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# New Mexico Register

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

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# The New Mexico Register

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# New Mexico Register

Volume XXIX, Issue 4
February 27, 2018

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A = Amended, E = Emergency, N = New, R = Repealed, Rn = Renumbered

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# Notices of Rulemaking and Proposed Rules

## CULTURAL AFFAIRS, DEPARTMENT OF

### NOTICE OF PROPOSED RULEMAKING

NOTICE IS HEREBY GIVEN that the Museum of New Mexico Board of Regents (BOR) and the Department of Cultural Affairs (DCA) are proposing to repeal 4.51.57 NMAC, which governs the portal artisans program of the New Mexico Palace of the Governors State History Museum (POG/NMHM), and replace it with a new 4.51.57 NMAC. In summary, 4.51.57 NMAC contains provisions on the location of the portal program; participant qualifications and program operations; vending rules; annual meeting requirements; responsibilities of portal committee; POG/NMHM's administration of the program; and the authenticity and quality of products offered for sale in the program. The BOR/DCA propose to repeal 4.51.57 NMAC because the current rule is disorganized; needs clarification; contains redundant, outdated, and unnecessary provisions; and lacks definitions and detail on the application process, committee structure, committee meetings, committee member elections, duty officer responsibilities, and rule enforcement.

The purpose of the proposed new rule is to clarify, supplement, and update 4.51.57 NMAC in order to enhance the program and the NMHM/POG's ability to effectively, fairly and lawfully administer the program. In summary, the proposed replacement rule 4.51.57 NMAC defines key terms; sets forth the portal coordinator's administrative responsibilities; establishes requirements for the application and demonstration process and participant qualifications consistent with law; establishes rules on the selection, structure, and responsibilities of the portal committee and removal of its members; establishes procedures for conducting annual, committee and special meetings; governs daily operations of the program, including establishing duty officer responsibilities, rules for the drawing for spaces, and participant vending rules; sets forth disciplinary procedures for rule violations, including penalty guidelines and appeals process; establishes product authenticity and quality standards; and codifies the portal committee code of conduct for all participants.

The BOR and DCA are proposing these rule changes pursuant to Subsection E of Section 9-4A-6 NMSA 1978 and Subsection G of Section 18-3-3 NMSA 1978.

The BOR and the DCA will hold a public hearing on Tuesday, April 3, 2018, at 10:00 A.M. in Room 238 of the Bataan Memorial Building (Old Senate Chambers), 407 Galisteo Street, Santa Fe, New Mexico 87501. The purpose of the hearing is to receive oral and written comments on the proposed rule repeals and on the proposed new rule.

The proposed rule is available at the DCA website: http://www.newmexicoculture.org. To request that a copy of the proposed rule be mailed to you, submit your request in writing to Shirley Lujan, Museum Resources Center, Dept. of Cultural Affairs, 725 Camino Lejo, Santa Fe, New Mexico 87504, or by email to Shirley.Lujan@state.nm.us.

Any person may appear at the hearing and make oral comments, or submit written comments, or both. Written comments may be submitted by mail or email to Shirley Lujan at the addresses noted above. The BOR and DCA will accept written comments for consideration no later than 10:00 A.M. on the hearing date. Written comments received at least one day prior to the public hearing will be posted on the DCA's website.

Individuals in need of a reader, amplifier, qualified sign language interpreter or any other form of auxiliary aid or service to attend or participate in the hearing should contact Shirley Lujan at 505-476-1126 at least five business days prior to the hearing.

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## ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
### OIL CONSERVATION COMMISSION

### NOTICE OF PROPOSED RULEMAKING

The New Mexico Oil Conservation Commission (Commission) hereby gives notice of the following proposed rulemaking (Case No. 15957).

The New Mexico Oil Conservation Division ("OCD") proposes to amend 19.15.2, 19.15.4, 19.15.14, 19.15.15, and 19.15.16 NMAC as follows to make changes concerning the drilling, spacing and operation of horizontal wells, and related matters:
19.15.2.7 NMAC. OCD proposes to amend 19.15.2.7 to add a new definition of "affected persons" and amend the definitions of "mineral interest owners" and "proration unit".
19.15.4.12 NMAC. OCD proposes to amend 19.15.4.12 to clarify the notice requirements for applications for non-standard well locations and non-standard spacing and proration units.
19.15.14 and 19.15.15 NMAC. OCD proposes to amend 19.15.14.8 and 19.15.15.8 to conform cross-references to proposed revisions of 19.15.16 NMAC.
19.15.16 NMAC. OCD proposes to amend 19.15.16 NMAC to comprehensively revise the requirements for horizontal wells. Changes include adding definitions of "first take point" and "last take point", "infill horizontal well", "multi-lateral well", and "unitized area", and repeal definitions of "penetration point", "producing area", "project area", and "standard project area".
19.15.16.14 NMAC will be

amended to provide for distinct rules of "directional" as opposed to "horizontal" wells. The rules for directional wells will not be significantly changed, but will no long apply to horizontal wells. 19.15.16.15 NMAC will be amended to collect in a single section those rules that apply to horizontal wells and proposes revisions to comprehensively regulate such wells. These changes include establishing standard horizontal spacing units and procedures for OCD approval of non-standard horizontal spacing units. The proposed changes also provide minimum setback distances for horizontal wells from horizontal spacing unit boundaries and authorize horizontal wells to produce at maximum efficient rates to prevent waste of oil and gas.

**Purpose of Proposed Rule.** The proposed changes will adapt the spacing and setback requirements for horizontal wells to the unique nature of those wells, and maximize such wells' efficiency by eliminating unnecessary restrictions on production, and also clarify matters that are uncertain in existing rules.

**Legal Authority.** These amendments are authorized by the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38, and specifically Section 70-2-11(A), (which authorizes the adoption of rules to carry out the purposes of the Act), Section 70-2-12(A) (which authorizes the Commission to prorate production of crude petroleum oil and natural gas) and Section 70-2-12(B)(10) (which authorizes the Commission to fix the spacing of wells). The rulemaking proceeding will be governed by the Commission's rule on rulemaking, 19.15.3 NMAC.

**The full text of the proposed rule amendments is available** from Commission Clerk, Florene Davidson at (505) 476-3458 or can be viewed on the Rules page at the Oil Conservation Division's website at http://www.emnrd.state.nm.us/ocd, or at Oil Conservation Division offices in Santa Fe, Hobbs, Artesia, or Aztec.

**Public Hearing and Comment.** The Commission will hold a **public hearing** on the proposed rules at the Commission meeting which will commence at 9:00 A.M. on April 17, 2018, in Porter Hall, 1st Floor, Wendell Chino Building, 1220 South St. Francis Drive, Santa Fe, New Mexico.

**Written or electronic comments** on the proposed rule may be hand delivered or mailed to the Commission Clerk, Florene Davidson, 3d floor, 1220 South St. Francis Drive, Santa Fe, NM 87505, or e-mailed to florene.davidson@state.nm.us. All written or electronic comments must be received by the Commission Clerk no later than 9:00 A.M. on April 17, 2018, unless the Commission or the Commission Chair extends this deadline.

**Persons intending to submit proposed modifications to the proposed rule amendments, to present technical testimony at the hearing, or to cross-examine witnesses** must file six copies of a Pre-hearing Statement conforming to the requirements of Subsection B of 19.15.3.11 NMAC, no later than 5:00 P.M. on April 3, 2018. Pre-hearing Statements must be hand-delivered, mailed, or e-mailed to the Commission Clerk at the above address.

Any person who has not submitted a pre-hearing statement may present non-technical testimony or make an unsworn statement at the hearing. A person may also offer exhibits with the testimony so long as the exhibits are relevant to the proposed rule changes and do not unduly repeat the testimony. Any person who wishes to present non-technical testimony should indicate his or her intent on a sign-in sheet at the hearing. A person who testifies at the hearing is subject to cross-examination by the commissioners, commission counsel, or a party on the subject matter of the person's direct testimony.

**If you are an individual with a disability** who needs a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact Ms. Davidson at (505) 476-3458 or through the New Mexico Relay Network at 1-800-659-1779 by April 3, 2018. Public documents can be provided in various accessible forms. Please contact Ms. Davidson if a summary or other type of accessible form is needed. A party who plans to use projection equipment at a hearing must contact Ms. Davidson seven business days prior to the hearing requesting the use of the projection equipment. Wireless internet is available; however, the person requesting to use the wireless connection must provide a laptop computer.

**Technical Information** that served as a basis for the proposed rule includes:
-Holditch, S. and Blakeley, D., "Flow Characteristics of Hydraulic Fracture Proppants Subjected to Repeated Production Cycles", SPE Production Engineering, Feb. 1992; and
-Crafton, J. and Noe, S., "Impact of Delays and Shut-Ins on Well Productivity", SPE Eastern Regional Meeting, August 2013.
These materials can be viewed on the Rules page at the Oil Conservation Division's website at http://www.emnrd.state.nm.us/ocd.

## ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
### STATE PARKS DIVISION

### NOTICE OF PROPOSED RULEMAKING

The New Mexico Energy, Minerals and Natural Resources Department (EMNRD), State Parks Division hereby gives notice of the following proposed rulemaking.

The State Parks Division proposes to amend its rules 19.5.1 NMAC, General Provisions; 19.5.2 NMAC,

Park Visitor Provisions; and 19.5.6 NMAC, Park Fees as follows.

19.5.1.7 NMAC – Definitions. The State Parks Division proposes to amend or add the following definitions: "commercial charter bus", "concession permit", "special event facility", "special use permit", "vehicle", and "visitor".

19.5.2.12 NMAC – Camping. The State Parks Divisions proposes to add Subsection J to make available reserved campsites to other visitors if the visitor holding the reservation does not occupy the reserved site or contact the reservation contractor or the park by 4:00 p.m. the day after the scheduled arrival date.

19.5.2.13 NMAC – Use of Facilities. The State Parks Division proposes to amend Subsection G to clarify that campsites, group shelters, group areas, cabins, yurts, and lodges are included in the areas that the State Parks Division Director may designate for use by reservation. The State Parks Division proposes to amend Subsection H to clarify that the State Parks Division itself does not charge a fee for reservations or cancellations. The State Parks Division contracts with a private entity to operate the reservation system and the contractor charges visitors directly for reservation processing and cancellation services.

19.5.2.16 NMAC – Off-Highway Motor Vehicles and Golf Cars. The State Parks Division proposes to amend Subsection F to clarify that visitors may use off-highway motor vehicles for ice fishing if the lake is open to ice fishing *and* the area is designated for off-highway motor vehicles use.

19.5.2.28 NMAC – Animals. The State Parks Division proposes to add Subsection F to allow the State Parks Division Director to designate or post areas within a park where visitors' animals do not have to be leashed or restrained.

19.5.2.29 NMAC – Littering. The State Parks Division proposes to add a new Subsection A to prohibit visitors from disposing commercial or construction waste, appliances, or furnishings within a state park.

19.5.2.32 NMAC – Fees and Charges. The State Parks Division proposes to amend Subsection A to remove the administrative fee as it is proposed to be removed from 19.5.6 NMAC. The State Parks Division proposes to amend Subsection F to clarify that facilities, sites, and day use are items for which visitors must pay fees in addition to any reservation processing fee the division's reservation systems contractor charges.

19.5.6.8 NMAC – Day Use Permit. The State Parks Division proposes to amend Subsection A to charge different fees for school buses and commercial charter buses. The State Parks Division proposes to amend Subsection B to remove Vietnam Veterans Memorial State Park from the fee schedule as the Department of Veterans Services now operates the memorial.

19.5.6.13 NMAC – Division-Operated Pumpout Facility. The State Parks Division proposes to repeal the service charge for division-operated pump out facilities as it no longer provides pump out services.

19.5.6.14 NMAC – Group Shelter. The Division proposes to increase fees for group shelters beginning December 1, 2018.

19.5.6.18 NMAC – Meeting, Event and Lodging Facilities. The State Parks Division proposes to amend Subsection A to include meeting rooms and classrooms in addition to conference rooms and establish a new fee schedule. The State Parks Division proposes to amend Subsection B to apply to all State Parks Division special event facilities and establish a new fee schedule. The State Parks Division proposes to amend Subsection C to establish fees for the rental of yurts, add Subsection D to establish fees for the rental of cabins, and add Subsection E to establish fees for the rental of corrals.

19.5.6.19 NMAC – Administrative Fee: The State Parks Division proposes to repeal 19.5.6.19 NMAC to remove the $25.00 administrative fee.

**Purpose of Amendments.** The proposed amendments are based on identified needs for changes to definitions, rules governing activities within state parks, and park fees.

**Legal Authority**. The Energy, Minerals and Natural Resources Department, State Parks Division proposes these rule amendments under the authority of NMSA 1978, Section 16-2-7 and NMSA 1978, Section 9-1-5(E).

**The full text of the proposed rule amendments is available** from Financial Specialist, Amanda Calderon at (505) 476-3377 or may be viewed on the Rules page at the State Park Division's website at http://www.emnrd.state.nm.us/spd/, or at State Parks Division's regional offices and park offices.

**Public Hearing and Comment.** The State Parks Division will hold a public hearing on proposed rule changes at 9:00 a.m. on Tuesday, April 10, 2018 in Porter Hall, Wendell Chino Building, 1220 South Saint Francis Drive, Santa Fe, New Mexico 87505.

**Written comments** on the proposed rule may be hand delivered or mailed to the Financial Specialist, Amanda Calderon, 2nd floor, 1220 South St. Francis Drive, Santa Fe, NM 87505, or e-mailed to amanda.calderon@state.nm.us. All written comments must be received by Mrs. Calderon no later than 9:00 A.M. on April 10, 2018, unless the Hearings Officer extends this deadline.

**Technical Information** that served as a basis for the proposed rule amendments includes:
- Fees: http://cpw.state.co.us/placestogo/parks/CherryCreek/Pages/Fees.aspx
- Special Event Facility: www.nhccnm.org
- Special Event Facility: http://www.internationalfolkart.org/about/facility-rental/
- Yurts: www.redriverrvpark.net/rv-park-yurts-rates

http://cpw.state.co.us/placestogo/parks/SylvanLake/Pages/Fees.aspx
- Equestrian & Cabins: http://cpw.state.co.us/placestogo/parks/Muller/Pages/Fees.aspx
- Blind Rental: www.minturnanglers.com/guided-hunting-colorado/blind-decoy-rental/

These materials may be viewed on the Rules page at the State Park Division's website at http://www.emnrd.state.nm.us/spd/.

