection E of Section 16.39.5.7 NMAC and augmented with the required two-year combined office and field board approved surveying

experience obtained under the direction of a licensed professional surveyor. Class time will not be counted in the required years of experience, but work prior to or while attending school may be counted toward the required experience at the discretion of the board.

**E.** Applicants for the principles and practices of surveying examination having graduated with a board-approved four year surveying curriculum of four years or more, or with a related-science degree, as determined by the board shall have a minimum of four years of experience acceptable to the professional surveying committee at the date of application and shall have passed the fundamentals of surveying examination.

**F.** No applicant will be eligible to take the professional surveying examination whose application for eligibility has not been completed, reviewed and approved by the board, as set forth in 16.39.5.8 NMAC.

**G.** Applicants for the professional surveying license will be accepted after applicant has passed the professional surveying exam, the New Mexico state specific surveying exam, and has fulfilled the education and experience requirements. Successful passing of the professional surveying exam does not ensure licensure as a professional surveyor. To satisfy the statutory requirement for board-approved surveying experience prior to licensure, a candidate with a board-approved surveying curriculum of four years or more as determined by the board shall have four years of experience acceptable to the professional surveying committee. This experience may be acquired before or after certification as a surveying intern. A candidate with a related science degree shall have four years of surveying experience acceptable to the professional surveying committee pursuant to the Engineering and Surveying Practice Act, Subsection A of Section 61-23-27.4 NMSA 1978. After successfully completing the professional surveying examination,

an applicant, if necessary to meet the licensing requirements in the New Mexico Engineering and Surveying Practice Act, shall update the application as provided by Subsection H of 16.39.5.8 NMAC.

**H.** To update a professional survey (PS) application file in relation to experience, the applicant must complete an application update form and provide references acceptable to the professional surveying committee to verify each additional experience record.

**I.** Applications for licensure or certification by examination, comity or endorsement which have been approved by the professional surveying committee shall remain valid for two years from the date of approval.

**J.** An applicant with foreign credentials requesting licensure by examination or endorsement shall provide to the professional surveying committee's satisfaction, evidence that the applicant's qualifications are equal to or exceed the qualifications for licensure in effect in New Mexico at the time of application.

**K.** All applicants for professional surveyor license shall show proficiency in the English language and shall have a minimum of four years of experience if a graduate of a board approved, four year surveying curriculum or eight years if a graduate of a board approved related science curriculum, working in the United States, or for a United States corporation, under the direction of a licensed professional surveyor who can attest to the applicant's ability and knowledge as a competent surveyor.

**L.** When considering surveying applicants who are graduates of educational programs from a school, college or university outside of the United States and its jurisdictions, or considering applicants from related science programs, the board will evaluate and approve the degrees on an individual basis. The board may require an independent evaluation

of the education and such evaluation shall be done through an organization approved by the board and at the expense of the applicant.

[16.39.5.8 NMAC - Rp, 16 NMAC 39.5.8, 1/01/2002; A, 7/01/2006; A, 7/1/2015; A, 1/1/2016; A, 12/28/2017; A, 3/12/2022; A, 12/16/2022]

#### **16.39.5.11 SEAL OF LICENSEE:**

**A.** Each licensed professional surveyor shall obtain a seal/stamp which must be impressed on all plats, reports, etc., prepared by the licensee in responsible charge. Adjacent to the seal/stamp shall appear the original signature of the licensee along with the date the signature was applied. Rubber stamps and all facsimiles of signatures are not acceptable. Electronic signature as provided by law and board's policy shall be acceptable.

**B.** The seal/stamp shall be either the impression type seal, the rubber type, or a computer-generated facsimile. Computer-generated seals shall be bona fide copies of the actual seal/stamp specific to the work being presented.

**C.** The design of the seal/stamp shall consist of either:

**(1)** three concentric circles, the outermost circle being one and one-half inches in diameter, the middle circle being one inch in diameter, and the innermost circle being one-half inch in diameter. The outer ring shall contain the words, "*professional surveyor*" and the licensee's name. The inner ring shall contain the words "*New Mexico*". The center circle shall contain the license number issued by the board. Any border pattern used by the manufacturer is acceptable; or

**(2)** a design approved by the board which contains the words "*professional surveyor*", the licensee's name, "*New Mexico*", and the license number issued by the board each in text no less than [0.2] 0.1 inches in height.

**D.** Professional surveyors who were licensed prior to the enactment of these current rules

and who have maintained that license without lapse, may retain and use the seals, stamps, and wall certificates previously approved.

E. The seal and signature shall be placed on work only when it was under the licensee's responsible charge. The licensee shall sign and seal only work within the licensee's area of discipline.

F. When the document contains more than one sheet, the first or title page shall be sealed and signed by the licensee who was in responsible charge. Two or more licensees may affix their signatures and seals provided it is designated by a note under the seal the specific subject matter for which each is responsible. In addition, each sheet shall be sealed and signed by the licensee or licensees responsible for that sheet. When a firm performs the work, each sheet shall be sealed and signed by the licensee or licensees who were in responsible charge of that sheet and, in the case of multiple licensees, explicitly identify the portion of work attributable to each licensee.

G. An electronic signature, as an option to a permanently legible signature, is acceptable for professional documents. The licensee shall provide adequate security regarding the use of the seal and signature. If the document contains more than one licensee and is electronically transmitted as specified under the preceding paragraph, each signature must contain an independent electronic signature.  
[16.39.5.11 NMAC - Rp, 16 NMAC 39.5.11, 1/01/2002; A, 7/01/2006; A, 7/1/2015; A, 12/28/2017; A, 3/12/2022; A, 12/16/2022]

## PROFESSIONAL ENGINEERS AND PROFESSIONAL SURVEYORS, BOARD OF LICENSURE FOR

This is an amendment to 16.39.6 Section 7, 8 and 9, effective 12/16/2022.

### 16.39.6.7 DEFINITIONS:

~~A. "Military service member means" a person who is serving in the armed forces of the United States or in an active reserve component of the armed forces of the United States, including the national guard.~~

~~B. "Recent veteran means" a person who has received an honorable discharge or separation from military service in the armed forces of the United States or in an active reserve component of the armed forces of the United States, including the national guard, within the two years immediately preceding the date the person applied for an occupational or professional license pursuant to this section.~~

~~C. "Spouse means" the spouse of a person who is serving in the armed forces of the United States as an active-duty member or in an active reserve component of the armed forces of the United States, including the national guard, or a surviving spouse of a member who at the time of death was serving on active duty.~~

~~D. "Child means" the child of a person who is serving in the armed forces of the United States as an active duty member or in an active reserve component of the armed forces of the United States, including the national guard; provided that child is also a dependent of that person for federal income tax purposes.~~

~~E. "Licensing Fee means" a fee charged at the time an application for a professional license is submitted to the board and any fee charged for the processing of the application for such license; "licensing fee" does not include a fee for an annual inspection or examination of a licensee or a fee charged for copies of documents, replacement licenses or other expenses.]~~

Definitions regarding military service members, veterans, spouses and dependents are outlined pursuant to Section 61-1-34 NMSA 1978.

A. "Licensing fee" has the same meaning as defined in Paragraph (1) of Subsection E of

Section 61-1-34 NMSA 1978.

B. "Military service member" has the same meaning as defined in Paragraph (2) of Subsection E of Section 61-1-34 NMSA 1978.

C. "Veteran" has the same meaning as defined in Paragraph (3) of Subsection E of Section 61-1-34 NMSA 1978.

[16.39.6.7 NMAC - N, 7/1/2015; A, 3/12/2022; A, 12/16/2022]

### 16.39.6.8 APPLICATION REQUIREMENTS:

A. Applications for licensure shall be completed on a form provided by the department.

B. The information shall include:

(1) completed application [and fee];

(2) satisfactory evidence that the applicant holds a license that is current and in good standing, issued by another jurisdiction, including a branch of armed forces of the United States. [; that has met the minimal licensing requirements that are substantially equivalent to the licensing requirements for license the applicant applies for pursuant to Chapter 61, Article 23 NMSA 1978.

(3) the applicant shall provide the following documentation:

(a) for military service member: copy of military orders;

(b) for spouse of military service members: copy of spouse's military orders, and copy of marriage license;

(c) for spouses of deceased military service members: copy of spouse's DD214 and copy of marriage license;

(d) for dependent children of military service members: copy of military orders listing dependent child, or a copy of military orders and one of the following: copy of birth certificate, military service member's federal tax return or other governmental or judicial documentation establishing dependency;

(e)

for veterans (retired or separated):  
copy of DD214 showing proof of  
honorable discharge.]

C. The license shall  
be issued by the board as soon as  
practicable but no later than thirty  
days after a qualified military service  
member, spouse, dependent child, or  
veteran files a complete application.

D. Military service  
members and veterans shall not pay  
and the board shall not charge a  
licensing fee for the first three years  
for a license issued pursuant to this  
rule.

[16.39.6.8 NMAC - N, 7/1/2015; A,  
3/12/2022; A, 12/16/2022]

### 16.39.6.9 RENEWAL REQUIREMENTS:

[~~\_\_\_\_\_ A. \_\_\_\_\_ A license issued  
pursuant to this section shall not be  
renewed unless the license holder  
satisfies the requirements for the  
issuance and for the renewal of a  
license pursuant to Chapter 61, Article  
23 NMSA 1978.~~

~~\_\_\_\_\_ B. \_\_\_\_\_ The licensee must  
submit the following documents at the  
time of renewal:~~

~~\_\_\_\_\_ (1) \_\_\_\_\_ applicants,  
with board-approved engineering/  
surveying degrees shall submit their  
official transcript(s) provided directly  
from the university;~~

~~\_\_\_\_\_ (2) \_\_\_\_\_ applicants  
with an accreditation board for  
engineering and technology (ABET)-  
accredited engineering technology-  
degree shall submit their official  
transcript(s) provided directly from  
the university;~~

~~\_\_\_\_\_ (3) \_\_\_\_\_ acceptable  
replies from five (5) references,  
pursuant to Section 61-23-10 (B)-  
NMSA 1978.~~

~~\_\_\_\_\_ C. \_\_\_\_\_ Every license shall  
automatically expire if not renewed  
on or before December 31 of the  
applicable biennial period pursuant  
Section 61-23-10 (B) NMSA 1978.]~~

A. A license issued  
pursuant to this section shall not be  
renewed unless the license holder  
satisfies the requirements for the  
issuance and for the renewal of a  
license pursuant to Chapter 61, Article  
23 NMSA 1978.

B. The licensee must

submit the following documents at the  
time of renewal:

(1) Proof of  
military service, spouse or dependent,  
or veteran status:

(a)  
for military service member: copy of  
military orders;

(b)  
for spouse of military service  
members: copy of spouse's military  
orders, and copy of marriage license;

(c)  
for spouses of deceased military  
service members: copy of spouse's  
DD214 and copy of marriage license;

(d)  
for dependent children of military  
service members: copy of military  
orders listing dependent child, or a  
copy of military orders and one of the  
following: copy of birth certificate,  
military service member's federal  
tax return or other governmental or  
judicial documentation establishing  
dependency;

(e)  
for veterans (retired or separated):  
copy of DD214 showing proof of  
honorable discharge.

(2) applicants  
for professional engineering license  
must meet the requirement as outlined  
in 16.39.3.9 NMAC;

(3) applicants  
for professional surveying license  
must meet the requirement as outlined  
in 16.39.5.8 NMAC.

C. Every license shall  
automatically expire if not renewed  
on or before December 31 of the  
applicable biennial renewal period  
pursuant to Subsection B of Section  
61-23-10 NMSA 1978.

[16.39.6.9 NMAC - N, 7/1/2015; A,  
12/16/2022]

## PROFESSIONAL ENGINEERS AND PROFESSIONAL SURVEYORS, BOARD OF LICENSURE FOR

This is an amendment to 16.39.8  
NMAC Section 9, effective  
12/16/2022.

### 16.39.8.9 RULES OF PROFESSIONAL CONDUCT:

A. The protection  
of the public safety, health, welfare  
and property in the performance of  
professional duties.

(1) Perform  
those duties in conformance with  
accepted engineering and surveying  
practices.

(2) Notify  
their employer or client and such  
other authority as may be appropriate  
of any instance in which their  
professional judgment is overruled  
under circumstances endangering  
the public safety, health, welfare or  
property.

(3) Approve  
and seal only those engineering and  
surveying documents which conform  
to applicable engineering and  
surveying standards.

(4) Shall not  
reveal privileged or confidential facts,  
data or information without prior  
consent of the client or employer  
except as authorized or required by  
law or this code.

(5) Refuse to  
associate in a business venture with  
any person or firm whom they may  
have reason to believe is engaging in  
fraudulent or dishonest business or  
professional practices as an engineer  
or surveyor and refuse to use or  
permit the use of their name or firm  
in connection with any such business  
venture.

(6) Inform  
the board of any violation of this  
code. Cooperate with the board in  
furnishing information or assistance  
as may be requested by the board in  
matters concerning violations.

(7) Shall not  
assist or participate in the unlawful  
practice of engineering and surveying  
by a person or firm.

B. Specialization and  
the performance of services only in  
specific areas of competence.

(1) Licensees  
shall undertake assignments only  
when qualified by education,  
experience or examination in the  
specific technical fields of engineering  
or surveying involved.



(2) Licensees shall not affix their signatures or seals to any plans or documents dealing with subject matter in which they lack competency, nor to any such plan or documents not prepared under their responsible charge.

(3) Licensees may accept an assignment when the total work involves technical fields beyond those in which they are qualified, providing their services are limited to those phases in which they are qualified and that the phases in which they are not qualified are performed by licensees who are properly qualified. In this instance, each qualified licensee will sign and seal the documents for their phase of the assignment.

C. The issuance of public statements.

(1) Licensees shall be objective and truthful in professional reports, statements or testimony. A professional report or professional opinion issued by or under the responsible charge of a licensee shall not contain any intentionally false, misleading or deceitful statements or testimony. Any report, statement or testimony by a licensee shall contain all relevant and pertinent information as required by accepted engineering or surveying principles.

(2) If a licensee issues statements on technical matters in his or her capacity as a professional engineer or professional surveyor on behalf of an interested party, the licensee must expressly preface his or her remarks by identifying said interested party and by revealing the existence and nature of any interest the licensee may have in the matter.

(3) A licensee who is competent in the subject matter may express publicly technical opinions that are found upon knowledge of the facts.

D. Professional relationships with employer or client.

(1) Licensees shall act in professional matters for each employer or client to avoid conflicts of interest. Licensees

shall disclose all known or potential conflicts of interest to their employers or clients by promptly informing them of any business association, interest or other circumstances which could reasonably be expected to influence their judgment or the quality of their services.

(2) Licensees shall not accept compensation, financial or otherwise, from more than one party for services on the same project, unless the circumstances are fully disclosed to, and agreed to, by all interested parties.

(3) Licensees shall not solicit or accept any gratuity, material favor, or any valuable consideration, directly or indirectly, from contractors, their agents, servants or employees or from any other party dealing with his client or employer in connection with any project for which he is performing or has contracted to perform engineering or surveying services. (The phrase "valuable consideration" is defined to mean any act, article, money or other material possession which is of such value or proportion that its acceptance creates a clandestine obligation on the part of the receiver or otherwise compromises his ability to exercise his own judgment.)

(4) Licensees in public service as a member or employee of a governmental body, agency or department shall not participate, directly or indirectly in deliberations or actions which would constitute a conflict of interest with respect to services offered or provided by him, his associates, or the licensee's business entity to such governmental body, agency or department.

(5) Licensees shall not solicit or accept a professional contract from a governmental body on which a principal or officer of their business entity serves as a member, except upon public disclosure of all pertinent facts and circumstances and consent of appropriate public authority.

(6) Licensees shall not reveal privileged or confidential facts, data or information

obtained in a professional capacity without prior consent of the client or employer except:

(a) As provided in [Subparagraph (b) and (f) of Paragraph (1)] Paragraphs (2) and (6) of Subsection A of 16.39.8.9 NMAC.

(b) As authorized or required by law.

(c) Any document that is a matter of public record by virtue of it being on file with a public agency.

(d) Any fact, data or information which is clearly the property of the engineer or surveyor.

E. Solicitation of professional employment.

(1) Licensees shall not falsify or permit misrepresentation of their, or their associates' academic or professional qualifications. They shall not misrepresent or exaggerate their degree of responsibility in or for the subject matter of prior assignments. Brochures or other representations incident to the solicitation of employment shall not misrepresent pertinent facts concerning employers, employees, associates, joint ventures or past accomplishments with the intent and purpose of enhancing their qualifications and their work.

(2) Licensees shall not offer, give, solicit or receive, either directly or indirectly, any commission, gift, or other valuable consideration in order to secure or influence the award of work and shall not make any political contribution in an amount intended to influence the award of a contract by public authority, and which may be reasonably construed by the public as having the effect or intent to influence the award of a contract.

F. Avoiding conduct or practice that deceives the public.

(1) Licensees shall avoid the use of a statement containing a material misrepresentation of a fact or omitting a material fact.

(2) Consistent with the foregoing, licensees may

prepare articles for the lay or technical press, but such articles shall not imply credit to the author for work performed by others.

**G.** Interaction with other [licenses] licensees.

**(1)** Licensees shall not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice or employment of other licensees.

**(2)** Licensees in private practice shall not review the work of another licensee for the same client, except with the knowledge of such licensees, or unless the connection of such licensee with the work has been terminated.