If **you are an individual with a disability** who needs a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact Mrs. Calderon at (505) 476-3377or through the New Mexico Relay Network at 1-800-659-1779 by April 10, 2018. Public documents can be provided in various accessible forms. Please contact Mrs. Calderon if a summary or other type of accessible form is needed. A party who plans to use projection equipment at a hearing must contact Mrs. Calderon seven business days prior to the hearing requesting the use of the projection equipment. Wireless internet is available; however, the person requesting to use the wireless connection must provide a laptop computer.

## LIVESTOCK BOARD, NEW MEXICO

### NOTICE OF RULE HEARING AND REGULAR BOARD MEETING

NOTICE IS HEREBY GIVEN that the New Mexico Livestock Board will hold a public hearing on Thursday, March 29, 2018 at 9:00 a.m. and following the hearing will convene a regular board meeting to consider the amendments of the rule and conduct regular board business. The rule hearing and board meeting will be held at the Albuquerque Hispano Chamber of Commerce, 1309 Fourth Street SW, Albuquerque, New Mexico, 87102. The purpose of the rule hearing is to receive public comment on changes regarding Bovine Trichomoniasis, 21.30.6.11 NMAC.

Proposed Amendments to Section 11 of 21.30.6 NMAC:

Paragraph (1) of Subsection B: Positive *T. foetus* bulls shall be identified with the official New Mexico livestock board "N" fire brand or other NMLB approved method.

Paragraph (2) of Subsection B: Positive *T. foetus* bulls shall be quarantined and sent directly to slaughter or to public livestock market for slaughter only. [~~A quarantined feed period may be allowed under special conditions. Positive bulls may be required to move on a NMLB approved method.~~] Positive bulls may be required to move on a NMLB approved method. Confined feeding may be allowed provided bulls are "N" branded.

Paragraph (5) of Subsection B: Any bull entering a quarantined premise will be required to test negative prior to re-introduction to its herd of origin.

Paragraph (1) of Subsection E: All facilities that share a common boundary with a positive *T. foetus* herd will be notified by the NMLB and [~~may be required to test all of the bulls on the facility at their own expense~~] may be quarantined based on results of the epidemiological investigation by the state veterinarian. Quarantine will remain in place until testing requirements are satisfied. [~~The decision to require such testing will be made by the state veterinarian based on results of epidemiological investigation.~~]

Section 77-2-7 NMSA 1953, authorizes the New Mexico Livestock Board to adopt and promulgate rules to carry out the purposes of The Livestock Code.

Copies of the agenda and proposed changes to 21.30.6.11 NMAC may be found at the NMLB website at: http://www.nmlbonline.com or by contacting Mr. P. Robert Alexander, Executive Director, New Mexico Livestock Board, 300 San Mateo NE Suite 1000, Albuquerque, NM 87108-1500, (505) 841-6161.

Interested parties may provide comment on the proposed rule amendments to 21.30.6.11 NMAC at the public hearing or may submit written comments, or both, to Mr. P. Robert Alexander, Executive Director, New Mexico Livestock Board, 300 San Mateo NE, Ste. 1000, Albuquerque, New Mexico 87108 or robert.alexander@state.nm.us, fax 505-841-6160. Written comments may also be submitted at the NMLB website at http:/www.nmlbonline.com. Written comments in any of the above formats must be received by close of business on March 27, 2018.

If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing or meeting, please contact the New Mexico Livestock Board at (505)841-6161 at least one week prior to the meeting or as soon as possible. Public documents, including the agenda and minutes, can be provided in various accessible formats. Please contact the New Mexico Livestock Board at (505)841-6161 if a summary or other type of accessible format is needed.

## REGULATION AND LICENSING DEPARTMENT
### CONSTRUCTION INDUSTRIES DIVISION

### NOTICE OF PUBLIC RULE HEARING

The Construction Industries Commission will convene a public hearing on proposed changes to 19.15.40 NMAC - NEW MEXICO LIQUIFIED PETROLEUM GAS STANDARD, Amending Sections 5,

14, 15, 20, 21, and 24. The hearing will be held before a hearing officer, at which time any interested person is invited to submit data, views or arguments on the proposed changes, either orally or in writing, and to examine witnesses testifying at the hearing.
The hearing is scheduled as follows: 9:00 a.m., March 28, 2018 at the New Mexico Regulation and Licensing Department (Toney Anaya Building – Hearing Room 2 on the 2nd Floor), located at 2550 Cerrillos Rd., Santa Fe, NM 87504.
Please Note: All persons wishing to participate in the public hearing remotely may do so telephonically dialing into:
Dial-in Number: (515) 739-1015
Meeting ID: 788-223-117
The proposed changes are as follows:
**19.15.40.5**
**EFFECTIVE DATE:** Amend to include new date

**19.15.40.14 PRINTED FORMS, AND FEES:**
**C**. (1) (b) amend section for installation of piping and appliances.

**19.15.40.15 LICENSE CLASSIFICTIONS, SCOPES AND FEES:**
**B**. amend section as to LP-3S allowable work.

**19.15.40.20 CONTAINERS AND INSTALLATIONS:**
**F**. (2) amend section for container protection.

**19.15.40.21 LP GAS CYLNIDER EXCHANGE INSTALLATIONS:**
**C**. amend section as to protection of cylinder exchange cabinets.

**19.15.40.24 STANDARDS:**
**A**. amend section to update code.
**B.** amend section to update code.
**C.** amend section to remove guide.
**D and E** amend to correct order.

Adoption of the amendments to Sections of 19.15.40 NMAC listed above, helps state and local jurisdictions, maintain minimum code requirements to provide a level of safety to protect building occupants. The adoption also reflects continual changes that protect life health and property. Sections 70-5-5 and 60-13-9 NMSA 1978 authorize the Commission and the Construction Industries Division (CID) to adopt rules to carry out the provisions of the Liquefied and Compressed Gases Act and the Construction Industries Licensing Act.

Interested persons may secure copies of the proposed changes by accessing the Construction Industries Division website (www.rld.state.nm.us/construction) or by request from the Santa Fe CID Office – Toney Anaya Building, 2550 Cerrillos Rd. Santa Fe, NM 87504. You may send written comments to: Construction Industries Division, P.O. Box 25101, Santa Fe, New Mexico 87504, Attention: Public Comments. Written comments may also be faxed to (505) 476-4702. All comments must be received no later than 5:00 p.m., on Friday, March 23, 2018. Written comments may also be submitted when appearing at the public hearing. All public comments and documentation will be entered into the record during the public rules hearing. If you require special accommodations to attend the hearing, please notify CID by phone, email, or fax, of such needs as soon as possible to ensure adequate accommodations. Telephone: (505) 269-6710. Email: clay.bailey@state.nm.us ; Fax No. (505) 476-4702.

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## REGULATION AND LICENSING DEPARTMENT
### FINANCIAL INSTITUTIONS DIVISION

**NOTICE OF PUBLIC HEARING ON PROPOSED RULEMAKING**
The Financial Institutions Division (FID) of the New Mexico Regulation and Licensing Department will convene a public hearing on proposed rule changes pursuant to §58-15-11 NMSA 1978 concerning Title 12 - TRADE, COMMERCE AND BANKING, CHAPTER 18 - LOAN COMPANIES.

The proposed changes are to the following rules:
Repeal the following rules:
- 12.18.2 NMAC - LENDERS' EXCHANGES.
- 12.18.5 NMAC - ANNUAL DATA REPORT FOR PAYDAY LOAN LENDERS.
- 12.18.6 NMAC - ANNUAL DATA REPORT FOR TITLE LOAN COMPANIES.

Amendments to the following rules:
- 12.18.3 NMAC - MANDATORY BROCHURE FOR SMALL LOAN BUSINESS, Amending Subsections A, C, D, E and F of Section 8
- 12.18.4 NMAC - MANDATORY SIGNAGE FOR ALL SMALL LOAN COMPANIES, Amending Sections 6 and 7 and Subsections A, C, D, F, E, G and H of Section 8.

Repeal and replace the following rules:
- 12.18.7 NMAC - TERMS AND CONDITIONS OF PAYDAY LOAN AGREEMENTS, Replaced by 12.18.7 NMAC - HEARING PROCEDURES FOR SMALL LOAN COMPANIES.
- 12.18.8 NMAC - LICENSING OF NONRESIDENT LENDERS, Replaced by 12.18.8 NMAC - LICENSING OF NONRESIDENT LENDERS.

Adoption of the following rules:
- 12.18.9 NMAC - REFUND ANTICIPATION LOANS.
- 12.18.10 NMAC - ELECTRONIC MEDIA REQUIREMENTS.

The purpose of the rule changes is to adopt requirements and correct inconsistencies to incorporate the provisions of 2017 House Bill 347 which amended provisions of the New Mexico Small Loan Act of 1955, the New Mexico Bank Installment Loan Act of 1959, and the Money, Interest, and Usury statute, concerning certain

types of loans in the state of New Mexico. The statutory changes made by 2017 House Bill 347 necessitate the amendment of existing rules concerning, but not limited to, signage and brochures required at licensed small loan company facilities, the repeal of rules related to certain loan products that are no longer permitted under statute, and the adoption of new rule provisions for administrative hearings under the Small Loan Act of 1955.

The hearing will be held before a hearing officer, at which time any interested person is invited to submit data, views or opinions on the proposed changes, orally or in writing.

**The hearing will be held at 1:30 p.m. on April 3, 2018** at the New Mexico Regulation and Licensing Department (Toney Anaya Building – Rio Grande Room on the 2nd Floor), located at 2550 Cerrillos Rd., Santa Fe, NM 87504.

Interested persons may secure copies of the proposed changes by accessing the FID website: www.rld.state.nm.us/financialinstitutions/ or by request from the Santa Fe FID Office - Toney Anaya Building, 2550 Cerrillos Rd. Santa Fe, NM 87504. You may send written comments to: Financial Institutions Division P.O. Box 25101, Santa Fe, New Mexico 87504, Attention: Public Comments. Written comments may also be faxed to (505) 476-4670. All comments must be received no later than 5:00 p.m., on April 2, 2018. All public comments and documentation will be entered into the record during the public rules hearing. If you require special accommodations to attend the hearing, please notify FID by phone, email, or fax, of such needs notifying us as soon as possible to ensure adequate accommodations. Telephone: (505) 476-4885. Email:maya.otero@state.nm.us; Fax No. (505) 476-4670.

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## SECRETARY OF STATE

### NOTICE OF RULE HEARING

The NM Secretary of State's Office ("Office") hereby gives notice that the Office will conduct a public hearing to obtain public input on the repeal of 1.10.10 NMAC, Ballot Position: Supreme Court or Court of Appeals and an amendment to sections 8 and 10 of 1.10.11 NMAC, Order of Offices on the Ballot.

The hearing is scheduled to occur on Friday, March 30, 2018 from 9:00 am to 11:00 am at the State Capitol Building, 490 Old Santa Fe Trail Room 321, Santa Fe, New Mexico.

Authority: Sections 1-2-1 and 1-10-8 NMSA 1978.

Purpose: The Secretary of State proposes to repeal 1.10.10 NMAC and amend relevant content from this rule into 1.10.11 NMAC for uniformity and readability to address the order of Supreme Court or Court of Appeals vacancies in the event that there are more than one to appear on the primary or general election ballot. Furthermore, a new section 10 is proposed for 1.10.11 NMAC to address the process of handling the possibility of an odd number of candidates for governor and lieutenant governor filing to appear on the primary or general election ballot to ensure compliance with the New Mexico State Constitution Article 5, Section 1.

Summary of full text: Relating to the order and appearance of the primary and general election ballot; establishing the process for ensuring compliance with the New Mexico State Constitution Article 5, Section 1, in which the governor and lieutenant governor shall be elected jointly by the casting by each voter of a single vote applicable to both offices during the general election.

Interested individuals may provide comments at the public hearing and/or submit written or electronic comments to Kari Fresquez, State Elections Director, via email at sos.rules@state.nm.us, fax (505)827-8081, or mail to Attn: Kari Fresquez - proposed rule, Secretary of State, 325 Don Gaspar, Suite 300, Santa Fe, NM 87501.

Written comments must be received no later than 5:00 pm on the Thursday prior to the first public hearing. However, the submission of written comments as soon as possible is encouraged. Persons may also submit written comments at the public hearing.

Copies of the proposed rule are available for download on the Office's website at http://www.sos.state.nm.us/ and available at the Office of the Secretary of State located at 325 Don Gaspar Suite 300, Santa Fe, NM 87501. A copy of the proposed rule may also be requested by contacting the Bureau of Elections at (505) 827-3600.

Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in the public hearing are asked to contact Ms. Fresquez at (505) 827-3600 as soon as possible to provide requested special accommodations.

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## SECRETARY OF STATE

### NOTICE OF RULE HEARING

The NM Secretary of State's Office ("Office") hereby gives notice that the Office will conduct a public hearing to obtain public input on an amendment to section 27 of 1.10.13 NMAC, CAMPAIGN FINANCE.

The hearing is scheduled to occur on Friday, March 30, 2018 from 9:00 am to 11:00 am at the State Capitol Building, 490 Old Santa Fe Trail Room 321, Santa Fe, New Mexico.

Authority: Section 1-19-26.2 authorizes the Secretary of State to adopt and promulgate rules and regulations to implement the

provisions of the Campaign Reporting Act [1-19-25 to 1-19-36 NMSA 1978].

Purpose: The purpose of the amendment is to correct and clarify portions of Section 27 of 1.10.13 relating to the handling of contribution limits collected during primary and general election reporting cycles in accordance with the Campaign Reporting Act.

Summary of full text: Relating to Campaign Finance; Guidance on primary and general election cycles for purposes of contribution limits.