**(3)** Licensees in governmental, industrial, or educational employment are entitled to review and evaluate the work of other licensees when so required by their employment duties.  
[16.39.8.9 NMAC - Rp, 16 NMAC 39.8.9, 1/01/2002; A, 7/1/2015; A, 12/28/2017; A, 12/16/2022]

## PUBLIC EDUCATION DEPARTMENT

### TITLE 6 PRIMARY AND SECONDARY EDUCATION CHAPTER 63 SCHOOL PERSONNEL - LICENSURE REQUIREMENTS FOR ANCILLARY AND SUPPORT PERSONNEL PART 18 LICENSURE FOR SCHOOL BEHAVIORAL HEALTH COUNSELORS, PRE K-12

**6.63.18.1 ISSUING**  
**AGENCY:** Public Education  
Department, hereinafter the  
department.  
[6.63.18.1 NMAC – N, 11/29/2022]

**6.63.18.2 SCOPE:**  
Individuals seeking licensure in  
school behavioral health counseling.  
[6.63.18.2 NMAC – N, 11/29/2022]

**6.63.18.3 STATUTORY**  
**AUTHORITY:** Sections 9-24-8, 22-  
2-1, 22-2-2, and 22-10A-17 NMSA  
1978.  
[6.63.18.3 NMAC – N, 11/29/2022]

**6.63.18.4 DURATION:**  
Permanent.  
[6.63.18.4 NMAC – N, 11/29/2022]

**6.63.18.5 EFFECTIVE**  
**DATE:** November 29, 2022, unless  
a later date is cited at the end of a  
section.  
[6.63.18.5 NMAC – N, 11/29/2022]

**6.63.18.6 OBJECTIVE:**  
This rule governs licensure in school  
behavioral health counseling in  
prekindergarten through 12th grade.  
[6.63.18.6 NMAC – N, 11/29/2022]

**6.63.18.7 DEFINITIONS:**  
**[RESERVED]**

**6.63.18.8 REQUIREMENTS:** Individuals  
seeking licensure in school behavioral  
health counseling shall meet the  
requirements in Subsection A, B, C,  
D, or E of this section.

**A.** Hold a department-  
issued license for school counseling  
or rehabilitation counseling and  
be certified by the New Mexico  
counseling and therapy practice  
board as one of the following types of  
counselors:

**(1)** licensed  
professional counselor (LPC);  
**(2)** licensed  
mental health counselor (LMHC);  
**(3)** licensed  
professional clinical mental health  
counselor (LPCC).

**B.** Hold a department-  
issued license for school social  
workers.

**C.** Hold a  
department-issued license for school  
psychologists.

**D.** Hold a national  
certified counselor credential issued  
by the national board for certified  
counselors and be certified by the  
New Mexico counseling and therapy  
practice board as one of the following  
types of counselors:

**(1)** licensed  
professional counselor (LPC);  
**(2)** licensed  
mental health counselor (LMHC);  
**(3)** licensed  
professional clinical mental health  
counselor (LPCC).

**E.** Be certified by the  
New Mexico counseling and therapy  
practice board as one of the following  
types of therapists of counselors:

**(1)** licensed  
marriage and family therapist  
(LMFT);  
**(2)** licensed  
alcohol and drug abuse counselor;  
**(3)** licensed  
professional art therapist (LPAT).

**F.** An individual  
who meets the requirements of  
Subsection A, B, C, D, or E of  
this section and who is seeking a  
level 2 school behavioral health  
counselor license shall provide, on a  
form acceptable to the department,  
evidence of experience working with  
children or adolescents in any state  
or foreign country or combination of  
other states or countries other than  
New Mexico for at least three full  
school years at any time preceding  
their application for licensure while  
holding at least one standard out-of-  
state or New Mexico teaching license  
or foreign country authorization  
to teach or combination of any  
of the aforementioned licenses or  
authorizations.

**G.** An individual who  
meets the requirements of Subsection  
A, B, C, D, or E of this section and  
who is seeking a level 3 school  
behavioral health counselor license  
shall provide, on a form acceptable  
to the department, evidence of  
experience working with children or  
adolescents in any state or foreign  
country or combination of other states  
or countries other than New Mexico  
for at least six full school years at any  
time preceding their application for  
licensure while holding at least one  
standard out-of-state or New Mexico  
teaching license or foreign country  
authorization to teach or combination  
of any of the aforementioned licenses  
or authorizations.  
[6.63.18.8 NMAC – N, 11/29/2022]

**6.63.18.9 SUPERVISION:**

Until the LPC or LMHC has acquired the official LPCC, LMFT, or LPAT license, the LPC or LMHC shall be supervised by a LPCC, LMFT, LPAT, licensed psychologist, licensed psychiatrist, or licensed independent social worker. It is the responsibility of the individual seeking supervision to ensure the supervision is acceptable for the level of licensure requested after the required supervision. The relationship between the supervisor and the applicant shall demonstrate that skill development and responsibility in delivering counseling or therapy services is being provided. During the tenure of the license, the licensee must provide confirmation of supervised hours signed by the supervisor and superintendent and their updated license issued by the New Mexico counseling therapy practice board.  
[6.63.18.9 NMAC – N, 11/29/2022]

**6.63.18.10 COMPETENCIES FOR SCHOOL BEHAVIORAL HEALTH COUNSELORS:** A school behavioral health counselor shall:

**A.** Demonstrate professional knowledge and skills in dealing with mental health as they relate to students' functioning and achievement in school by:

(1) interpreting to school personnel the relationship between the student's social, emotional, or home problems and the student's behavior or academic performance;

(2) interpreting to school personnel the wide range of social, emotional, cultural, and economic differences among children, families, and communities;

(3) consulting with school personnel on current mental health practices and concepts;

(4) expanding knowledge through consultation with coordinators, specialists, psychologists, psychiatrists, and colleagues, as well as through reading, research, and course work; and

(5) keeping abreast of current community resources and determining how their services may be beneficial to the student, their family, and the family's involvement in the academic process.

**B.** Establish basic counseling management procedures for intervention by:

(1) opening a case as soon after referral as possible;

(2) prioritizing cases according to severity and seriousness of identified concerns;

(3) establishing routines for the assessment of case referrals;

(4) coordinating multidisciplinary efforts for the management of cases when appropriate;

(5) consulting with and assisting school and community personnel regarding case management; and

(6) participating in interdisciplinary team meetings relevant to the assessment and disposition of individual cases.

**C.** Structure the method of student intervention by appropriate planning and preparation by:

(1) investigating all relevant information regarding a referred case;

(2) consulting with school personnel, community agencies, or family members to assess the identified concerns;

(3) formulating individual goals and objectives for the management of each case; and

(4) consulting with another school behavioral health personnel, supervisor, psychologist, or psychiatrist regarding individual cases as needed.

**D.** Employ appropriate methods of practice that enable students and families to function adequately within their educational and community settings by:

(1) providing individual, group, and family counseling to students and families;

(2) providing intensive crisis intervention to remedy effects of abuse, neglect, adverse childhood events, or exploitation of children;

(3) identifying school district and community services appropriate to students' and families' needs, execute referrals, and provide follow-up; and

(4) serving as an advocate for parents to ensure that their wishes and concerns regarding their children are registered and considered by school personnel and agencies.

**E.** Demonstrate a professional and helpful demeanor in relationships with students, parents, and school personnel by:

(1) providing support and encouragement to students, parents, and staff in an atmosphere of mutual respect;

(2) developing a caring relationship with students and parents and showing consideration of their feelings;

(3) communicating openly with students and parents by listening and responding to their opinions and suggestions;

(4) promoting respect and positive interpersonal relationships among students and families;

(5) working cooperatively with fellow employees to develop and maintain effective interaction; and

(6) promoting free and easy communication between home and school.

**F.** Utilize appropriate methods to evaluate the student's services by continuously:

(1) keeping a personal, confidential file on all cases;

(2) maintaining an up-to-date log, indicating types of referrals received, dates, and status of referral and referral sources; and

(3) assessing the effectiveness of any further need for behavioral health services.

**G.** Demonstrate knowledge of educational foundations, including:

(1) organization and operation of schools;

(2) the organization and administration of school counseling services, including record keeping; the social, philosophical, historical, and cultural issues in education; setting intervention programs and strategies; and

(3) the current identification, referral, and placement procedures for students with mental health issues.

**H.** Demonstrate knowledge of human development and psychopathology and associated biological, cultural, and social influences on human behavior.

**I.** Provide or contribute to prevention and intervention programs that promote the mental health and physical well-being of students; including, but not limited to, delivering individual and group counseling services to identified students.

**J.** Have knowledge and ability to conduct risk and threat assessments, interventions, and referrals as necessary for crisis intervention.

**K.** Understand the cultural context of relationships, issues, and trends in a multicultural and diverse society related to such factors as culture, ethnicity, nationality, age, gender, sexual orientation, mental and physical characteristics, education, family values, religious and spiritual beliefs, and socioeconomic status, and unique characteristics of individuals, couples, families, ethnic groups, and communities.

[6.63.18.10 NMAC – N, 11/29/2022]

#### 6.63.18.11 CONTINUING SCHOOL BEHAVIORAL HEALTH COUNSELOR LICENSURE:

**A.** An individual with a level one school behavioral health counselor license seeking a level two school behavioral health counselor license shall:

(1) have worked at level one licensure for three full school years;

(2) submit an application for continuing New Mexico licensure through the online licensure portal;

(3) submit a copy of a valid board license issued by the New Mexico counseling therapy practice board along with the online application for continuing New Mexico licensure; and

(4) submit verification that the applicant has satisfactorily demonstrated the competencies for school behavioral health counselor for the level and type of school behavioral health counselor license sought by the superintendent of the most current school in which the applicant is employed.

**B.** An individual with a level two school behavioral health counselor license seeking a level three school behavioral health counselor license shall:

(1) have worked at the level two licensure for three full school years;

(2) submit an application for continuing New Mexico licensure through the online licensure portal;

(3) submit a copy of a valid board license issued by the New Mexico counseling therapy practice board along with the online application for continuing New Mexico licensure; and

(4) submit verification that the applicant has satisfactorily demonstrated the competencies for school behavioral health counselor for the level and type of school behavioral health counselor license sought by the superintendent of the most current school in which the applicant is employed.