Interested individuals may provide comments at the public hearing and/or submit written or electronic comments to Kari Fresquez, State Elections Director, via email at sos.rules@state.nm.us, fax (505)827-8081, or mail to Attn: Kari Fresquez – proposed rule, Secretary of State, 325 Don Gaspar, Suite 300, Santa Fe, NM 87501.

Written comments must be received no later than 5:00 pm on the Thursday prior to the first public hearing. However, the submission of written comments as soon as possible is encouraged. Persons may also submit written comments at the public hearing.

Copies of the proposed rule are available for download on the Office's website at http://www.sos.state.nm.us/ and available at the Office of the Secretary of State located at 325 Don Gaspar Suite 300, Santa Fe, NM 87501. A copy of the proposed rule may also be requested by contacting the Bureau of Elections at (505) 827-3600.

Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in the public hearing are asked to contact Ms. Fresquez at (505) 827-3600 as soon as possible to provide requested special accommodations.

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## SECRETARY OF STATE

### NOTICE OF RULEMAKING HEARING

**Public Notice:** The New Mexico Secretary of State's Office hereby gives notice that it will conduct a public hearing in Santa Fe at the State Capitol Building, 490 Old Santa Fe Trail, Room 321, Santa Fe, New Mexico 87501, on March 30, 2018, from 9:00 a.m. to 11:00 a.m. (MDT). The purpose of the public hearing is to receive public input on the proposed repeal and replace of 01.10.22 NMAC – Provisional Voting.

**Purpose:** The Help American Vote Act, PL 107-252, effective October 29, 2002, requires the casting of a provisional ballot in the following circumstances; a voter whose name does not appear on the roster at the polling place, county voter file, or a new voter who has not provided the required identification to. The Election Code also provides for the use of a provisional ballot qualification process in the instance of an affirmed challenge or when a replacement ballot for an absent voter is required. Most recently in 2017, the New Mexico Legislature adopted procedures specifying the use of a provisional ballot in the event of an emergency, as defined in Section 1-6-16.2, NMSA 1978. The proposed repeal and replacement of 01.10.22 NMAC, creates uniform criteria for the issuance and reporting of all provisional ballots and offers consistency in the qualification process and the counting and canvassing of the ballots for all county clerk offices. The revision also provides for the secrecy of a provisional voter's ballot during each stage of the election process, extending out through a recount or contest of the election and the ensuing requalification of the provisional ballots.

**Summary of full text:** The proposed changes relate to provisional voting in elections conducted under the NM Election Code. The changes define terms associated to provisional voting, and provide guidance on a wide range of topics including: provisional ballot issuance, procedures for precinct board members on the processing of provisional ballots, details of the provisional ballot qualification process conducted by the county clerk, notification standards to provisional voters regarding the status of their ballot and their right to an appeal hearing, and the counting and canvassing of qualified provisional ballots.

**Authority:** The Election Code, Article 2 NMSA 1978 defines the secretary of state as the chief election officer of the state and requires the secretary of state to prepare uniform instructions for the conduct of elections and registration matters. The Election Code, Section 1-6-5 mandates the secretary of state to establish procedures for the submittal, when required by federal law, of required voter identification with mailed-in absentee ballots. 1 The Election Code, Section 1-6-16.1 states that the secretary of state shall adopt rules deemed necessary to preserve the secrecy of the replacement absentee paper ballots. Per the Election Code, Section 1-12-25.2, the secretary of state shall provide a free access system, such as a toll-free telephone number or internet website that a voter who casts a provisional paper ballot may access to ascertain whether the voter's ballot was counted and, if the vote was not counted, the reason it was not counted. This section also requires the secretary of state to issue rules on how a voter may appeal the decision of their provisional ballot disqualification. The Election Code, Section 1-12-25.4 NMSA 1978 obligates the secretary of state to issue rules to ensure securing the secrecy of the provisional paper ballots, especially during canvassing, review or recounting, and protecting against fraud in the voting process.

**Public Comment.** Interested parties may provide comment on the proposed repeal and replacement of

this state rule at the public hearing or may submit written comments, or both, to Rebecca Martinez, Elections Administrator, New Mexico Secretary of State, 325 Don Gaspar Avenue, Santa Fe, New Mexico 87501, Suite 300, by electronic mail at sos.rules@state.nm.us or fax to (505) 827-8081. All written comments must be received no later than 5:00 p.m. (MDT) on the Thursday prior to the public hearing. The Secretary of State encourages the early submission of written comments. Persons may also submit written comments at the public hearing.

Copies of the proposed rule may be accessed through the New Mexico Secretary of State website at http://www.sos.state.nm.us/ at the Secretary of State's Office located at 325 Don Gaspar, Suite 300, Santa Fe NM 87501 or by contacting the Bureau of Elections at (505) 827-3600 during regular business hours.

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 Rebecca Martinez at (505) 827-3600 as soon as possible before the date set for the public hearing. The Secretary of State requires at least ten (10) calendar days advance notice to provide any special accommodations requested.

## SUPERINTENDENT OF INSURANCE

### NOTICE OF PROPOSED RULEMAKING

**NOTICE IS HEREBY GIVEN** that the Superintendent of Insurance ("Superintendent"), and the New Mexico Office of Superintendent of Insurance ("OSI"), pursuant to the New Mexico Insurance Code, Section 59A-1-1 *et seq.* NMSA 1978 ("Insurance Code"), proposes a new rule pertaining to creditor-placed insurance, removing OSI's contact information from Section 20 of 13.18.3 NMAC, and to provide contact information for the New Mexico FAIR Plan, and to remove references to LOTUS and Quattro pro as these software programs are obsolete. This new rule is to be codified in the New Mexico Administrative Code, 13.18.3 NMAC – Credit Insurance – Creditor-Placed Insurance.

The purpose of this rule is to establish guidelines within which creditor-placed insurance may be written in this state, to regulate rates, and to prohibit unfair practices in the transaction of creditor-placed insurance.

Statutory authority for promulgation of this rule is found at Sections 59A-2-9, 59A-12-10, 59A-16-14, 59A-16-18, 59A-17-6, 59A-17-16, 59A-17-28 and 59A-18-12 NMSA 1978.

The proposed rule may be found on the OSI website at http://www.osi.state.nm.us/, under the "Rulemaking" tab and is incorporated by reference into this NOPR. A copy of the full text of the proposed rule is available by electronic download from the OSI website or the New Mexico Sunshine portal, or by requesting a copy in person at the NM Office of Superintendent of Insurance, 1120 Paseo de Peralta, Santa Fe, NM 87501.

The Superintendent will hold a public comment hearing beginning at **9:30 a.m. on Friday, March 30, 2018**, at the Office of Superintendent of Insurance, Fourth Floor Conference Room, PERA Building, 1120 Paseo de Peralta, Santa Fe, New Mexico.

OSI staff, all insurers, licensees, insurance business entities, other persons transacting insurance business in New Mexico, and the members of the public are encouraged to provide comments or file any written proposals or comments according to the criteria and schedule set forth as follows: (a) oral comments will be accepted at the public hearing from any interested parties; (b) written statements, proposals or comments may be submitted for the record, in lieu of providing oral testimony at the hearing are due no later than **4:00 p.m. on Thursday March 29, 2018.**

Written responses may be submitted for the record following the hearing and are due no later than **4:00 pm on Friday, April 6, 2018.**

The Superintendent will consider all oral comments, and will review all timely submitted written comments and responses. The record shall be closed at **4:00 p.m. on Friday, April 6, 2018**.

Any person with a disability requiring special assistance in order to participate in a hearing should contact Melissa Martinez, at 505-476-0333 at least 48 hours prior to the commencement of the hearing.

Written comments, proposals, or responsive comments may be submitted via email to mariano.romero@state.nm.us or may be filed by sending original copies to:
OSI Records & Docketing, NM Office of Superintendent of Insurance
Attention: Mariano Romero, Room 331
1120 Paseo de Peralta, P.O. Box 1689, Santa Fe, NM 87504-1689
**Docket No. 18-00013-RULE-PC**

Only signed statements, proposals or comments will be accepted. Scanned or facsimile signatures or electronic signatures conforming to federal and state court requirements will be accepted with the understanding that if there is any dispute regarding a signature, OSI reserves the right to require that original signatures be provided to verify the electronic or facsimile signature. All filings must be received between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday except on state holidays. Any filings after 4:30 will be filed to the docket the next business day.

**DONE AND ORDERED** this 15th day of February, 2018.
**S/JOHN G. FRANCHINI**

## SUPERINTENDENT OF INSURANCE

### NOTICE OF PROPOSED RULEMAKING

**NOTICE IS HEREBY GIVEN** that the Superintendent of Insurance ("Superintendent"), and the New Mexico Office of Superintendent of Insurance ("OSI"), pursuant to the New Mexico Insurance Code, Section 59A-1-1 *et seq*. NMSA 1978 ("Insurance Code"), proposes an amended rule pertaining to credit for reinsurance requirements for all domestic insurers doing business in New Mexico, to be codified in the New Mexico Administrative Code, 13.9.18 NMAC – Life Insurance and Annuities – Use of Preferred Risk Mortality Tables.

The purpose of this amended rule is to allow, for policies issued on or after January 1, 2004 and prior to January 1, 2007, the use of the 2001 CSO preferred class structure mortality table instead of the 2001 CSO smoker or nonsmoker mortality table, subject to the Superintendent's consent. The proposed rule nonetheless prohibits the use of the 2001 CSO preferred class structure morality table for policies issued prior to January 1, 2007 in cases where an excessive or an inadequate reserve credit exits as a result of differences in the frequency of the mode of payment of reinsurance premiums versus policy premiums. The proposed rule also provides a separability section to 13.9.18 NMAC. This proposed rule adopts the 2009 version of the National Association of Insurance Commissioners Model Regulation #815: "Permitting the Recognition of Preferred Mortality Tables for Use in Determining Minimum Reserve Liabilities." Authority for this rule derives from the Superintendent's powers under Section 59A-2-9 NMSA 1978.

The proposed rule may be found on the OSI website at http://www.osi.state.nm.us/, under the "Rulemaking" tab and is incorporated by reference into this NOPR. A copy of the full text of the proposed rule is available by electronic download from the OSI website or the New Mexico Sunshine portal, or by requesting a copy in person at the NM Office of Superintendent of Insurance, 1120 Paseo de Peralta, Santa Fe, NM 87501.

The Superintendent will hold a public comment hearing beginning at **9:30 a.m. on Friday, March 30, 2018**, at the Office of Superintendent of Insurance, Fourth Floor Conference Room, PERA Building, 1120 Paseo de Peralta, Santa Fe, New Mexico.

OSI staff, all insurers, licensees, insurance business entities, other persons transacting insurance business in New Mexico, and the members of the public are encouraged to provide comments or file any written proposals or comments according to the criteria and schedule set forth as follows: (a) oral comments will be accepted at the public hearing from any interested parties; (b) written statements, proposals or comments may be submitted for the record, in lieu of providing oral testimony at the hearing are due no later than **4:00 p.m. on Thursday March 29, 2018.**

Written responses may be submitted for the record following the hearing and are due no later than **4:00 pm on Friday, April 6, 2018.** The Superintendent will consider all oral comments, and will review all timely submitted written comments and responses. The record shall be closed at **4:00 p.m. on Friday, April 6, 2018**. Any person with a disability requiring special assistance in order to participate in a hearing should contact Melissa Martinez, at 505-476-0333 at least 48 hours prior to the commencement of the hearing.

Written comments, proposals, or responsive comments may be submitted via email to mariano.romero@state.nm.us or may be filed by sending original copies to:
OSI Records & Docketing, NM Office of Superintendent of Insurance
Attention: Mariano Romero, Room 331
1120 Paseo de Peralta, P.O. Box 1689, Santa Fe, NM 87504-1689
**Docket No. 18-00011-RULE-PC**

Only signed statements, proposals or comments will be accepted. Scanned or facsimile signatures or electronic signatures conforming to federal and state court requirements will be accepted with the understanding that if there is any dispute regarding a signature, OSI reserves the right to require that original signatures be provided to verify the electronic or facsimile signature. All filings must be received between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday except on state holidays. Any filings after 4:30 will be filed to the docket the next business day.

**DONE AND ORDERED** this 15th day of February, 2018.
**S/JOHN G. FRANCHINI**

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## SUPERINTENDENT OF INSURANCE

### NOTICE OF PROPOSED RULEMAKING

**NOTICE IS HEREBY GIVEN** that the Superintendent of Insurance ("Superintendent"), and the New Mexico Office of Superintendent of Insurance ("OSI"), pursuant to the New Mexico Insurance Code, Section 59A-1-1 et seq. NMSA 1978 ("Insurance Code"), proposes a new rule pertaining to the valuation of life insurance policies for all issuers of life insurance policies in New Mexico, to be codified in the New Mexico Administrative Code, 13.9.13 NMAC – Life Insurance and Annuities – Valuation of Life Insurance Policies.

The purpose of this rule is to provide revised requirements for the general calculation of basic reserves and premium deficiency reserves for issuers of life insurance policies. The proposed rule also reorganizes the sectional housing of some provisions of Chapter 9 of Title 13 NMAC. This proposed rule adopts the 2009 version of the National Association

of Insurance Commissioners Model Regulation #830: "Valuation of Life Insurance Policies." This proposed rule, along with the 2014 amendments to Section 59A-20-31 NMSA 1978, are part of an initiative by the National Association of Insurance Commissioners to introduce a new method for calculating life insurance policy reserves. This method, called Principle-Based Reserving, replaces a formulaic approach with an approach that more closely reflects the risks of the complexity of life insurance products on the modern market.

Statutory authority for promulgation of this rule is found Sections 59A-2-8, 59A-2-9, 59A-8-5 and 59A-8-6 NMSA 1978.

The proposed rule may be found on the OSI website at http://www.osi.state.nm.us/, under the "Rulemaking" tab and is incorporated by reference into this NOPR. A copy of the full text of the proposed rule is available by electronic download from the OSI website or the New Mexico Sunshine portal, or by requesting a copy in person at the NM Office of Superintendent of Insurance, 1120 Paseo de Peralta, Santa Fe, NM 87501.