**C.** An individual with a level three school behavioral health counselor license continuing a level three school behavioral health counselor license shall:

(1) have worked at level three licensure for three full school years;

(2) submit an application for continuing New Mexico licensure through the online licensure portal;

(3) submit a copy of a valid board license issued by the New Mexico counseling therapy practice board along with the online application for continuing New Mexico licensure; and

(4) submit verification that the applicant has satisfactorily demonstrated the competencies for school behavioral health counselor for the level and type of school behavioral health counselor license sought by the superintendent of the most current school in which the applicant is employed.

[6.63.18.11 NMAC – N, 11/29/2022]

#### HISTORY OF 6.63.18 NMAC: [RESERVED]

### PUBLIC REGULATION COMMISSION

**This is an amendment to 17.7.3 NMAC, Sections 9, 10, 12, 14, 16, 17, effective 11/29/2022.**

#### 17.7.3.9 FACILITATED STAKEHOLDER PROCESS; IRP PROCESS:

**A.** At least six months prior to the filing of its IRP, the utility shall notify the commission, members of the public, the New Mexico attorney general, and all parties to its most recent base rate case and most recent IRP case of its intent to file an IRP. The commission, upon notification, shall initiate a facilitated process for the utility, commission utility division staff, and stakeholders to reach a potential agreement on a proposed statement of need pursuant to 17.7.3.10 NMAC and an action plan pursuant to 17.7.3.11 NMAC. The commission, aside from utility division staff and the appointed facilitator, shall not participate in the facilitated stakeholder process.

(1) The utility shall provide commission utility division staff and stakeholders who have signed a confidentiality



agreement reasonable access to the same modeling software used by the utility on equal footing as the utility, and shall perform a reasonable number of modeling runs [~~not to exceed five modeling runs~~] per staff or a stakeholder, if requested by staff or a stakeholder, in accordance with commission precedent, and the utility shall share all modeling information.

(2) Nothing in this Section shall preclude commission utility division staff from providing an analysis based on an alternative, open-source modeling software.

**B.** In selecting the facilitator, the commission, through its designee, may solicit recommendations of the names of independent firms or individuals that demonstrate independence from public utilities supplying electric service in the state, their affiliates, and likely bidders, and demonstrate the qualifications, expertise, and experience to perform the functions of a facilitator as provided in this rule. The commission shall comply with the New Mexico procurement code in its solicitation of a facilitator.

(1) The facilitator shall provide a statement of interest to the commission which discloses any contracts or other economic arrangements of any kind between the facilitator and any investor-owned electric utility or affiliate within the last four years.

(2) The facilitator shall notify the commission and utility of any perceived or actual conflicts that arise during the course of the facilitation process.

**C.** The commission, through its designee, shall develop a standard form of contract between the facilitator and the commission that requires the facilitator, in consultation with the utility, to issue notice of facilitated stakeholder meetings, and to host and moderate facilitated stakeholder meetings, including but not limited to, preparing the agenda, and acting as the coordinator between the utility's presentation and the stakeholders' questions and comments.

**D.** Funding for the services of the facilitator shall be paid by the utility and treated as a regulatory asset to be recovered through rates established in the utility's next general rate proceeding.

**[B:] E.** Not later than six months after the facilitated stakeholder process commences, the utility shall file the IRP with the commission, explaining all resolved and unresolved issues resulting from the facilitated process.

(1) Written public comments may be filed within 30 days of the utility's filing of the IRP.

(a) Written public comments may include the commenter's own draft statement of need and action plan for commission review.

(b) Written public comments shall be made part of the utility's IRP as addendums.

(2) The utility shall file, within 60 days of the utility's filing of the IRP, a written response to all timely filed written public comments, stating whether it adopts any of the written comments as amending the IRP and the reasons why or why not.

(3) The commission's utility division staff shall consider the filed written public comments and the utility's written responses and shall file a statement with the commission within 90 days of utility's filing of the IRP as to whether the statement of need and action plan comply with the policies and procedures of this rule.

(4) If the commission has not acted within 120 days of the filing of the IRP, the statement of need and action plan are deemed accepted as compliant with this rule. If the commission determines that the statement of need or action plan do not comply with the requirements of this rule, the commission shall identify the deficiencies and return it to the utility with instructions for re-filing.  
[17.7.3.9 NMAC - N, 10/27/2022; A, 11/29/2022]

### 17.7.3.10 STATEMENT OF NEED:

**A.** The statement of need is a description and explanation of the amount and the types [type] of new resources, including the technical characteristics of any proposed new resources, to be procured, expressed in terms of energy or capacity, necessary to reliably meet an identified level of electricity demand in the planning horizon and to effect state policies.

**B.** The statement of need shall not solely be based on projections of peak load. The need may be attributed to, but not limited by, incremental load growth, renewable energy customer programs, or replacement of existing resources, and may be defined in terms of meeting net capacity, providing reliability reserves, securing flexible resources, securing demand-side resources, securing renewable energy, expanding or modifying transmission or distribution grids, or securing energy storage as required to comply with resource requirements established by statute or commission decisions.

[17.7.3.10 NMAC - N, 10/27/2022; A, 11/29/2022]

### 17.7.3.12 REQUEST FOR PROPOSALS PROCESS:

**A.** Scope and purpose: Unless the commission grants a public utility's variance application pursuant to 17.7.3.17 NMAC for a variance from Section 12 of this rule, the utility shall follow the request for proposals process to ensure cost competitiveness and fairness in procurement by comparing proposals among bidders through a transparently designed and monitored request for proposals.

**B.** To address the utility's procurement need, if any, as described in the statement of need, and to fulfill the objectives of the utility's action plan, the utility shall issue a request for proposals (RFP) in the current IRP docket, within five months of the commission's acceptance of its statement of need and action plan.

C. Prior to the utility's commencement of an RFP solicitation, the utility shall provide the commission, the IM, and parties to the utility's pending IRP case with the documents and contracts that constitute the RFP solicitation (RFP documents) and a timeline for soliciting, accepting, and evaluating [and ranking] bids.

D. Within 21 days of receipt of the RFP documents, commissioners, commission utility division staff, and intervenors may submit comments to the utility, including on whether its proposed RFP conforms with its accepted statement of need and action plan and is not unduly discriminatory. Comments shall be considered, and may be incorporated, by the utility prior to the issuance of the RFP.

E. The utility may issue the RFP after comments are submitted on the independent monitor's design report pursuant to Subsection I of 17.7.3.14 NMAC. The utility shall file a notice with the commission of any final changes to the RFP design upon issuance.

F. The proposed RFP(s) shall include:

- (1) bid evaluation [and ranking] criteria;
- (2) the overall amount and duration of power the utility is soliciting and any other details concerning its resource needs;
- (3) a request for bidders' reasonable estimates of any new transmission costs and transmission upgrade costs for resources, if known;
- (4) the extent and degree to which resources shall be dispatchable, including the requirement, if necessary, that resources be able to operate under automatic dispatch control;
- (5) the utility's proposed contract(s) for the acquisition of resources;
- (6) proposed contract term lengths;
- (7) the applicable discount rate;
- (8) the timeline, including the solicitation

period, the [ranking] evaluation period, and the expected selection period;

(9) all security requirements and the rationale behind them; and

(10) any other information necessary to implement a competitive RFP process.

G. For a proposed RFP, each utility shall provide:

(1) a description of information that the utility claims is confidential;

(2) descriptions of proposed protection methods for:

(a) bid prices; and

(b) other bid details.

H. Not later than [75] 120 days after the utility receives bids for its projected needs, the utility shall provide the IM with [a ranking] an evaluation of proposals that meet the above stated criteria, a detailed description of price and non-price criteria, its preferred portfolio of resources, along with a timeline for resource development.

I. The utility shall [rank] evaluate bids submitted in response to an RFP using the following price and non-price criteria:

(1) consistency with the terms and requirements of the Efficient Use of Energy Act and the Renewable Energy Act; and other public policies regarding resource preferences adopted by New Mexico or the federal government;

(2) cost of the resource that would be borne by ratepayers, described in terms of the net present value of capacity cost and lifetime cost of energy calculation;

(3) resource effect on system operations and reliability, credit, and financial risks to the utility;

(4) any risks imposed on ratepayers, including assessment of relative amounts of risk inherent among different technologies, fuel sources, or financing arrangements;

(5) environmental impacts including, but not limited to, those associated with resources that emit carbon dioxide or create long-term waste disposal issues;

(6) resource dispatchability and operational flexibility benefits or constraints;

(7) the utility shall include in its evaluation the estimated cost and environmental impact of transmission upgrades or distribution infrastructure upgrades necessary to deliver the project's energy, capacity, or services;

(8) each bidder shall be responsible for all costs associated with interconnecting its project to the transmission grid or, if applicable, to local distribution facilities; and

(9) completeness and credibility of a detailed critical path schedule, and ability to meet scheduled construction start date and commercial operational date, including completing the interconnection process.

J. Additional criteria used by the utility for [ranking] evaluation may not establish a preference for utility ownership or for projects proposed by a utility-affiliated company. The utility shall not unreasonably discriminate between proposals for a utility-owned or utility affiliate-owned resource and proposals for a resource owned by an independent power producer through a purchased power agreement.

K. The bid evaluation shall ensure that all bids are compared and evaluated on a consistent basis that is competitive, fair, and shall be subject to review by the commission.

L. The utility may issue additional RFPs in the current IRP docket, adhering to the processes and procedures described in 17.7.3.12 NMAC, if prudent following a material event pursuant to Subsection D of 17.7.3.11 NMAC.

M. Nothing in this rule shall be construed to prevent a public utility from procuring resources as required by the REA, Section 62-16-4 NMSA 1978, the EUEA, Section

62-17-5 NMSA 1978, or 17.9.570 NMAC. Such procurements shall be included in the utility's forecasting, statement of need, and action plan. [17.7.3.12 NMAC - N, 10/27/2022; A, 11/29/2022]

**17.7.3.14 INDEPENDENT MONITOR:**

**A.** Scope and purpose: The independent monitor's role is to help the commission determine that the request for proposals design and execution is fair, competitive, and transparent. The independent monitor shall advise the commission and report on the RFP process, but the independent monitor shall not make or participate in the public utility's decisions regarding the procurement process or the selection of resources.

**B.** Following commission acceptance of a public utility's statement of need and action plan, the commission shall appoint an independent monitor to monitor the procurement process of a public utility for competitive resource procurements pursuant to 17.7.3.12 NMAC. The independent monitor, as provided in this Section, shall assist the commission in ensuring that all such processes are reasonable and competitively fair and shall report to the commission regarding those matters as provided in this rule. The commission may appoint an IM for emergency procurements pursuant to 17.7.3.17 NMAC.

**C.** The commission shall, through its designee:

- (1) undertake a process consistent with state purchasing rules and commission policies in recommending a pool of qualified IMs;
- (2) develop an RFP, including the scope, terms of work, and evaluation process to score the RFP responses;
- (3) receive, review, score, and rank the RFP responses;
- (4) confer with the public utility on the recommendation of the IM;
- (5) recommend qualified bidders to the

commission for appointment as the IM; and

(6) administer the contract with the appointed IM, including: confirming that contract deliverables are met, reviewing invoices and related contract performance, and approving utility invoices after staff's review and approval.

**D.** In selecting the IM, the commission, through its designee, may solicit recommendations of the names of independent firms or individuals that demonstrate independence from public utilities supplying electric service in the state, their affiliates, and likely bidders, and demonstrate the qualifications, expertise, and experience to perform the functions of an IM as provided in this rule.

(1) The IM shall provide a statement of interest to the commission which discloses any contracts or other economic arrangements of any kind between the IM and any investor-owned electric utility or affiliate within the last four years.

(2) The IM shall notify the commission and utility of any perceived or actual conflicts that arise during the course of the procurement process.

**E.** The commission, through its designee, shall develop a standard form of contract between an IM and the commission that requires the IM to perform the functions of an IM as provided in this rule in a manner that is not subject to the control of the public utility. The standard form of contract between an IM and the commission for IM services as provided for in this rule shall include, but shall not be limited to, the identification of the IM's functions and scope of work as provided in Subsection G of 17.7.3.14 NMAC.

**F.** Funding for the services of the IM shall be paid by the utility and treated as a regulatory asset to be recovered through rates established in the utility's next general rate proceeding.

**G.** Duties of the independent monitor:

(1) The IM shall file a minimum of two reports with the commission. The first report shall analyze the RFP design (design report). The final report shall review the fairness of the RFP execution (final report).

(a) In the design report, the IM shall report to the commission on RFP design within 28 days of the public utility's provision of RFP documents pursuant to Subsection C of 17.7.3.12 NMAC. The IM shall analyze the proposed RFP, including but not limited to its scope, instructions, conditions for eligible proposals, specifications, time schedules, disclosure of bid evaluation methods, and term sheets. The RFP design report shall state whether the contents of the proposed RFP comply with the requirements of 17.7.3.10 NMAC through 17.7.3.12 NMAC and are otherwise reasonable, competitively fair, designed to promote a robust bid response, and designed to identify a utility's most cost-effective option among resource alternatives to meet its service needs in compliance with this rule.

(b) In the final report, the IM shall, within 30 days of the utility's submission of its shortlist to the IM, review and report on the reasonableness, competitiveness, and fairness of the utility's solicitation, evaluation, and procurement processes, including but not limited to bid screening, comparison, [ranking] evaluation, and short-listing criteria.

(i) The IM shall state whether the RFP process implemented by the public utility complied with the requirements of 17.7.3.11 NMAC and 17.7.3.12 NMAC.

(ii) The IM's report shall also provide summary information on the results of the bids, including the number of bids sorted by the following criteria: by resource type, capacity or energy, price range by resource type, and whether there were any deficiencies in those respects that should be

addressed by the commission in a future proceeding for approval of the solicited projects. The commission may rely on that opinion to request that the utility make modifications in a timely manner.

(2) At any point during the public utility's RFP process the IM may notify the commission and the utility of any deficiency as contemplated in Subsection G of 17.7.3.14 NMAC.

H. The public utility shall provide the IM with prompt and continuing access to all documents, data, assumptions, models, specific model inputs, bidding and weighting criteria used, and any other relevant information reviewed, produced, or relied on by the public utility in the preparation and conduct of its competitive resource procurement process.

I. All communications, including but not limited to reports pursuant to this Section, provided by the IM to the commission, shall be made part of the commission's public records in a timely manner in the public utility's most recent IRP docket.

(1) The public utility, commission utility division staff, and any parties to the public utility's most recent IRP docket may comment within 14 days of the filing of the design report to the public record. After the design report comment deadline of 14 days, the utility may issue the RFP.

(2) In any proceeding filed by a public utility for approvals stemming from its solicitation made pursuant to the RFP process as described in 17.7.3.12 NMAC, the commission may rely upon any reports or findings of the IM assigned to monitor that solicitation as evidence, provided that such evidence shall not be conclusive as to whether or not a resource proposed by the utility shall be approved.

J. All communications between the public utility and any bidders shall be shared at the same time with the IM. Commission utility division staff and any parties are restricted from initiating contacts

with the independent monitor. The independent monitor may initiate contact with the utility, commission utility division staff, and any parties.

(1) For all contacts with the public utility, commission utility division staff, and any parties in the resource plan proceeding, the independent monitor shall maintain a log that briefly identifies the entities communicating with the IM, the date and duration of the communication, the means of communication, the topics discussed, and the materials exchanged, if any.

(2) The communications log shall be contained in the IM's report to the commission pursuant to Subparagraph (b) of Paragraph (1) of Subsection G of 17.7.3.14 NMAC.

K. The independent monitor shall serve as an advisor to the commission and shall not be a party to the proceedings in accordance with 1.2.3.9 NMAC. As such, the independent monitor shall not be subject to discovery nor cross-examination at hearing, if one is held, but the public utility, commission utility division staff, and any parties shall have the opportunity to respond to any reports or findings of the IM pursuant to Paragraph (1) of Subsection I of 17.7.3.14 NMAC.

L. The commission shall not appoint an independent monitor for a utility's procurement for which the commission grants a variance pursuant to Subsection D of 17.7.3.17 NMAC.

[17.7.3.14 NMAC - N, 10/27/2022; A, 11/29/2022]

#### 17.7.3.16 EXEMPTIONS:

A. Motion for exemption from rule: Upon motion by a utility and for good cause shown, the commission may exempt public utilities with fewer than five thousand customers and distribution-only public utilities from the requirements of this rule.

B. Filing of a notice of exemption from rule: Upon the filing of a notice of exemption in the utility's most recent IRP docket, a utility shall be exempted from

the requirements of 17.7.3.12 and 17.7.3.14 NMAC for the following procurements:

(1) emergency procurements; and

(2) capacity or energy from the generation facilities of other utilities or from non-utility generators pursuant to agreements for a two year term or less (including renewal terms) or for 20 megawatts of capacity or less;

[B:] C. Multi-state resource planning: The commission shall take into account a public utility's resource planning requirements in other states and shall authorize utilities that operate in multiple states to implement plans that coordinate the applicable state resource planning requirements.

[17.7.3.16 NMAC - Rp, 17.7.3.14 NMAC, 10/27/2022; A, 11/29/2022]

#### 17.7.3.17 VARIANCES AND AMENDMENTS:

A. A utility may file a request for a variance from the requirements of this rule.

B. Such application shall:

(1) describe the situation which necessitates the variance;

(2) set out the effect of complying with this rule on the utility and its customers if the variance is not granted;

(3) identify the section(s) of this rule for which the variance is requested;

(4) describe the expected result which the request shall have if granted; and

(5) state how the variance shall aid in achieving the purposes of this rule.

C. The commission may grant a request for a procedural variance through an order issued by the chair, a commissioner, or a designated hearing examiner.