The Superintendent will hold a public comment hearing beginning at **9:30 a.m. on Friday, March 30, 2018**, at the Office of Superintendent of Insurance, Fourth Floor Conference Room, PERA Building, 1120 Paseo de Peralta, Santa Fe, New Mexico. Deputy Superintendent Robert Doucette will be the designated hearing examiner in this case.

OSI staff, all insurers, licensees, insurance business entities, other persons transacting insurance business in New Mexico, and the members of the public are encouraged to provide comments or file any written proposals or comments according to the criteria and schedule set forth as follows: (a) oral comments will be accepted at the public hearing from any interested parties; (b) written statements, proposals or comments may be submitted for the record, in lieu of providing oral testimony at the hearing are due no later than **4:00 p.m. on Thursday March 29, 2018.**

Written responses may be submitted for the record following the hearing and are due no later than **4:00 pm on Friday, April 6, 2018.** The Superintendent will consider all oral comments, and will review all timely submitted written comments and responses. The record shall be closed at **4:00 p.m. on Friday, April 6, 2018**. Any person with a disability requiring special assistance in order to participate in a hearing should contact Melissa Martinez, at 505-476-0333 at least 48 hours prior to the commencement of the hearing.

Written comments, proposals, or responsive comments may be submitted via email to mariano.romero@state.nm.us or may be filed by sending original copies to:
OSI Records & Docketing, NM Office of Superintendent of Insurance
Attention: Mariano Romero, Room 331
1120 Paseo de Peralta, P.O. Box 1689, Santa Fe, NM 87504-1689
**Docket No. 18-00012-RULE-LH**

Only signed statements, proposals or comments will be accepted. Scanned or facsimile signatures or electronic signatures conforming to federal and state court requirements will be accepted with the understanding that if there is any dispute regarding a signature, OSI reserves the right to require that original signatures be provided to verify the electronic or facsimile signature. All filings must be received between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday except on state holidays. Any filings after 4:30 will be filed to the docket the next business day.

**DONE AND ORDERED** this 15th day of February, 2018.
**S/JOHN G. FRANCHINI**

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## SUPERINTENDENT OF INSURANCE

### NOTICE OF PROPOSED RULEMAKING

**NOTICE IS HEREBY GIVEN** that the Superintendent of Insurance ("Superintendent"), and the New Mexico Office of Superintendent of Insurance ("OSI"), pursuant to the New Mexico Insurance Code, Section 59A-1-1 *et seq.* NMSA 1978 ("Insurance Code"), proposes a new rule pertaining to credit for reinsurance requirements to be codified in the New Mexico Administrative Code, 13.2.8 NMAC – Insurance Company Licensing and Operation – Credit For Reinsurance

The purpose of this rule is to implement the following rulemaking requirement contained in 2014 amendments in to Section 59A-7-11 NMSA 1978 as follows:

59A-7-11(B)(5)(c) NMSA 1978 "If the superintendent recognizes as qualified a jurisdiction that does not appear on the list of qualified jurisdictions, the superintendent shall provide thoroughly documented justification in accordance with criteria developed by the rule.";

59A-7-11(B)(5)(d) NMSA 1978 "The superintendent shall consider the financial strength ratings that were assigned by rating agencies deemed acceptable to the superintendent pursuant to rule and assign a rating to each certified reinsurer.";

59A-7-11(B)(5)(e) NMSA 1978 "A certified reinsurer shall secure obligations assumed from United States ceding insurers pursuant to this subsection at a level consistent with its rating, as specified in rules promulgated by the superintendent."

This proposed rule adopts the National Association of Insurance Commissioners (NAIC) 2012 version of the Credit for Reinsurance Model Regulation. This proposed rule along with the 2014 amendments to

59A-7-11 NMSA 1978 are part of a broad effort to modernize reinsurance regulation and to conform with the Nonadmitted and Reinsurance Reform Act component of Dodd-Frank. Statutory authority for promulgation of this rule is found at Section 59A-7-11 NMSA 1978.

The proposed rule may be found on the OSI website at http://www.osi.state.nm.us/, under the "Rulemaking" tab and is incorporated by reference into this NOPR. A copy of the full text of the proposed rule is available by electronic download from the OSI website or the New Mexico Sunshine portal, or by requesting a copy in person at the NM Office of Superintendent of Insurance, 1120 Paseo de Peralta, Santa Fe, NM 87501.

The Superintendent will hold a public comment hearing beginning at **9:30 a.m. on Friday, March 30, 2018**, at the Office of Superintendent of Insurance, Fourth Floor Conference Room, PERA Building, 1120 Paseo de Peralta, Santa Fe, New Mexico.

OSI staff, all insurers, licensees, insurance business entities, other persons transacting insurance business in New Mexico, and the members of the public are encouraged to provide comments or file any written proposals or comments according to the criteria and schedule set forth as follows: (a) oral comments will be accepted at the public hearing from any interested parties; (b) written statements, proposals or comments may be submitted for the record, in lieu of providing oral testimony at the hearing are due no later than **4:00 p.m. on Thursday March 29, 2018**.

Written responses may be submitted for the record following the hearing and are due no later than **4:00 pm on Friday, April 6, 2018**. The Superintendent will consider all oral comments, and will review all timely submitted written comments and responses.

The record shall be closed at **4:00 p.m. on Friday, April 6, 2018**. Any person with a disability requiring special assistance in order to participate in a hearing should contact Melissa Martinez, at 505-476-0333 at least 48 hours prior to the commencement of the hearing.

Written comments, proposals, or responsive comments may be submitted via email to mariano.romero@state.nm.us or may be filed by sending original copies to:
OSI Records & Docketing, NM Office of Superintendent of Insurance
Attention: Mariano Romero, Room 331
1120 Paseo de Peralta, P.O. Box 1689, Santa Fe, NM 87504-1689
**Docket No. 18-00009-RULE-PC**

Only signed statements, proposals or comments will be accepted. Scanned or facsimile signatures or electronic signatures conforming to federal and state court requirements will be accepted with the understanding that if there is any dispute regarding a signature, OSI reserves the right to require that original signatures be provided to verify the electronic or facsimile signature. All filings must be received between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday except on state holidays. Any filings after 4:30 will be filed to the docket the next business day.

**DONE AND ORDERED** this 15th day of February, 2018.
**S/JOHN G. FRANCHINI**

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## SUPERINTENDENT OF INSURANCE

### NOTICE OF PROPOSED RULEMAKING

**NOTICE IS HEREBY GIVEN** that the Superintendent of Insurance ("Superintendent"), and the New Mexico Office of Superintendent of Insurance ("OSI"), pursuant to the New Mexico Insurance Code, Section 59A-1-1 *et seq.* NMSA 1978 ("Insurance Code"), proposes an amended rule pertaining to actuarial opinion and memoranda for all life insurers and fraternal benefit societies doing business in New Mexico and for all life insurers and fraternal benefit societies that are authorized to reinsure life insurance, annuities, or accident and health insurance business in New Mexico to be codified in the New Mexico Administrative Code, 13.2.6. NMAC – Insurance Company Licensing and Operation – Actuarial Opinion and Memoranda.

The purpose of this amended rule is to provide examples of interim results that may be of significant concern to the appointed actuary when providing comments in the Regulatory Asset Adequacy Issues Summary. This proposed amended rule adopts the 2010 version of the National Association of Insurance Commissioners Model Regulation Act #822: "Actuarial Opinion and Memorandum." Statutory authority for this rule derives from the Superintendent's powers under Section 59A-2-9 NMSA 1978.

The proposed rule may be found on the OSI website at http://www.osi.state.nm.us/, under the "Rulemaking" tab and is incorporated by reference into this NOPR. A copy of the full text of the proposed amended rule is available by electronic download from the OSI website or the New Mexico Sunshine portal, or by requesting a copy in person at the NM Office of Superintendent of Insurance, 1120 Paseo de Peralta, Santa Fe, NM 87501.

The Superintendent will hold a public comment hearing beginning at **9:30 a.m. on Friday, March 30, 2018**, at the NM Office of Superintendent of Insurance, Fourth Floor Conference Room, PERA Building, 1120 Paseo de Peralta, Santa Fe, New Mexico.

OSI staff, all insurers, licensees, insurance business entities, other persons transacting insurance business in New Mexico, and the members of the public are encouraged to provide comments or file any written proposals or comments according to

the criteria and schedule set forth as follows: (a) oral comments will be accepted at the public hearing from any interested parties; (b) written statements, proposals or comments may be submitted for the record, in lieu of providing oral testimony at the hearing are due no later than **4:00 p.m. on Thursday March 29, 2018.**

Written responses may be submitted for the record following the hearing and are due no later than **4:00 pm on Friday, April 6, 2018.**

The Superintendent will consider all oral comments, and will review all timely submitted written comments and responses. The record shall be closed at **4:00 p.m. on Friday, April 6, 2018**.

Any person with a disability requiring special assistance in order to participate in a hearing should contact Melissa Martinez, at 505-476-0333 at least 48 hours prior to the commencement of the hearing.

Written comments, proposals, or responsive comments may be submitted via email to mariano.romero@state.nm.us or may be filed by sending original copies to:
OSI Records & Docketing, NM Office of Superintendent of Insurance
Attention: Mariano Romero, Room 331
1120 Paseo de Peralta, P.O. Box 1689, Santa Fe, NM 87504-1689
**Docket No. 18-00014-RULE-LH**

Only signed statements, proposals or comments will be accepted. Scanned or facsimile signatures or electronic signatures conforming to federal and state court requirements will be accepted with the understanding that if there is any dispute regarding a signature, OSI reserves the right to require that original signatures be provided to verify the electronic or facsimile signature. All filings must be received between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday except on state holidays. Any filings after 4:30 will be filed to the docket the next business day.

**DONE AND ORDERED** this 15th day of February, 2018.
**S/JOHN G. FRANCHINI**

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## SUPERINTENDENT OF INSURANCE

### NOTICE OF PROPOSED RULEMAKING

**NOTICE IS HEREBY GIVEN** that the Superintendent of Insurance ("Superintendent"), and the New Mexico Office of Superintendent of Insurance ("OSI"), pursuant to the New Mexico Insurance Code, Section 59A-1-1 *et seq*. NMSA 1978 ("Insurance Code"), proposes a new rule pertaining to insurance holding company requirements for all domestic insurers doing business in New Mexico, to be codified in the New Mexico Administrative Code, 13.2.2 NMAC – Insurance Company Licensing and Operation – Insurance Holding Companies.

The purpose of this rule is to introduce a pre-acquisition notification form regarding the potential competitive impact of a proposed merger or acquisition by a non-domiciliary insurer doing business in New Mexico or by a domestic insurer, to introduce an enterprise risk report form, and to require that additional statements regarding cost-sharing arrangements be included in the form for prior notice of a transaction.

Statutory authority for promulgation of this rule derives from the superintendent's powers under Section 59A-2-9 NMSA 1978, as well as from the 2014 amendments to Section 59A-37-20(A)(2) NMSA 1978.

The proposed rule may be found on the OSI website at http://www.osi.state.nm.us/, under the "Rulemaking" tab and is incorporated by reference into this NOPR. A copy of the full text of the proposed rule is available by electronic download from the OSI website or the New Mexico Sunshine portal, or by requesting a copy in person at the NM Office of Superintendent of Insurance, 1120 Paseo de Peralta, Santa Fe, NM 87501.

The Superintendent will hold a public comment hearing beginning at **9:30 a.m. on Friday, March 30, 2018**, at the Office of Superintendent of Insurance, Fourth Floor Conference Room, PERA Building, 1120 Paseo de Peralta, Santa Fe, New Mexico.

OSI staff, all insurers, licensees, insurance business entities, other persons transacting insurance business in New Mexico, and the members of the public are encouraged to provide comments or file any written proposals or comments according to the criteria and schedule set forth as follows: (a) oral comments will be accepted at the public hearing from any interested parties; (b) written statements, proposals or comments may be submitted for the record, in lieu of providing oral testimony at the hearing are due no later than **4:00 p.m. on Thursday March 29, 2018.**

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OSI Records & Docketing, NM Office of Superintendent of Insurance
Attention: Mariano Romero, Room 331

1120 Paseo de Peralta, P.O. Box 1689,
Santa Fe, NM 87504-1689
**Docket No. 18-00010-RULE-PC**

Only signed statements, proposals or comments will be accepted. Scanned or facsimile signatures or electronic signatures conforming to federal and state court requirements will be accepted with the understanding that if there is any dispute regarding a signature, OSI reserves the right to require that original signatures be provided to verify the electronic or facsimile signature. All filings must be received between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday except on state holidays. Any filings after 4:30 will be filed to the docket the next business day.

**DONE AND ORDERED** this 15th day of February, 2018.
**S/JOHN G. FRANCHINI**

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## End of Notices of Rulemaking and Proposed Rules

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# Adopted Rules

**Effective Date and Validity of Rule Filings**

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

## AUDITOR, OFFICE OF THE

The Office of the State Auditor reviewed at its 12/14/2017 hearing, to repeal its rule 2.2.2 NMAC, Audits of Governmental Entities - Requirements For Contracting Audits of Agencies (filed 3/1/2017) and replace it with 2.2.2 NMAC, Audits of Governmental Entities - Requirements For Contracting Audits of Agencies, adopted 02/15/2018 and effective 2/27/2018.

## AUDITOR, OFFICE OF THE

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

**2.2.2.1 ISSUING AGENCY:** Office of the State Auditor.
[2.2.2.1 NMAC - Rp, 2.2.2.1 NMAC, 2/27/2018]

**2.2.2.2 SCOPE:** Agencies as defined by the Audit Act and independent public accountants interested in contracting to perform audit services for those agencies.
[2.2.2.2 NMAC - Rp, 2.2.2.2 NMAC, 2/27/2018]

**2.2.2.3 STATUTORY AUTHORITY:** Audit Act, Sections 12-6-1 to 12-6-14 NMSA 1978.
[2.2.2.3 NMAC - Rp, 2.2.2.3 NMAC, 2/27/2018]

**2.2.2.4 DURATION:** Permanent.
[2.2.2.4 NMAC - Rp, 2.2.2.4 NMAC, 2/27/2018]

**2.2.2.5 EFFECTIVE DATE:** February 27, 2018, unless a later date is cited at the end of a section.
[2.2.2.5 NMAC - Rp, 2.2.2.5 NMAC, 2/27/2018]

**2.2.2.6 OBJECTIVE:** The objective is to establish policies, procedures, rules and requirements for contracting and conducting financial audits, special audits, attestation engagements, performance audits, and forensic audits of governmental agencies of the state of New Mexico.
[2.2.2.6 NMAC - Rp, 2.2.2.6 NMAC, 2/27/2018]

**2.2.2.7 DEFINITIONS:**

**A. "AAG GAS"** means AICPA Audit and Accounting Guide - Government auditing standards and Single Audits (latest edition).

**B. "AAG SLV"** means AICPA Audit and Accounting Guide - State and Local Governments (latest edition).

**C. "Agency"** means any department, institution, board, bureau, court, commission, district or committee of the government of the state, including district courts, magistrate or metropolitan courts, district attorneys and charitable institutions for which appropriations are made by the legislature; any political subdivision of the state, created under either general or special act, that receives or expends public money from whatever source derived, including counties, county institutions, boards, bureaus or commissions; municipalities; drainage, conservancy, irrigation, or other special districts; and school districts; any entity or instrumentality of the state specifically provided for by law, including the New Mexico finance authority, the New Mexico mortgage finance authority, the New Mexico lottery authority and every office or officer of any entity listed in Paragraphs (1) through (3) of Subsection A of Section 12-6-2 NMSA 1978.

**D. "Audit"** means both annual financial and compliance audits and agreed upon procedures, unless otherwise specified.

**E. "Auditor"** means independent public accountant.

**F. "AICPA"** means American institute of certified public accountants.

**G. "AU-C"** means U.S. auditing standards-AICPA (Clarified)

**H. "AUP"** means agreed upon procedures.

**I. "CPA"** means certified public accountant.

**J. "CPE"** means continuing professional education.

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

**L. "ERB"** means the New Mexico education retirement board.

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

**N. "FDIC"** means federal deposit insurance corporation.

**O. "FDS"** means financial data schedule.

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

**Q. "GAGAS"** means the most recent revision of government auditing standards issued by the comptroller general of the

United States (yellow book).

**R. "GAO"** means the government accountability office, a division of the OSA.

**S. "GASB"** means governmental accounting standards board.

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

**U. "GSD"** means the New Mexico general services department.

**V. "GRT"** means gross receipts tax.

**W. "HED"** means the New Mexico higher education department.

**X. "HUD"** means United States (US) department of housing and urban development.

**Y. "IPA"** means independent public accountant.

**Z. "IRC"** means internal revenue code.

**AA. "LGD"** means the local government division of department of finance and administration (DFA).

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

**CC. "NCUSIF"** means national credit union shares insurance fund.

**DD. "NMAC"** means New Mexico administrative code.

**EE. "NMSA"** means New Mexico statutes annotated.

**FF. "Office" or "OSA"** means the New Mexico office of the state auditor.

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

**HH. "PED"** means the New Mexico public education department.

**II. "PERA"** means the New Mexico public employee retirement association.

**JJ. "PHA"** means public housing authority.

**KK. "REAC"** means real estate assessment center.

**LL. "REC"** means regional education cooperative.

**MM. "RSI"** means required supplementary information.

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

**OO. "SHARE"** means statewide human resources accounting and management reporting system.

**PP. "SI"** means supplementary information.

**QQ. "State auditor"** may refer to either the elected state auditor of the state of New Mexico, or personnel of his office designated by him.

**RR. "STO"** means state treasurer's office.

**SS. "Tier"** is established based on the amount of each local public body's annual revenue, pursuant to Section 12-6-3 NMSA 1978 and Section 2.2.2.16 NMAC.

**TT. "UFRS"** means uniform financial reporting standards.

**UU. "Uniform guidance"** Title 2 U.S. Code of Federal Regulations Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

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

[2.2.2.7 NMAC - Rp, 2.2.2.7 NMAC, 2/27/2018]

**2.2.2.8 THE PROCUREMENT AND AUDIT PROCESS:**

**A. Firm profiles:** For an IPA to be included on the state auditor's list of approved firms, an IPA shall submit a firm profile online annually on January 5th or on the next business day, in accordance with the guidelines set forth herein. The OSA shall review each firm profile for compliance with the requirements set forth in this rule. IPAs shall notify the state auditor of changes to the firm profile as information becomes available. The state auditor shall approve contracts only with IPAs who have *submitted a complete and correct* firm profile that has been approved by the OSA, and who have complied with all the requirements of this rule, including but not limited to:

**(1)** Subsection A of Section 2.2.2.14 NMAC, continuing professional education requirements for all staff that the firm will use on any New Mexico governmental engagements;

**(2)** listed professional service contracts the firm entered into;

**(3)** for IPAs who have audited agencies under this rule in the past, they shall have previously complied with: Section 2.2.2.9 NMAC, Report Due Dates, including notifying the state auditor regarding late audit reports and Section 2.2.2.13 NMAC, review of audit reports and audit documentation.

**B. List of approved firms:** The state auditor shall maintain a list of independent public accounting (IPA) firms that are approved and eligible to compete for audit contracts and agreed upon procedures engagements with agencies. The state auditor's list of approved firms shall be reviewed and updated on an annual basis. An IPA on the list of approved firms is approved to perform government audits until the list of approved firms is published for the following year; provided that the OSA may restrict firms at any time for failure to submit firm profile updates timely. An IPA that is included on the state auditor's list of approved firms for the first time shall be subject to an OSA quality control review of the IPA's working papers. This review shall be conducted as soon as the documentation completion date, as defined by AU-C Section 230, has passed (60 days after the report release date). The state auditor shall approve contracts only with IPA firms that have submitted a complete and correct firm profile complying with all the requirements set forth in this rule and that has been approved by the OSA. The OSA shall inform all IPAs whose firm profiles were submitted by the due date whether they are on the list of approved firms and shall publish the list of approved

firms concurrent with notification to government agencies to begin the procurement process to obtain an IPA to conduct the agency's annual financial audit.

**C. Disqualified firms:** An IPA firm shall not be included on the list of approved firms if any of the following applies to that IPA:

**(1)** the firm received a peer review rating of "failed";

**(2)** the firm does not have a current New Mexico firm permit to practice;

**(3)** the firm profile does not include at least one certified public accountant with a current CPA certificate who has met the GAGAS CPE requirements described at Subsection A of Section 2.2.2.14 NMAC, to perform GAGAS audits;

**(4)** the IPA has been restricted in the past and has not demonstrated improvement (this includes submitting excessively deficient audit reports or having excessively deficient workpapers);

**(5)** the IPA made false statements in their firm profile or any other official communication with the OSA that were misleading enough to merit disqualification; or

**(6)** any other reason determined by the state auditor to serve the interest of the state of New Mexico.

**D. Restriction:**

**(1)** IPAs may be placed on restriction based on the OSA's review of the firm profile and deficiency considerations as described below. Restriction may take the form of limiting either the type of engagements or the number of audit contracts, or both, that the IPA may hold. The OSA may impose a corrective action plan associated with the restriction. The restriction remains in place until the OSA notifies the IPA that the restriction has been modified or removed. The deficiency considerations include, but are not necessarily limited to:

**(a)** failure to submit reports in accordance with report due dates provided in Subsection A of Section 2.2.2.9 NMAC, or the terms of their individual agency contract(s);

**(b)** failure to submit late report notification letters in accordance with Subsection A of Section 2.2.2.9 NMAC;

**(c)** failure to comply with this rule;

**(d)** poor quality reports as determined by the OSA;

**(e)** poor quality working papers as determined by the OSA;

**(f)** a peer review rating of "pass with deficiencies" with the deficiencies being related to governmental audits;

**(g)** failure to contract through the OSA for New Mexico governmental audits or agreed upon procedures engagements;

**(h)** failure to inform agency in prior years that the IPA is restricted;

**(i)** failure to comply with the confidentiality requirements of this rule;

**(j)** failure to invite the state auditor or his designee to engagement entrance conferences, progress meetings or exit conferences after receipt of related notification from the OSA;

**(k)** failure to comply with OSA referrals or requests in a timely manner;

**(l)** suspension or debarment by the U.S. general services administration;

**(m)** false statements in the IPA's firm profile or any other official communication with the OSA;

**(n)** failure to cooperate timely with requests from successor IPAs, such as reviewing workpapers; or

**(o)** any other reason determined by the state auditor to serve the interest of the state of New Mexico.

**(2)** The OSA shall notify any IPA that it proposes to place under restriction. If the proposed restriction includes a limitation on the number of engagements that an IPA is eligible to hold, the IPA shall not submit proposals or bids to new agencies if the number of multi-year proposals the IPA possesses at the time of restriction is equal to or exceeds the limitation on the number of engagements for which the IPA is restricted.

**(3)** An IPA under restriction is responsible for informing the agency whether the restricted IPA is eligible to engage in a proposed contract.

**(4)** If an agency or local public body submits an unsigned contract to the OSA for an IPA that was ineligible to perform that contract due to its restriction, the OSA shall reject the unsigned contract.

**E. Procedures for imposition of restrictions:**

**(1)** The state auditor may place an IPA under restriction in accordance with Subsection D of Section 2.2.2.8 NMAC.

**(a)** The state auditor or his designee shall cause written notice of the restriction to be sent by email and certified mail, return receipt requested, to the IPA, which shall take effect as of the date of the letter of restriction. The letter shall contain the following information:

**(i)** the nature of the restriction;

**(ii)** the conditions of the restriction;

**(iii)** the reasons for the restriction;

**(iv)** the action to place the IPA on restriction is brought pursuant to Subsection A of Section 12-6-3 NMSA 1978 and these regulations;

**(v)** the IPA may request, in writing, reconsideration of the proposed contract restriction which shall be received by the OSA within 15 calendar days from the day the IPA

receives the letter of restriction; and

**(vi)** the e-mail or street address where the IPA's written request for reconsideration shall be delivered, and the name of the person to whom the request shall be sent.

**(b)** The IPA's written request for reconsideration shall include sufficient facts to rebut on a point for point basis each deficiency noted in the OSA's letter of restriction. The IPA may request an opportunity to present in person its written request for reconsideration and provide supplemental argument as to why the OSA's determination should be modified or withdrawn. The IPA may be represented by an attorney licensed to practice law in the state of New Mexico.

**(c)** The IPA shall have forfeited its opportunity to request reconsideration of the restriction(s) if the OSA does not receive a written request for reconsideration within 15 calendar days of the date of receipt of the letter of restriction. The state auditor may grant, for good cause shown, an extension of the time an IPA has to submit a request for reconsideration.

**(2)** The OSA shall review an IPA's request for reconsideration and shall make a determination on reconsideration within 15 calendar days of receiving the request unless the IPA has asked to present its request for reconsideration in person, in which case the OSA shall make a determination within 15 calendar days from the date of the personal meeting. The OSA may uphold, modify or withdraw its restriction pursuant to its review of the IPA's request for reconsideration, and shall notify the IPA of its final decision in writing which shall be sent to the IPA via email and certified mail, return receipt requested.

**F. Procedures to obtain professional services from an IPA:** Concurrent with publication of the list of approved firms, the OSA shall authorize agencies to select an IPA to perform their audit or agreed-upon procedures engagement. Agencies are prohibited from beginning the process of procuring IPA services until they receive the OSA authorization. Agencies that wish to begin the IPA procurement process prior to receiving OSA authorization may request an exception, however any such exceptions granted by OSA are subject to changes in the final audit rule applicable to the audit and changes in restrictions to, or disqualifications of, IPAs. The notification shall inform the agency that it shall consult its prospective IPA to determine whether the prospective IPA has been restricted by the OSA as to the type of engagement or number of contracts it is eligible to perform. Agencies that may be eligible for the tiered system shall complete the evaluation described in Subsection B of Section 2.2.2.16 NMAC. Agencies that receive and expend federal awards shall follow the uniform guidance procurement requirements from 2 CFR 200.317 to 200.326 and 200.509, and shall also incorporate applicable guidance from the following requirements. Agencies shall comply with the following procedures to obtain professional services from an IPA for an audit or agreed-upon procedures engagement.

**(1)** Upon receipt of written authorization from the OSA to proceed, and at no time before then unless OSA has granted an exception, the agency shall identify all elements or services to be solicited pursuant to this rule and conduct a procurement that includes each applicable element of the annual financial audit or agreed upon procedures engagement.

**(2)** Quotations or proposals for annual financial audits shall contain each of the following elements:

**(a)** financial statement audit;

**(b)** federal single audit (if applicable);

**(c)** financial statement preparation so long as the IPA has considered any threat to independence and mitigated it;

**(d)** other non-audit services (if applicable and allowed by current government auditing standards); and

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

**(3)** The agency is encouraged to request multiple year proposals for audit and AUP services (not to exceed three years), however the term of the contract shall be for one year only. The parties shall enter a new audit contract each year. The agency is responsible for procuring IPA services in accordance with all applicable laws and regulations which may include, but are not limited to, the State Procurement Code (Chapter 13, Article 1 NMSA 1978) or equivalent home rule procurement provisions; GSD Rule, Section 1.4.1 NMAC, Procurement Code Regulations, if applicable; DFA Rule, Section 2.40.2 NMAC, Governing the Approval of Contracts for the Purchase of Professional Services; Uniform Guidance; and Section 13-1-191.1 NMSA 1978 relating to campaign contribution disclosure forms. In the event that either of the parties to the contract elects not to contract for all of the years contemplated by a multiple year proposal, or the state auditor disapproves the contract, the agency shall use the procedures described above to procure services from a different IPA.

**(4)** If the agency is a component of a primary government, the agency's procurement for audit services shall include the AU-C 600 (group audits) requirements for the IPA to communicate and cooperate with the group engagement partner and team, and the primary government. This requirement applies to agencies and universities that are part of the statewide CAFR, other component units of the statewide CAFR and other component units of any primary government that use a different audit firm from the primary government's audit firm. Costs for

the IPA to cooperate with the group engagement partner and team, and the primary government, caused by the requirements of AU-C 600 (group audit) may not be charged in addition to the cost of the engagement, as the OSA views this in the same manner as compliance with any other applicable standard.