D. The following types of procurements that deviate from the utility's commission-accepted action plan shall be submitted to the commission as an application for a variance pursuant to 17.7.3.17 NMAC:



~~(1) emergency procurements;~~

~~(2) capacity or energy from newly-constructed, utility-owned, supply-side resources with a nameplate rating of 20 megawatts or less;~~

~~(3) capacity or energy from the generation facilities of other utilities or from non-utility generators pursuant to agreements for a two-year term or less (including renewal terms) or for 20 megawatts of capacity or less;~~

~~(4) improvements or modifications to existing utility generation facilities that change the production capability of the generation facility site in question by 20 megawatts or less based on the utility's share of the total power generation at the facility site and that have an estimated cost of \$20 million or less;~~

~~(5) interruptible service provided to the utility's electric customers;~~

~~(6) modification to, or amendment of, existing power purchase agreements provided that the modification or amendment does not extend the agreement more than four years, does not add more than 20 megawatts of nameplate capacity to the utility's system, and is cost effective in comparison to other supply-side alternatives available to the utility; and~~

~~(7) utility administered demand-side programs.]~~

(1) capacity or energy from newly-constructed, utility-owned, supply-side resources with a nameplate rating of 20 megawatts or less;

(2) improvements or modifications to existing utility generation facilities that change the production capability of the generation facility site in question by 20 megawatts or less based on the utility's share of the total power generation at the facility site and that have an estimated cost of \$20 million or less;

(3) interruptible service provided to the utility's electric customers;

(4) modification to, or amendment of, existing power purchase agreements provided that the modification or amendment does not extend the agreement more than four years, does not add more than 20 megawatts of nameplate capacity to the utility's system, and is cost effective in comparison to other supply-side alternatives available to the utility; and

(5) utility administered demand-side programs. [17.7.3.17 NMAC - Rp, 17.7.3.15 NMAC, 10/27/2022; A, 11/29/2022]

## TAXATION AND REVENUE DEPARTMENT

The New Mexico Taxation and Revenue Department approved the repeal of 3.2.213 NMAC, Deduction - Gross Receipts Tax - Transaction in Interstate Commerce (filed 5/17/2001) and replaced it with Deduction - Gross Receipts Tax - Transaction in Interstate Commerce (adopted on 11/15/2022), effective 11/29/2022.

## TAXATION AND REVENUE DEPARTMENT

### TITLE 3: TAXATION CHAPTER 2: GROSS RECEIPTS TAXES PART 213: DEDUCTION - GROSS RECEIPTS TAX - TRANSACTION IN INTERSTATE COMMERCE

**3.2.213.1 ISSUING AGENCY:** Taxation and Revenue Department, Joseph M. Montoya Building, 1100 South St. Francis Drive, P.O. Box 630, Santa Fe NM 87504-0630  
[3.2.213.1 NMAC, Rp 3.2.213.1 NMAC, 11/29/2022]

**3.2.213.2 SCOPE:** This part applies to all persons transmitting

messages or conversations by radio, selling radio or television broadcast time, advertising or otherwise engaging in interstate commerce.  
[3.2.213.2 NMAC, Rp 3.2.213.2 NMAC, 11/29/2022]

**3.2.213.3 STATUTORY AUTHORITY:** Section 9-11-6.2 NMSA 1978.  
[3.2.213.3 NMAC, Rp 3.2.213.3 NMAC, 11/29/2022]

**3.2.213.4 DURATION:** Permanent.  
[3.2.213.4 NMAC, Rp 3.2.213.4 NMAC, 11/29/2022]

**3.2.213.5 EFFECTIVE DATE:** November 29, 2022, unless a later date is cited at the end of a section, in which case the later date is the effective date.  
[3.2.213.5 NMAC, Rp 3.2.213.5 NMAC, 11/29/2022]

**3.2.213.6 OBJECTIVE:** The objective of this part is to interpret, exemplify, implement and enforce the provisions of the Gross Receipts and Compensating Tax Act.  
[3.2.213.6 NMAC, Rp 3.2.213.6 NMAC, 11/29/2022]

**3.2.213.7 DEFINITIONS:**  
**A. "Regional"**  
**defined:** As used in Section 7-9-55 NMSA 1978, a "regional" seller or advertiser is a person who sells from locations in more than one state or who purchases advertising services intended to be heard or viewed in more than one state. A person is deemed to sell from locations in more than one state if that person either maintains a physical retail establishment in more than one state, or if that person regularly stores, warehouses, or otherwise maintains stocks of tangible personal property for the fulfillment of purchases in more than one state. A person does not advertise in more than one state if the advertisement is intended to be viewed only in one state, but some incidental views occur outside of that state.

**B. “Seller or advertiser” defined:** As used in Section 7-9-55 NMSA 1978, “seller or advertiser” means a person whose identity, business, service, product or products are the primary subject of the advertising message.

**C. “Principal place of business” defined:** As used in Section 7-9-55 NMSA 1978, “principal place of business” means the place in which a business:

(1) earns the largest percentage of its revenues; and  
(2) owns the largest percentage of its capital assets; and

(3) employs the largest percentage of its full-time equivalent employees. A business can have only one principal place of business.

[3.2.213.7 NMAC, Rp 3.2.213.7 NMAC, 11/29/2022]

### 3.2.213.8 ADVERTISING RECEIPTS OF PUBLICATION FROM OUT-OF-STATE

**CUSTOMERS:** Receipts of a newspaper or magazine which is published within New Mexico and circulated to subscribers within and without New Mexico from the sale of advertising space to advertisers within and without New Mexico are subject to the gross receipts tax. The gross receipts tax levied on advertising receipts does not impose an unconstitutional burden on interstate commerce.

[3.2.213.8 NMAC, Rp 3.2.213.8 NMAC, 11/29/2022]

### 3.2.213.9 BROADCASTING AND RELATED ADVERTISING:

**A. Microwave carriers:** The receipts of a microwave carrier from relaying television signals for another party for a fee from a point of origin outside this state to a point of destination within this state may be deducted from gross receipts even though a portion of those receipts is derived from relaying the signals between towers located within New Mexico.

**B. Deduction available to broadcaster and**

**advertising agency:** A New Mexico radio or television broadcaster may deduct from its gross receipts the receipts derived from the sale of broadcast time which is sold either directly to a national or regional seller or advertiser not having its principal place of business in or being incorporated under the laws of New Mexico, or to an advertising agency which purchases the broadcast time on behalf of, or for subsequent sale to, such national or regional seller or advertiser. No nontaxable transaction certificate is required. If the advertising agency subsequently sells the broadcast time to a New Mexico seller or advertiser, however, compensating tax will be due on the value of the broadcast time.

**C. Sales of broadcast time:** Receipts from sales of broadcast time by New Mexico radio and television broadcasters to advertising agencies are subject to gross receipts tax, but may be deductible under Section 7-9-48 NMSA 1978 or Section 7-9-55 NMSA 1978.

**D. Cable television systems:** Cable television systems are eligible for the deduction provided by Section 7-9-55 NMSA 1978 for receipts from the sale of broadcast time to a national or regional advertiser.

**E. Digital advertising services:** Providers of digital advertising services are eligible for the deduction provided by Section 7-9-55 NMSA 1978. Receipts of a provider of digital advertising services are deductible when the receipts:

(1) are from a national or regional advertiser not having its principal place of business in New Mexico, or that is not incorporated under the laws of New Mexico, or

(2) are from an advertising agency which purchases the display of advertisements on the platform on behalf of, or for subsequent sale to, a seller defined in Paragraph (1) of Subsection E of 3.2.213.9NMAC. However, the commissions of advertising agencies

from performing services in this state may not be deducted.

[3.2.213.9 NMAC, Rp 3.2.213.9 NMAC, 11/29/2022]

### 3.2.213.10 INTERSTATE TRANSPORTATION:

**A. Transporting forest fire fighting materials:** The receipts from transporting forest firefighting materials, such as slurry, in airplanes from a point inside New Mexico to a point outside New Mexico are deductible from gross receipts.

**B. Star route contractors:**

(1) A person holding a contract for the transportation of United States mail as a “star route contractor” from points within New Mexico to other points outside New Mexico may deduct the portion of gross receipts which were derived from transactions in interstate commerce.

(2) In order to determine the portion of the receipts from the contract which is subject to the gross receipts tax, the total receipts from the contract are to be multiplied by a fraction, the numerator of which is the total number of delivery points in New Mexico and the denominator of which is the total number of delivery points. A delivery point is any point at which mail is required, by contract, to be delivered.

**C. Hauling livestock or produce:** Receipts from hauling livestock or agricultural products in a single shipment from points within New Mexico to points outside New Mexico, or from points outside New Mexico to points within New Mexico, are deductible from gross receipts as transactions in interstate commerce.

**D. Transportation by aircraft:**

(1) Receipts from transporting persons by aircraft from one point to another are deductible as receipts from transactions in interstate commerce.

(2) Receipts from transporting property by aircraft in a single flight from points within

New Mexico to points outside New Mexico, or from points outside New Mexico to points within New Mexico are deductible from gross receipts as receipts from transactions in interstate commerce.

(3) Receipts from transporting property by aircraft from one point in New Mexico to another point in New Mexico are not deductible as transactions in interstate commerce.