**(5)** Agencies are encouraged to include representatives of the offices of separately elected officials such as county treasurers, and component units such as charter schools and housing authorities, in the IPA selection process. As part of their evaluation process, the OSA recommends that agencies consider the following when selecting an IPA:

**(a)** responsiveness to the request for proposal (the firm's integrity, record of past performance, financial and technical resources);

**(b)** relevant experience, availability of staff with professional qualifications and technical abilities;

**(c)** results of the firm's peer and external quality control reviews; and

**(d)** weighting the price criteria less than fifteen percent of the total criteria taken into consideration by the evaluation process or selection committee.

Upon the OSA's request, the agency shall make accessible to the OSA all of the IPA procurement and selection documentation.

**(6)** After selecting an IPA, each agency shall enter the appropriate requested information online on the OSA-connect website (www.osa-app.org). In order to do this, the agency shall register on OSA-Connect and obtain a user-specified password. The agency's user shall then use OSA-Connect to enter information necessary for the contract and for the OSA's evaluation of the IPA selection. After the agency enters the information, the OSA-Connect system generates a draft contract containing the information entered. The agency shall submit to the OSA for approval a copy of the unsigned draft contract by following the instructions on OSA-Connect. Note that the IPA recommendation form no longer exists as a separate document, because OSA-Connect gathers and delivers to the OSA the information historically submitted on the IPA recommendation form.

**(7)** The OSA shall notify the agency as to the OSA's approval or rejection of the selected IPA and contract. The OSA's review of audit contracts does not include evaluation of compliance with any state or local procurement laws or regulations; each agency is responsible for its own compliance with applicable procurement laws, regulations or policies. After the agency receives notification of approval of the selected IPA and contract from the OSA, the agency is responsible for getting the contract signed and sent to any oversight agencies, including DFA, for approval (if applicable). The OSA shall not physically sign the contract. After the agency obtains all the required signature and approvals of the contract, the agency shall submit an electronic portable document format (PDF) copy of the final signed contract to the OSA by electronic mail to: *reports@osa.state.nm.us*.

**(8)** The agency shall deliver the unsigned contract generated by OSA-Connect to the OSA by the due date shown below. In the event that the due date falls on a weekend or holiday, the due date shall be the next business day. If the unsigned contract is not submitted to the state auditor by these due dates, the IPA may, according to professional judgment, include a finding of non-compliance with Subsection F of Section 2.2.2.8 NMAC in the audit report or agreed-upon procedures report.

**(a)** Regional education cooperatives, cooperative educational services, independent housing authorities, hospitals and special hospital districts: April 15;

**(b)** school districts, counties, and higher education: May 1;

**(c)** incorporated counties (of which Los Alamos is the only one), local workforce investment boards and local public bodies that do not qualify for the tiered system: May 15;

**(d)** councils of governments, district courts, district attorneys, state agencies and the state of New Mexico CAFR: June 1;

**(e)** local public bodies that qualify for the tiered system pursuant to Subsections A and B of Section 2.2.2.16 NMAC: July 1;

**(f)** agencies with a fiscal year end other than June 30 shall use a due date 30 days before the end of the fiscal year; and

**(g)** component units that are being separately audited: on the primary government's due date.

**(h)** Charter schools that are chartered by the PED and agencies that are subject to oversight by the HED have the additional requirement of submitting their audit contract to PED or HED for approval (Section 12-6-14 NMSA 1978).

**(i)** In the event the agency's unsigned contract is submitted to the OSA, but is not approved by the state auditor, the state auditor shall promptly communicate the decision, including the reason(s) for disapproval, to the agency, at which time the agency shall promptly submit a contract with a different IPA using OSA-Connect. This process shall continue until the state auditor approves an unsigned contract. During this process, whenever an unsigned contract is not approved by the state auditor, the agency may submit a written request to the state auditor for reconsideration of the disapproval. The agency shall submit its request no later than 15 calendar days after the date of the disapproval and shall include documentation in support of its IPA selection. If warranted, after review

of the request, the state auditor may hold an informal meeting to discuss the request. The state auditor shall set the meeting in a timely manner with consideration given to the agency's circumstances.

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

**(10)** If the agency fails to submit an unsigned contract by the due date set forth in this rule, or, if no due date is applicable, within 60 days of notification from the state auditor to engage an IPA, the state auditor may conduct the audit or select the IPA for that agency. The reasonable costs of such an audit shall be borne by the agency audited unless otherwise exempted pursuant to Section 12-6-4 NMSA 1978.

**(11)** In selecting an IPA for an agency pursuant to Subsection F of Section 2.2.2.8 NMAC the state auditor shall at a minimum consider the following factors, but may consider other factors in the state auditor's discretion that serve the best interest of the state of New Mexico and the agency:

**(a)** the IPA shall be drawn from the list of approved IPAs maintained by the state auditor;

**(b)** an IPA subject to restriction pursuant to Subsection D of Section 2.2.2.8 NMAC, is ineligible to be selected under this paragraph;

**(c)** whether the IPA has conducted one or more audits of similar government agencies;

**(d)** the physical proximity of the IPA to the government agency to be audited;

**(e)** whether the resources and expertise of the IPA are consistent with the audit requirements of the government agency to be audited;

**(f)** the IPA's cost profile, including examination of the IPA's fee schedule and blended rates;

**(g)** the state auditor shall not select an IPA in which a conflict of interest exists with the agency or that may be otherwise impaired, or that is not in the best interest of the state of New Mexico.

**(12)** The state auditor shall consider, at a minimum, the following factors when considering which agencies shall be subject to the state auditor's selection of an IPA:

**(a)** whether agency is demonstrating progress in its own efforts to select an IPA;

**(b)** whether the agency has funds to pay for the audit;

**(c)** whether the agency is on the state auditor's "at risk" list;

**(d)** whether the agency is complying with the requirements imposed on it by virtue of being on the state auditor's "at risk" list;

**(e)** whether the agency has failed to timely submit its e-mailed draft unsigned contract copy in accordance with the audit rule on one or more occasions;

**(f)** whether the agency has failed to timely submit its annual financial audit report in accordance with the audit rule due dates on one or more occasions.

**(13)** The state auditor may appoint a committee of the state auditor's staff to make recommendations for the state auditor's final determination as to which IPAs shall be selected for each government agency subject to the discretion of the state auditor.

**(14)** Upon selection of an IPA to audit a government agency subject to the discretion of the state auditor, the state auditor shall notify the agency in writing regarding the selection of an IPA to conduct its audit. The notification letter shall include, at a minimum, the following statements:

**(a)** the agency was notified by the state auditor to select an IPA to perform its audit or agreed upon procedures engagement;

**(b)** 60 days or more have passed since such notification, or the applicable due date in this rule has passed, and the agency failed to deliver its draft contract in accordance with this subsection;

**(c)** pursuant to Subsection A of Section 12-6-14 NMSA 1978, the state auditor is selecting the IPA for the agency;

**(d)** delay in completion of the agency's audit is contrary to the best interest of the state and the agency, and threatens the functioning of government and the preservation or protection of property;

**(e)** in accordance with Section 12-6-4 NMSA 1978, the reasonable costs of such an audit shall be borne by the agency unless otherwise exempted;

**(f)** selection of the IPA is final, and the agency shall immediately take appropriate measures to procure the services of the selected IPA.

**G. State auditor approval/disapproval of unsigned contract:** The state auditor shall use discretion and may not approve:

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

**(a)** lack of experience of the IPA;

**(b)** failure to meet the auditor rotation requirements as follows:

**(i)** the IPA is prohibited from conducting the agency audit or agreed upon procedures engagement for a period of two years because the IPA already conducted those services for that agency for a period of six consecutive years;

**(ii)**

if firm A purchases the stock or assets of firm B, or if firm B merges into firm A with firm A being the surviving firm, firm A shall not be affected for purposes of the auditor rotation requirement; the auditor rotation clock shall continue to run without interruption for firm B's audit contracts, despite the fact that such audit contracts may be issued by firm A after the purchase or merger. Because of the impact of firm purchases and mergers on IPA independence the OSA may evaluate historical mergers when applying this section;

**(c)** lack of competence or staff availability;

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

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

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

**(g)** lack of compliance with the procurement code, the audit act, or this rule;

**(h)** the agency giving too much consideration to the price of the IPA's response to the request for bids or request for proposals in relation to other evaluation criteria;

**(i)** newness of the IPA to the state auditor's list of approved firm;

**(j)** noncompliance with the requirements of Section 12-6-3 NMSA 1978 the audit act by the agency for previous fiscal years; or

**(k)** any other reason determined by the state auditor to be in the best interest of the state of New Mexico.

**(2)** Audit contracts or agreed-upon procedures contracts of an IPA that has:

**(a)** breached a prior-year contract;

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

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

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

**(e)** performed non-audit services under a separate contract for services that may be disallowed by GAGAS independence standards;

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

**(g)** impaired independence during an engagement;

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

**(i)** not adhered to external quality control review standards as defined by GAGAS and Section 2.2.2.14 NMAC;

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

**(k)** released the audit report or agreed upon procedures report to the agency, local public body or the public before the audit release letter or the OSA letter releasing the agreed upon procedures report was received from the OSA;

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

**(m)** failed to submit a completed firm profile as required by Subsection A of Section 2.2.2.8 NMAC or failed to include all staff in the firm profile who would be working on the firm's engagements;

**(n)** reached the limit of contracts to which the state auditor restricted the IPA;

**(o)** failed to respond to communications from the OSA or engagement clients within a reasonable amount of time; or

**(p)** otherwise, in the opinion of the state auditor, the IPA was unfit to be awarded a contract.

**(3)** An audit or agreed-upon procedures contract for an IPA received by the OSA which the state auditor decides to perform himself with or without the assistance of an IPA, and pursuant to Section 12-6-3 NMSA 1978, even if the agency or local public body was previously designated for audit or agreed upon procedures to be performed by an IPA.

**H. Audit contract requirements:** The agency shall use the appropriate audit or agreed upon procedures engagement contract form provided by the OSA through the OSA-connect website at www.osa-app.org. The OSA may provide audit or agreed-upon procedures engagement contract forms to the agency via facsimile or U.S. mail if specifically requested by the agency. Only contract forms provided by the state auditor shall be accepted and shall:

**(1)** be completed and submitted in its unsigned form by the due date indicated at Subsection F of Section 2.2.2.8 NMAC;

**(2)** for all agencies whose contracts are approved through the DFA's contracts review bureau, have the IPA's combined reporting system (CRS) number verified by the taxation and revenue department (TRD) after approval by the state auditor; and

**(3)** in the compensation section of the contract, include the dollar amount that applies to each element of the contracted procedures that shall be performed;

**(4)** if the agency requires the IPA to provide additional services outside the scope of work described in the standard

audit or agreed upon procedures contract form provided through the OSA-connect website, the additional services shall be described in detail in the "other provisions section" of the contract; if the additional services required by the "other provisions" section of the contract cause a significant change in the scope of the audit, then the contract amendment provisions of Subsection N of Section 2.2.2.8 NMAC shall apply.

**I. Professional liability insurance:** The IPA shall maintain professional liability insurance covering any error or omission committed during the term of the contract. The IPA shall provide proof of such insurance to the state auditor with the firm profile. The amount maintained should be commensurate with the risk assumed. The IPA shall provide to the state auditor, prior to expiration, updated insurance information.

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

**K. Subcontractor requirements:**

**(1)** Audit firms that have only one individual qualified to supervise a GAGAS audit and issue the related audit report pursuant to Section 61-28B-17 NMSA 1978, and GAGAS Paragraph 3.76 shall submit with the firm profile, a completed contingency subcontractor form that is dated to be effective until the date the next firm profile shall be submitted. The form shall indicate which IPA on the state auditor's current list of approved IPA's shall complete the IPA's audits in the event the one individual with the qualifications described above becomes incapacitated and unable to complete the audit. See the related contingency subcontractor form available at www.osanm.org. The OSA shall not approve audit contracts for such a firm without the required contingency subcontractor form.

**(2)** In the event an IPA chooses to use a subcontractor to assist the IPA in working on a specific audit, then the IPA shall obtain the prior written approval of the state auditor to subcontract a portion of the audit work. The IPA may subcontract only with IPAs who have submitted a completed and approved firm profile to the state auditor as required in Subsection A of Section 2.2.2.8 NMAC. Subcontractors are subject to an independence analysis, which may include the IPA rotation requirements of Subsection G of Section 2.2.2.8 NMAC. "Technical review contracts" are considered subcontracting and are subject to the requirements of this section. The audit contract shall specify subcontractor responsibility, who shall sign the report(s), and how the subcontractor shall be paid. For additional information see the subcontract work section of the OSA website.

**L. IPA independence:** IPAs shall maintain independence with respect to their client agencies in accordance with the requirements of *government auditing standards*, December 2011 revision, issued by the US-GAO (GAGAS 3.02-3.59).

**(1)** An IPA who performs the agency's annual financial audit shall not enter into any special audit or non-audit service contract with the respective agency without the prior written approval of the state auditor. The exception to this requirement is an engagement that costs one thousand dollars ($1,000) and less (exclusive of gross receipts tax) for client assistance with responses to IRS and other regulators. Requests for approval of professional service contracts shall be submitted to the OSA with the signed agreement. The OSA shall review the requests and respond to the agency and the IPA within 30 calendar days of receipt. The following documentation shall be submitted to the OSA for review and approval.

**(a)** The professional services contract shall be submitted to the state auditor for review and approval after it has been signed by the agency and the IPA. The contract shall include the contract fee, start and completion date, and the specific scope of services to be performed by the IPA.