**E. Federal preemption - transportation by motor carrier:** 49 USC 14505 prohibits New Mexico and its political subdivisions from imposing tax on receipts from transporting passengers by motor carrier in interstate commerce. Such receipts, therefore, are deductible under Section 7-9-55 NMSA 1978. [3.2.213.10 NMAC, Rp 3.2.213.10 NMAC, 11/29/2022]

**3.2.213.11 PRINTED REPORTS:** Receipts from the sale of a printed report of oil and gas leasing activities, which is not a "newspaper" as that term is used in Section 7-9-64 NMSA 1978, to nonresidents of New Mexico where delivery is made out-of-state by the seller's vehicle, U.S. mail or common carrier are receipts from transactions in interstate commerce and such receipts may be deducted from the gross receipts of the seller. [3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996; 3.2.213.11 NMAC, Rp 3.2.213.11 NMAC, 11/29/2022]

**3.2.213.12 TRANSACTIONS NOT QUALIFIED AS INTERSTATE COMMERCE:**

**A.** Receipts of New Mexico sellers from sales of property to New Mexico residents who request that delivery be made out of state are not receipts from transactions in interstate commerce and are not deductible under Section 7-9-55 NMSA 1978.

**B.** Receipts of New Mexico sellers from sales of property to nonresidents of New Mexico

who accept delivery of the property in New Mexico or where transfer of title or risk of loss passes to the nonresident buyer in New Mexico are not receipts from transactions in interstate commerce and are not deductible under Section 7-9-55 NMSA 1978.

[3.2.213.12 NMAC, Rp 3.2.213.12 NMAC, 11/29/2022]

**HISTORY OF 3.2.213 NMAC:**

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

BOR 67-2, NM Gross Receipts and Compensating Tax Regulations, filed 9/29/1967.

BOR 69-4, Regulations in Effect and Pertaining to the New Mexico Gross Receipts and Compensating Tax Act, filed 12/5/1969.

BOR 74-2, Regulations in Effect and Pertaining to the New Mexico Gross Receipts and Compensating Tax Act, filed 3/20/1974.

BOR 76-1, Regulations in Effect and Pertaining to the New Mexico Gross Receipts and Compensating Tax Act, filed 7/26/1976.

R.D. Rule No. 82, Regulations Pertaining to the Gross Receipts and Compensating Tax Act, Sections 7-9-1 to 7-9-80.1 NMSA 1978, filed 4/7/1982.

R.D. Rule No. 84, Regulations Pertaining to the Gross Receipts and Compensating Tax Act, Sections 7-9-1 to 7-9-80.1 NMSA 1978, filed 5/4/1984.

TRD Rule No. 9-86, Regulations Pertaining to the Gross Receipts and Compensating Tax Act, Sections 7-9-1 to 7-9-80.1 NMSA 1978, filed 4/2/1986.

TRD Rule GR-90, Regulations Pertaining to the Gross Receipts and Compensating Tax Act, Sections 7-9-1 to 7-9-80.1 NMSA 1978, filed 11/26/1990.

**History of Repealed Material:**

3.2.213 NMAC, Deduction - Gross Receipts Tax - Transaction in Interstate Commerce, filed 5/17/2001 repealed effective 11/29/2022.

**NMAC History:**

3 NMAC 2.55, Deduction - Gross Receipts Tax - Transaction in Interstate Commerce, filed 11/4/1996. 3.2.213 NMAC, Deduction - Gross Receipts Tax - Transaction in Interstate Commerce, filed 5/17/2001 replaced 3.2.213 NMAC, Deduction - Gross Receipts Tax - Transaction in Interstate Commerce, effective 11/29/2022.

**TAXATION AND REVENUE DEPARTMENT**

**This is an amendment to 3.2.1 NMAC, Section 19 effective 11/29/2022.**

**3.2.1.19 GROSS RECEIPTS; RECEIPTS OF AGENTS:**

**A. Nonemployee agents:**

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

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

(3) *Example 2:* The receipts of a nonemployee

agent or sub-agent derived from commissions received from;

(a)

correspondence schools for enrolling persons in those schools;

(b)

freight companies, bus transportation firms, and similar business concerns for rendering services; and

(c)

the owner of trailers or trucks for leasing those trailers or trucks, are subject to gross receipts tax.

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

(1) As of

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

(2)

**Associations in which common areas are owned by unit owners:**

(a)

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

(b)

Amounts received by an association of this type from unit owners for accumulation in a trust account owned by the unit owners for current or future expenditures for the improvement, maintenance or rehabilitation of the common areas, elements or facilities are not taxable gross receipts since such amounts are not receipts of the association. However, with respect to receipts not exempt under Section 7-9-20 NMSA 1978, when payments are made from the trust account to the association or its employees, officers or representatives for the improvement, maintenance or rehabilitation, these payments are taxable gross receipts of the association under Section 7-9-3.5 NMSA 1978. When payments

are made directly from the account to third parties, those third parties will be liable for the gross receipts tax on those receipts.

(c)

With respect to receipts which are not exempt under Section 7-9-20 NMSA 1978, associations of this type which bill unit owners may issue nontaxable transaction certificates (NTTCs) when appropriate under Section 7-9-48 NMSA 1978 (sale of a service for resale) to suppliers of these services, unless the service is deductible by the association under the Internal Revenue Code as an ordinary and necessary business expense. The association must report and pay gross receipts taxes on all its receipts for services, including those for which NTTCs are given. This version of Paragraph (2) of Subsection B of 3.2.1.19 NMAC applies to transactions occurring on or after July 1, 2000.

(3) *Example*

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

(4) *Example*

*A 2:* Association A employs a maintenance person to maintain and clean the common areas. The maintenance person is responsible for mowing lawns, maintaining the landscape, cleaning halls, lobbies

and other common areas and making minor repairs to common facilities. Funds received by Association A from the trust account to pay the maintenance person's wages and to pay various payroll taxes and employee benefits are gross receipts for the performance of service on which Association A is required to pay tax.

(5) *Example A*

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

(6) *Example*

*A 4:* For the last 10 years, funds have accumulated in the trust for construction of a swimming pool. A Pool Co. builds the pool and is paid directly from the trust account. A Pool Co. is subject to gross receipts tax on the receipts from the construction of the pool. Association A, acting as agent for the property owners, has no receipts and pays no tax on this transaction.

(7) *Example*

*A 5:* Association A purchases, with its own funds, chemicals which its employee will use to maintain the new swimming pool. To recover this expense, Association A increases the amount it charges the property owners each month and draws funds from the trust account which it places with its own funds. These receipts of Association A are subject to the tax since Association A is performing services for the property owners. This treatment of receipts applies to purchases of other maintenance or cleaning supplies which Association A consumes in the performance of maintenance and cleaning services. Association A may not execute a non-taxable transaction certificate for



the purchase of these chemicals or other cleaning supplies, because the chemicals and supplies are consumed in the performance of services by the association.

(8)

**Associations in which common areas are owned by the association with long-term real property rights held by individual unit owners:**

(a)

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

(b)

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

(9)

**Associations in which common areas are owned by association:** Different treatment is required for an association of unit owners in a real estate development in which the common elements, areas or facilities are owned by the association and the unit owners (as defined in Subparagraph (a) of Paragraph (2) of Subsection B of 3.2.1.19 NMAC) do not possess the real property rights to the common elements described in Paragraphs (2) and (8) of Subsection B of 3.2.1.19 NMAC. All receipts of this type of association (e.g., payments by unit owners for

maintenance and use of the common areas) are fully taxable and no NTTCs may be issued for services purchased. Because of the association's status as owner and the absence of real property rights of the unit owners in the common areas, the association is not acting as the unit owners' agent, nor is it reselling a service.

(10) Example

*C 1:* Association C holds title to all common areas of a development which includes a clubhouse, golf course, swimming pool and tennis courts. Each owner of property within the development is a member of Association C and pays a membership fee. In consideration for the fees received, Association C grants each member a license to use facilities owned by the association. Association C is liable for gross receipts tax on its receipts from granting the licenses to use the facilities.

(11) Example

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

(12) Example

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

**C. Reimbursed**

**expenditures:**

[~~—————~~ (1) ~~—————~~] The receipts of any person received as a reimbursement of expenditures incurred in connection with the performance of a service or the sale or lease of property are gross

receipts as defined by Section 7-9-3.5 NMSA 1978, unless that person incurs such expense as agent on behalf of a principal while acting in a disclosed agency capacity. [An agency relationship exists if a person has the power to bind a principal in a contract with a third party so that the third party can enforce the contractual obligation against the principal.

(2) Receipts

from the reimbursement of expenses incurred as agent on behalf of a principal while acting in a disclosed agency capacity are not included in the agent's gross receipts if the expenses are separately stated on the agent's billing to the client and are identified in the agent's books and records as reimbursements of expenses incurred on behalf of the principal party.

(3) If these

requirements are not met, the reimbursement of expenses are included in the agent's gross receipts.