**(b)** For non-audit services, include the auditor's documentation of:

**(i)** whether management has the ability to effectively oversee the non-audit service pursuant to GAGAS 3.34;

**(ii)** the documented assurance from the entity that management shall assume all management responsibilities, oversee the services by designating an individual, preferably within senior management, who possesses suitable skill, knowledge, or experience; evaluate the adequacy and results of the services performed; and accept responsibility for the results of the services pursuant to GAGAS 3.37;

**(iii)** the auditor's establishment and documentation (engagement letter) of the auditor's understanding with the entity's management or those charged with governance of the objectives of the non-audit services, the services to be performed, audited entity's acceptance of its responsibilities, the auditor's responsibilities, and any limitations of the non-audit service, pursuant to GAGAS 3.39; and

**(iv)** the auditor's consideration of significant threats (if applicable) to independence that have been eliminated or reduced to an acceptable level through the application of additional safeguards, and a description of those safeguards.

**(c)** Upon completion of the non-audit services, the IPA shall provide the state auditor with a copy of any report submitted to the agency. Such reports are not subject to OSA review and release procedures unless Section 2.2.2.15 NMAC requires such review and release procedures.

**(2)** An IPA

may not enter into any type of fraud-related engagement (this includes waste and abuse related engagements) with a New Mexico governmental agency without first obtaining the prior written approval of the state auditor. This requirement applies both when the IPA is the annual auditor approved by OSA and when the IPA is not the agency's annual auditor. See Section 2.2.2.15 NMAC for the requirements to submit such reports to the OSA for review and release. If the proposed engagement is not related to fraud, waste or abuse and is therefore not subject to Section 2.2.2.15 NMAC, then prior written approval by the state auditor is not required when the IPA is not the agency's annual auditor. However, a copy of the contract that is unrelated to fraud and a copy of any report resulting from such a contract shall be submitted to the OSA when requested by the OSA.

**(3)** The state auditor shall not approve any contract for an agency's annual auditor to perform non-audit services that are management responsibilities as provided in GAGAS 3.36. Nor shall the state auditor approve any contract for an agency's annual auditor to perform services that always impair the auditor's independence pursuant to GAGAS 3.50, 3.53, 3.54, 3.56, 3.57, and 3.58.

**M. Progress Payments:** The state auditor shall approve progress and final payments for the annual audit contract as follows:

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

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

**(3)** Progress payments up to seventy percent do not require state auditor approval provided that the agency certifies the receipt of services before any payments are made to the IPA. The agency shall monitor audit progress and make progress payments only up to the percentage that the audit is completed. If requested by the state auditor, the agency or the IPA shall provide a copy of the approved invoices and progress billing(s). Progress payments of seventy percent to ninety percent require state auditor approval after being approved by the agency. When component unit audits are part of a primary government's audit contract, requests for progress payments on the component unit audit(s) shall be included within the primary government's request for progress payment approval. In this situation, the OSA shall not process separate progress payment approvals submitted by the component unit.

**(4)** The state auditor may limit progress payments allowed to be made without state auditor approval for an IPA whose previous audits were submitted after the due date specified in Subsection A of Section 2.2.2.9 NMAC to only the first fifty percent of the total fee.

**(5)** Section 12-6-14 NMSA 1978 (contract audits) provides that final payment under an audit contract may be made by the agency to the IPA only after the state auditor has determined, in writing, that the audit has been made in a competent manner in accordance with contract provisions and this rule. The state auditor's determination with respect to final payment shall be stated in the letter accompanying the release of the report to the agency. In no circumstance may the total billed by the IPA under the audit contract exceed the total contract amount, as amended if applicable. Further, as the compensation section of the contract shall include the dollar amount that applies to each element of the contracted procedures that shall be performed, if certain procedures, such as a single audit, are determined to be unnecessary and are not performed, the IPA may not bill the agency for these services. Final payment to the IPA by the agency prior to review and release of the audit report by the state auditor is considered a violation of Section 12-6-14 NMSA 1978 and this rule and shall be reported as an audit finding in the audit report of the agency. If this statute is violated, the IPA may be removed from the state auditor's list of approved auditors.

**N. Contract amendment requirements:**

**(1)** Contract amendments to contracts for audit services, agreed upon procedures services, or non-audit services may be submitted to the OSA regarding executed contracts. Contracts may not be amended after they expire. The contract should be amended prior to the additional work being performed or as soon as practicable thereafter. Any amendments to contracts shall be made on the contract amendment form available at www.saonm.org. The OSA's review of audit contracts and amendments does not include evaluation of compliance with the state procurement code or other applicable requirements. Although the parties may amend the delivery dates in a contract, audit report regulatory due dates cannot be modified by amendment. The OSA's review of audit contract amendments does not include evaluation of compliance with any state or local procurement laws or regulations; each agency is responsible for its own compliance with applicable procurement laws, regulations or policies.

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

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

**(b)** how the work to be performed relates to the scope of work outlined in the original contract.

**(3)** Since annual financial audit contracts

are fixed-price contracts, contract amendments for fee increases shall only be approved for extraordinary circumstances, reasons determined by the state auditor to be in the best interest of the state of New Mexico, or a significant change in the scope of an audit. For example, if an audit contract did not include a federal single audit, a contract amendment shall be approved if a single audit is required. Other examples of significant changes in the scope of an audit include: the addition of a new program, function or individual fund that is material to the government-wide financial statements; the addition of a component unit; and the addition of special procedures required by this rule, a regulatory body or a local, state or federal grantor. Contract amendments shall not be approved to perform additional procedures to achieve an unmodified opinion. The state auditor shall also consider the auditor independence requirements of Subsection L of Section 2.2.2.8 NMAC when reviewing contract amendments for approval. Requests for contract amendments shall be submitted to the OSA with the signed contract amendment. The OSA shall review the requests and respond to the agency and the IPA within 30 calendar days of receipt.

**(4)** If a proposed contract amendment is rejected for lack of adequate information, the IPA and agency may submit a corrected version for reconsideration.

**O. Termination of audit contract requirements:**

**(1)** The state auditor may terminate an audit contract to be performed by an IPA after determining that the audit has been unduly delayed, or for any other reason, and perform the audit entirely or partially with IPAs contracted by the OSA (consistent with the October 6, 1993, stipulated order Vigil v. King, No. SF 92-1487(C). The notice of termination of the contract shall be in writing.

**(2)** If the agency or IPA terminate the audit or agreed upon procedures engagement contract pursuant to the termination paragraph of the contract, the OSA shall be notified of the termination immediately. The party sending out the termination notification letter shall simultaneously send a copy of the termination notification letter to the OSA with an appropriate cover letter, addressed to the state auditor.

**(a)** The agency is responsible for procuring the services of a new IPA in accordance with all applicable laws and regulations, and this rule.

**(b)** The unsigned contract for the newly procured IPA shall be submitted to the OSA within 30 calendar days of the date of the termination notification letter.

**(c)** As indicated in Subsection A of Section 2.2.2.9 NMAC, the state auditor shall not grant extensions of time to the established regulatory due dates.

**(d)** If the IPA does not expect to deliver the engagement report by the regulatory due date, the IPA shall submit a written notification letter to the state auditor and oversight agency as required by Subsection A of Section 2.2.2.9 NMAC or Subsection G of Section 2.2.2.16 NMAC.

[2.2.2.8 NMAC - Rp, 2.2.2.8 NMAC 2/27/2018]

**2.2.2.9 REPORT DUE DATES:**

**A. Report due dates:** The IPA shall deliver the organized and bound annual financial audit report to the state auditor by 5:00 p.m. on the date specified in the audit contract or send it postmarked by the due date. IPAs and agencies are encouraged to perform interim work as necessary and appropriate to meet the following due dates.

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

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

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

**(c)** higher education, state agencies not specifically named elsewhere in this Subsection , district courts, district attorneys, the New Mexico finance authority, the New Mexico lottery authority, and other agencies with June 30 fiscal year-ends that are reported as component units in the state of New Mexico comprehensive annual financial report: November 1;

**(d)** school districts and the state of New Mexico component appropriation funds (state general fund): November 15;

**(e)** the PED, the state investment council, and the three post-employment benefit agencies (PERA, ERB and the retiree health care authority): the Wednesday before Thanksgiving day;

**(f)** counties, incorporated counties (of which Los Alamos is the only one), workforce investment boards, councils of governments, and the New Mexico mortgage finance authority: December 1;

**(g)** local public bodies including municipalities: December 15;

**(h)** the state of New Mexico comprehensive annual financial report (CAFR): December 31;

**(i)** the ERB, PERA and retiree health care authority schedules of employer allocations reports and related employer guides required by SubSections Z and DD of Section 2.2.2.10 NMAC: June 15;

**(j)** agencies with a fiscal year-end other than June 30 shall submit the audit report no later than *five months after the fiscal year-end*;

**(k)** regarding component unit reports (e.g., housing authorities, charter schools, hospitals, foundations, etc.), all separate audit reports prepared by an auditor that is different from the primary government's auditor, are *due fifteen days before the primary*

*government's audit report is due*, unless some other applicable due date requires the report to be submitted earlier;

**(l)** any agency that requires its report to be released by December 31st for any reason (bonding, GFOA, etc.): the earlier of its agency due date or December 1; and

**(m)** late audit or agreed upon procedures reports of any agency (not performed in the current reporting period): not more than six months after the date the contract was executed.

**(2)** If an audit report is not delivered on time to the state auditor, the auditor shall include this instance of non-compliance with Subsection A of Section 2.2.2.9 NMAC as an audit finding in the audit report. This requirement is not negotiable. If appropriate, the finding may also be reported as a significant deficiency or material weakness in the operation the agency's internal controls over financial reporting pursuant to AU-C 265.

**(3)** An organized bound hard copy of the report shall be submitted for review by the OSA with the following: copy of the signed management representation letter and a copy of the completed state auditor report review guide (available at www.saonm.org). A report shall not be considered submitted to the OSA for the purpose of meeting the due date until a copy of the signed management representation letter and the completed report review guide are also submitted to the OSA. All separate reports prepared for component units shall also be submitted to the OSA for review, along with a copy of the management representation letter, and a completed report review guide for each separate audit report. A separate component unit report shall not be considered submitted to the OSA for the purpose of meeting the due date until a copy of the signed management representation letter and the completed report review guide are also submitted to the OSA. If a due date falls on a weekend or holiday, or if the OSA is closed due to inclement weather, the audit report is due the following business day by 5:00 p.m. If the report is mailed to the state auditor, it shall be postmarked no later than the due date to be considered filed by the due date. If the due date falls on a weekend or holiday the audit report shall be postmarked by the following business day.

**(4)** AU-C 700.41 requires the auditor's report to be dated after audit evidence supporting the opinion has been obtained and reviewed, the financial statements have been prepared and the management representation letter has been signed. AU-C 580.20 requires the management representation letter to be dated the same date as the independent auditor's report.

**(5)** As soon as the auditor becomes aware that circumstances exist that will make an agency's audit report be submitted after the applicable due date provided in Subsection A of Section 2.2.2.9 NMAC, the auditor shall notify the state auditor in writing. This notification shall consist of a letter, not an email. However, a scanned version of the official letter sent via email is acceptable. A copy of the letter shall be sent to the legislative finance committee and any applicable oversight agency: PED, FCD, LGD, or HED. There shall be a separate notification for each late audit report. The notification shall include a specific explanation regarding why the report will be late, when the IPA expects to submit the report and a concurring signature by a duly authorized representative of the agency. If the IPA is going to miss the expected report submission date, then the IPA shall send a revised notification letter. In the event the contract was signed after the report due date, the notification letter shall still be submitted to the OSA explaining the reason the audit report will be submitted after the report due date. The late report notification letter is not required if the report was submitted to the OSA for review by the due date, and then rejected by the OSA, making the report late when resubmitted. Reports resubmitted to the OSA with changes of the IPA's opinion after the report due date shall be considered late and a late audit finding shall be included in the audit report.

**B. Delivery and release of the audit report:**

**(1)** All audit reports (and all separate reports of component units, if applicable) shall be organized, bound and paginated. The OSA does not accept facsimile or e-mailed versions of the audit reports for initial review. The IPA shall deliver to the state auditor a hard copy of the audit report for review by 5:00 p.m. on the day the report is due. Reports postmarked by the due date shall be considered received by the due date. Unfinished or excessively deficient reports shall not satisfy this requirement; such reports shall be rejected and returned to the IPA and the OSA may take action in accordance with Subsection C of Section 2.2.2.13 NMAC. When the OSA rejects and returns a substandard audit report to the IPA, the OSA shall consider the audit report late if the corrected report is not resubmitted by the due date. The IPA shall also report a finding for the late audit report in the audit report. The firm shall submit an electronic version of the corrected rejected report for OSA review. The name of the electronic file shall be "corrected rejected report" followed by the agency name and fiscal year.

**(2)** Before initial submission, the IPA shall review the report using the appropriate report review guide available on the OSA's website. The report review guide shall reference applicable page numbers in the audit report. The audit manager or person responsible for the IPA's quality control system shall either complete the report review guide or sign off as having reviewed it. All questions in the guide shall be answered, and the reviewer shall sign and date the last page of the guide. If the review guide is not accurately completed or incomplete, the report shall not be accepted.

**(3)** IPAs are encouraged to deliver completed audit reports before the due date. The OSA shall review all audit reports submitted by the report due date before reviewing reports that are submitted after the report due date. Once the review of the report is completed pursuant to Subsection A of Section 2.2.2.13 NMAC, and any OSA comments have been addressed by the IPA, the OSA shall indicate to the IPA that the report is ready to print. After the OSA issues the "*ok to print*" communication for the audit report, the OSA shall authorize the IPA to submit the corrected report with the following items to the OSA within five business days; an electronic searchable version of the audit report labeled "final", in PDF format, an electronic excel version of the summary of findings report, an electronic excel version of the vendor schedule, an electronic excel version of the completed fund balance form, an electronic excel version of the GASBS 77 disclosure template, if applicable, an electronic excel version of the indigent care schedules for hospitals, if applicable, and an electronic excel version of the schedule of asset management costs for investing agencies, if applicable (all available at www.saonm.org). The OSA shall not release the report until the searchable electronic PDF version of the report and all required electronic excel schedules are received by the OSA. The electronic file containing the final audit report shall:

**(a)** be created and saved as a PDF document in a single PDF file format (simply naming the file using a PDF extension .pdf does not by itself create a PDF file);

**(b)** be version 5.0 or newer;

**(c)** not exceed 10 megabyte (MB) per file submitted (contact the OSA to request an exception if necessary);

**(d)** have all security settings like self-sign security, user passwords, or permissions removed or deactivated so the OSA is not prevented from opening, viewing, or printing the file;

**(e)** not contain any embedded scripts or executables, including sound or movie (multimedia) objects;

**(f)** have a file name that ends with .pdf;

**(g)** be free of worms, viruses or other malicious content (a file with such content shall be deleted by the OSA);

**(h)** be "flattened" into a single layer file prior to submission;

**(i)** not contain any active hypertext links, or any internal/external links (although it is permissible for the file to textually reference a URL as a disabled link);

**(j)** be saved at 300 dots per inch (DPI) (lower DPI makes the file hard to read and higher DPI makes the file too large);

**(k)** have a name that starts with "final version," followed by the name of the agency and the fiscal year; and

**(l)** be searchable.

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

**(5)** After the release of a report, the OSA shall provide DFA and the legislative finance committee with notification that the report is available on the OSA website.