(4) Example

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

(5) Example

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

~~(6) Example~~

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

~~(7) Example~~

~~4: X contracts with company Y to perform administrative functions relating to the employment relationship between Y and its workers. Y pays X the costs for Y's employees' payroll, payroll taxes, worker's compensation, contributions to employee benefits and healthcare and other amounts X pays to or on behalf of Y's workers. Y separately pays X a two percent fee for the administrative services. Y or X recruits workers, selects them for work assignments, establishes their rate of pay, assigns their schedule, instructs them when and where to work, assigns them their duties, supervises and monitors the performance of their duties, authorizes leaves of absence, handles worker's complaints, union grievances or disputes, and disciplines, lays off or terminates the workers. X issues payroll checks, with X as payor. The checks are distributed by Y to workers. X also secures worker's compensation coverage for the workers, calculates, withhold and submits payroll taxes to appropriate taxing authorities, calculates and makes contributions to union health, pension and welfare benefit trust funds for workers, funds unemployment insurance contributions and responds to unemployment compensation claims, and processes garnishment orders. X can require Y to post a bond or other security for the payment of payroll. Y agrees to indemnify X against~~

~~worker's claims for non-payment of wages, any claims arising from the acts of worker at the work site, grievances by unions representing the worker arising from acts of Y, wage and hour claims, tax claims, and failure of Y to provide training to workers. X has no gross receipts from the amount representing the payroll, payroll taxes, worker's compensation and benefits; this amount is not subject to the gross receipts tax. The additional two percent, however is X's fee for performing services and is subject to tax.~~

~~(8) Example~~

~~5: A enters into an agreement with its client B to provide temporary workers to B. The agreement provides that A retains the right to select and hire employees, to control when the employees are paid, and the right to replace employees. A issues the payroll checks to employees with A as payor. The employees are unaware of any principal-agent relationship between A and B. All receipts A receives from B for payroll and A's commission or fee for its services to B are subject to gross receipts tax.~~

~~(9) All~~

~~receipts or fees for services provided by an agent are subject to the gross receipts tax.]~~

**D. Reimbursement of expenditures made to volunteers:**

**(1) A**

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

**(2) For**

purposes of Paragraph (1) of Subsection D of 3.2.1.19 NMAC, the term "volunteer" means any person who contributes time, effort or talent for the direct benefit of an organization which is exempt from taxation under the Internal Revenue Code. The term also extends to any person who contributes time,

effort or talent without the receipt of consideration or remuneration to the state of New Mexico or any agency or any political subdivision of the state, or to the United States or any agency of the United States. "Volunteer" further includes any elected official serving without consideration or remuneration and any appointive non-employee member of any public commission or board serving without consideration or remuneration, whether the appointment was made by the governor, any other elected official or a public body.

**(3) For**

purposes of Paragraph (1) of Subsection D of 3.2.1.19 NMAC, "reimbursement" includes per diem amounts set by statute to reimburse uncompensated elected and appointed governmental officials for the expense of carrying out official duties. [3.2.1.19 NMAC - Rp, 3.2.1.19 NMAC 10/13/2021; A, 11/29/2022]

## TAXATION AND REVENUE DEPARTMENT

**This is an amendment to 3.2.106 NMAC, Section 7 and adding 15 effective 11/29/2022.**

**3.2.106.7 DEFINITIONS:**

**A. AGRICULTURAL PRODUCTS:** [Agricultural products are those products and the intermediate stages thereof which are normally raised or grown primarily for use as fiber or food for human or animal consumption.]

**(1)**

Agricultural products are those products and the intermediate stages thereof which are normally raised or grown primarily for use as fiber or food for human or animal consumption.

**(2) Cannabis**

is not an agricultural product.

**B. POULTRY:** The term "poultry" means domestic fowl raised for sale or use in the ordinary course of business or for the production of meat, eggs, hides or feathers for sale or use in the ordinary course of business.

[12/5/1969, 3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 12/23/92, 11/15/1996; 3.2.106.7 NMAC - Rn, 3 NMAC 2.18.1.7, 5/15/2001; A, 8/15/12; A 11/29/2022]

**3.2.106.15 CANNABIS:**  
Receipts of a licensed cannabis retailer from the sale of cannabis products, including without limitation cannabis flowers as defined in Section 26-2C-2 NMSA 1978, are subject to the gross receipts tax. The receipts from the sale of cannabis products, including cannabis flowers as defined in Section 26-2C-2 NMSA 1978, are not receipts from the sale of unprocessed agricultural products.  
 [3.2.106.15 NMAC - N, 11/29/2022]

**End of Adopted Rules**

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## Other Material Related to Administrative Law

**GOVERNOR,  
OFFICE OF THE  
EXECUTIVE ORDER 2022-149**

**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 November 8, 2022 the Centers for Disease Control and Prevention (“CDC”) reported over 97.6 million people have been infected in the United States, with over 1,068,000 related deaths, and the New Mexico Department of Health has reported 632,738 positive COVID-19 cases and 8,673 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 subsequently declared a state of emergency and implemented significant measures and deployed substantial resources to fight the spread of COVID-19; many, if not most, have kept such states of emergency in place.

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, 2021-004, 2021-010, 2021-011, 2021-012, 2021-023, 2021-030,

2021-044, 2021-049, 2021-054, 2021-058, 2021-061, 2021-067, 2022-004, 2022-007, 2022-012, 2022-016, 2022-024, 2022-067, 2022-109, 2022-115, 2022-120, 2022-131, and 2022-147 shall be renewed and extended through November 11, 2022.

2. All other powers, directives, and orders invoked in Executive Order 2020-004 remain in effect.

3. Unless previously rescinded, 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 Order 2020-020.

4. This Order supersedes any previous orders, proclamations, or directives in conflict. This Order shall take effect on November 10, 2022, and shall remain in effect until December 9, 2022, unless renewed, modified, or rescinded.

**ATTEST:**

**DONE AT THE EXECUTIVE  
OFFICE THIS 10TH DAY OF  
NOVEMBER 2022.**

**WITNESS MY HAND AND THE  
GREAT SEAL OF THE STATE  
OF NEW MEXICO**

/ S /  
**MAGGIE TOULOUSE OLIVER  
SECRETARY OF STATE**

/ S /  
**MICHELLE LUJAN  
GRISHAM  
GOVERNOR**

**GOVERNOR,  
OFFICE OF THE**

**EXECUTIVE ORDER 2022-150**

**RESCINDING EXECUTIVE  
ORDERS 2011-036 AND 2020-  
039**

**WHEREAS**, former Governor Susana Martinez issued Executive Order 2011-036 creating the State Notary Compliance and Enforcement Unit within the Regulation and Licensing Department to assist the Governor with fulfilling her duty to discipline notary publics under the Notary Public Act, NMSA 1978, §§ 14-12A-1 to -26;

**WHEREAS**, I issued Executive Order 2020-039 pursuant to my authority under the Notary Public Act to allow for notarial acts through audio-visual technology under certain circumstances in order to minimize the spread of COVID-19;

**WHEREAS**, the Notary Public Act has since been repealed and replaced with the Revised Uniform Law on Notarial Acts, NMSA 1978, §§ 14-14A-1 to -32, which transferred authority to discipline notary publics to the State Ethics Commission; and

**WHEREAS**, these Orders, which no longer have any legal force, should be officially rescinded in order to avoid any confusion.

**NOW, THEREFORE**, 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 **RESCIND** Executive Orders 2011-036 and 2020-039. This Order supersedes any previous orders, proclamations, or directives in conflict. This Order shall take effect immediately.

**ATTEST:**

**DONE AT THE EXECUTIVE  
OFFICE THIS 10TH DAY OF  
NOVEMBER 2022.**

**WITNESS MY HAND AND THE  
GREAT SEAL OF THE STATE  
OF NEW MEXICO**

**/ S /  
MAGGIE TOULOUSE OLIVER  
SECRETARY OF STATE**

**/ S /  
MICHELLE LUJAN  
GRISHAM  
GOVERNOR**

**End of Other Material  
Related to Administrative  
Law**

# 2022 New Mexico Register

## Submittal Deadlines and Publication Dates

### Volume XXXIII, Issues 1-24

Issue	Submittal Deadline	Publication Date
Issue 1	January 4	January 11
Issue 2	January 13	January 25
Issue 3	January 27	February 8
Issue 4	February 10	February 22
Issue 5	February 24	March 8
Issue 6	March 10	March 22
Issue 7	March 24	April 5
Issue 8	April 7	April 19
Issue 9	April 21	May 3
Issue 10	May 5	May 24
Issue 11	May 26	June 7
Issue 12	June 9	June 21
Issue 13	July 1	July 12
Issue 14	July 14	July 26
Issue 15	July 28	August 9
Issue 16	August 11	August 23
Issue 17	August 25	September 13
Issue 18	September 15	September 27
Issue 19	September 29	October 11
Issue 20	October 13	October 25
Issue 21	October 27	November 8
Issue 22	November 17	November 29
Issue 23	December 1	December 13
Issue 24	December 15	December 27

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### Volume XXXIV, Issues 1-24

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Issue 1	January 5	January 18
Issue 2	January 19	January 31
Issue 3	February 2	February 14
Issue 4	February 16	February 28
Issue 5	March 2	March 14
Issue 6	March 16	March 28
Issue 7	March 30	April 11
Issue 8	April 13	April 25
Issue 9	May 4	May 16
Issue 10	May 18	May 31
Issue 11	June 1	June 13
Issue 12	June 15	June 27
Issue 13	July 7	July 18
Issue 14	July 20	July 31
Issue 15	August 3	August 15
Issue 16	August 17	August 29
Issue 17	August 31	September 12
Issue 18	September 14	September 26
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Issue 20	October 12	October 24
Issue 21	October 26	November 7
Issue 22	November 9	November 21
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