**(6)** If an audit report is reissued pursuant to AU-C 560, subsequent events and subsequently discovered facts, or AAG GAS 13.29-.30 for uniform guidance compliance reports, the reissued audit report shall be submitted to the OSA with a cover letter addressed to the state auditor. The cover letter shall explain that:

**(a)** the attached report is a "reissued" report;

**(b)** the circumstances that caused the reissuance; and

**(c)** a summary of the changes that appear in the reissued report. The OSA shall subject the reissued report to the report review process and upon completion of that report review process, shall issue a "release letter." The contents of the reissued audit report are subject to the confidentiality requirements described in Subsection M of Section 2.2.2.10 NMAC. Agency management and the IPA are responsible for ensuring that the latest version of the report is provided to each recipient of the prior version of the report. The OSA shall notify the appropriate oversight agencies regarding the updated report on the OSA website.

**(7)** If changes to a released audit report are submitted to the OSA, and the changes do not rise to the level of requiring a reissued report, the IPA shall submit a cover letter addressed to the agency, with a copy to the state auditor, which includes the following minimum elements:

**(a)** a statement that the changes did not rise to the level of requiring a reissued report;

**(b)** a description of the circumstances that caused the resubmitted updated report; and

**(c)** a summary of the changes that appear in the resubmitted updated report compared to the prior released report. Agency management and the IPA are responsible for ensuring that the latest version of the resubmitted report is provided to each recipient of the prior version of the report. The OSA shall notify the appropriate oversight agencies regarding the updated report on the OSA website.

**C. Required status reports:** For an agency that has failed to submit audit or agreed-upon procedures reports as required by this rule, and has therefore been designated as "at risk" due to late reports, the state auditor requires the agency to submit written status reports to the OSA on each March 15, June 15, September 15, and December 15 that the agency is not in compliance with this rule. Status reports are not required for agencies that are included on the "at risk" list solely due to an adverse or disclaimed independent auditor's opinion. The status report shall be signed by a member of the agency's governing authority, a designee of the governing authority or a member of the agency's top management. If the agency has a contract with an IPA to conduct the audit or perform the agreed upon procedures engagement, the agency must send the IPA a copy of the quarterly status report. IPAs engaged to audit or perform agreed upon procedures engagements for agencies with late reports are responsible for assisting these agencies in complying with the reporting requirements of this section. Failure to do so shall be noted by the OSA and taken in to account during the IPA Firm Profile evaluation process. At a minimum, the quarterly written status report shall include:

**(1)** a detailed explanation of the agency's efforts to complete and submit its audit or agreed-upon procedures;

**(2)** the current status of any ongoing audit or agreed-upon procedures work;

**(3)** any obstacles encountered by the agency in completing its audit or agreed-upon procedures; and

**(4)** a projected completion date for the financial audit or agreed-upon procedures report.

[2.2.2.9 NMAC - Rp, 2 2.2.9 NMAC, 2/27/2018]

**2.2.2.10 GENERAL CRITERIA:**

**A. Scope of annual financial audit**:

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

**(a)** The primary government shall determine whether an agency that is a separate legal entity from the primary government is a component unit of the primary government as defined by GASBS 14, 39, 61, and 80 (as amended). The flowchart at GASBS 61.68 may be useful in making this determination. The primary government shall notify all other agencies determined to be component units by September 15 of the subsequent fiscal year. Failure to meet this due date results in a compliance finding. All agencies that meet the criteria to be a component unit of the primary government shall be included with the audited financial statements of the primary government by discrete presentation unless otherwise approved by the state auditor. An exemption shall be requested by the primary government, in writing, from the state auditor in order to present a component unit as other than a discrete component unit. The request for an exemption shall include a detailed explanation, conclusion and supporting documentation justifying the request for blended component unit presentation. Documentation of the state auditor's approval of the blended component unit presentation shall accompany the bound hard copy of the report submitted to OSA for review. Component units are reported using the government financial reporting format if they have one or more of the characteristics described at AAG SLV 1.01. If a component unit does not qualify to be reported using the governmental format, that fact shall be explained in the notes to the financial statements (summary of significant accounting policies: financial reporting entity).

**(b)** If a primary government has no component units, that fact shall be disclosed in the notes to the financial statements (summary of significant accounting policies: financial reporting entity). If the primary government has component units that are not included in the financial statements due to materiality, that fact shall also be disclosed in the notes. However, if the primary government is a state agency, department, board, public institution of higher education, public post-secondary educational institution, county, municipality or public school district, Section 6-5A-1 NMSA 1978 requires all 501(c)3 component unit organizations with a gross annual income in excess of two hundred fifty thousand dollars (250,000) to be audited annually. This statutory requirement does not set a universal materiality threshold for purposes of the performing audits subject to this rule.

**(c)** The state auditor requires component unit(s) to be audited by the same audit firm that audits the primary government (except for public housing authority component units that are statutorily exempt from this requirement, and the statewide CAFR). Requests for exemption from this requirement shall be submitted in writing by the primary government to the state auditor. If the request to use a different auditor for the component unit is approved in writing by the state auditor, the following requirements shall be met:

**(i)** the IPAs of the primary government and all component units shall consider and comply with the requirements of AU-C 600;

**(ii)** the group engagement partner shall agree that the group engagement team will be able to obtain sufficient appropriate audit evidence through the use of the group engagement team's work or use of the work of the component auditors (AU-C 600.15);

**(iii)** the component unit auditor selected shall appear on the OSA list of approved IPAs;

**(iv)** all bid and auditor selection processes shall comply with the requirements of

this rule;

**(v)** the OSA standard contract form shall be used by both the primary government and the component unit;

**(vi)** the primary government, the primary engagement partner, management of the component unit, and the component unit auditor shall all coordinate their efforts to ensure that the audit reports of the component unit and the primary government are submitted by the applicable due dates;

**(vii)** all component unit findings shall be disclosed in the primary government's audit report (except the statewide CAFR which shall include only component unit findings that are significant to the state as a whole); and

**(viii)** any separately issued component unit financial statements and associated auditors' reports shall be submitted to the state auditor by the due date in Subsection A of Section 2.2.2.9 NMAC for the review process described in Subsection A of Section 2.2.2.13 NMAC.

**(d)** With the exception of the statewide CAFR, the following SI pertaining to component units for which separately issued financial statements are not available shall be audited and opined on as illustrated in AAG SLV 16.103 example A-15: financial statements for each of the component unit's major funds, combining and individual fund financial statements for all of the component unit's non-major funds, and budgetary comparison statements for the component unit's general fund and major special revenue funds that have legally adopted annual budgets (AAG SLV 3.22).

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

**(a)** The level of planning materiality described at AAG SLV 4.72-4.73 and exhibit 4.1 shall be used. Planning materiality for component units is at the individual component unit level.

**(b)** The scope of the audit includes the following statements and disclosures which the auditor shall audit and give an opinion on. The basic financial statements (as defined by GASB and displayed in AAG SLV exhibit 4.1) consisting of:

**(i)** the governmental activities, the business-type activities, and the aggregate discretely presented component units;

**(ii)** each major fund and the aggregate remaining fund information;

**(iii)** budgetary comparison statements for the general fund and major special revenue funds that have legally adopted annual budgets (when budget information is available on the same fund structure basis as the GAAP fund structure, the state auditor requires that the budgetary comparison statements be included as part of the basic financial statements consistent with GASBS 34 fn. 53, as amended, and AAG SLV 11.13); and

**(iv)** the related notes to the financial statements.

**(c)** Budgetary comparison statements for the general fund and major special revenue funds presented on a fund, organization, or program structure basis because the budgetary information is not available on the GAAP fund structure basis for those funds shall be presented as RSI pursuant to GASBS 41.

**(d)** The auditor shall apply procedures and report in the auditor's report on the following RSI (if applicable) pursuant to AU-C 730:

**(i)** management's discussion and analysis (GASBS 34.8-.11);

**(ii)** RSI data required by GASBS 67 and 68 for defined benefit pension plans;

**(iii)** RSI schedules required by GASBS 43 and 74 for postemployment benefit plans other than pension plans;

**(iv)** RSI schedules required by GASBS 45 and 75 regarding employer accounting and financial reporting for postemployment benefits other than pensions; and

**(v)** infrastructure modified approach schedules derived from asset management systems (GASBS 34.132-133).

**(e)** The audit engagement and audit contract compensation include an AU-C 725 opinion on the SI schedules presented in the audit report. The auditor shall subject the information on the SI schedules to the procedures required by AU-C 725. The auditor shall report on the remaining SI in an other-matter paragraph following the opinion paragraph in the auditor's report on the financial statements pursuant to AU-C 725. With the exception of the statewide CAFR, the following SI schedules are required to be included in the AU-C 725 opinion if the schedules are applicable to the agency:

**(i)** primary government combining and individual fund financial statements for all non-major funds (GASBS 34.383);

**(ii)** the schedule of expenditures of federal awards required by uniform guidance;

**(iii)** the schedule of pledged collateral required by Subsection P of Section 2.2.2.10 NMAC;

**(iv)** the schedule of changes in assets and liabilities for agency funds required by Subsection X of Section 2.2.2.10 NMAC;

**(v)** the financial data schedule (FDS) of housing authorities pursuant to Subsection B of 2.2.2.12 NMAC;

**(vi)** the school district schedule of cash reconciliation required by Subsection C of 2.2.2.12 NMAC. In addition, the school district schedule of cash

reconciliation SI shall be subjected to audit procedures that ensure the cash per the schedule reconciles to the PED reports as required by Subsection C of 2.2.2.12 NMAC;

**(vii)** the indigent care schedules for hospitals pursuant to Subsection F of 2.2.2.12 NMAC; and

**(viii)** any other SI schedule required by this rule.

**(f)** The agency shall prepare a schedule of vendors using the form and instructions available on www.saonm.org, for *procurements* exceeding sixty thousand dollars ($60,000) (excluding gross receipts tax) that occurred during the audited fiscal year, that includes the following information: request for bid or request for proposal number; type of procurement, for example, request for proposal (RFP), sole source, etc.; the names and physical addresses of all vendors that responded to requests for bids or requests for proposals during the fiscal year; whether each vendor received the award; dollar amount of the awarded contract; dollar amount of any contract amendment during the fiscal year that caused a previously awarded contract to exceed sixty thousand dollars ($60,000) (excluding gross receipts tax); whether each responding vendor was an in-state vendor or an out-of-state vendor (based on the statutory definition); if the vendor was in-state and chose the veterans' preference instead of the in-state preference (this is n/a for federal funds); and a short description of the scope of work. The schedule shall include all contracts totaling over sixty thousand dollars ($60,000) (excluding gross receipts tax) regardless of whether related expenditures exceeded sixty thousand dollars ($60,000) during the fiscal year and regardless of procurement method. Exclude information on a multi-year procurement that occurred in a prior year unless there was a contract amendment during the current fiscal year that caused the previously existing contract to exceed sixty thousand dollars ($60,000) for the first time. Exclude procurements that agencies performed based on statewide pricing agreements obtained by general services department (GSD) or cooperative educational services from the schedule. However, agencies like GSD and cooperative educational services that perform procurement services for other agencies that result in price agreements shall disclose all their procurements in their vendor schedules in their own audit reports, including procurements that resulted in price agreements. The IPA shall submit an electronic excel version of the vendor schedule using the form provided by the OSA with the final PDF version of the audit report as required by Subsection B of Section 2.2.2.9 NMAC. The GAO may aggregate, analyze and publish vendor schedule information.

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

**(1)** the most recent revision of GAGAS issued by the United States government accountability office;

**(2)** U.S. auditing standards-AICPA (clarified);

**(3)** uniform administrative requirements, cost principles, and audit requirements for federal awards (uniform guidance);

**(4)** AICPA audit and accounting guide, government auditing standards and single audits, (AAG GAS) latest edition;

**(5)** AICPA audit and accounting guide, state and local governments (AAG SLV) latest edition; and

**(6)** 2.2.2 NMAC, requirements for contracting and conducting audits of agencies, latest edition.

**C. Financial statements and notes to the financial statements:** The financial statements and notes to the financial statements shall be prepared in accordance with accounting principles generally accepted in the United States of America. Governmental accounting principles are identified in the government accounting standards board (GASB) codification, latest edition. IPAs shall follow interpretations, technical bulletins, and concept statements issued by GASB, other applicable pronouncements, and GASB illustrations and trends for financial statements. In addition to the revenue classifications required by NCGAS 1.110, the OSA requires that the statement of revenues, expenditures, and changes in fund balance - governmental funds include classifications for intergovernmental revenue from federal sources and intergovernmental revenue from state sources, as applicable.

**D. Requirements for preparation of financial statements:**

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

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

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

**(4)** If the IPA prepared the financial statements for management's review and approval, including documenting independence safeguards as required by GAGAS 3.59, the fact that the auditor prepared the financial statements shall be disclosed on the exit conference page of the audit report. If the IPA prepared the financial statements,

the auditor shall determine whether an audit finding shall be reported in accordance with AU-C 265.

**E. Audit documentation requirements:**

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

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

**(3)** The audit documentation of a predecessor IPA shall be made available to a successor IPA in accordance with AU-C 510.07 and 510.A3 to 510. A11, and the predecessor auditor's contract. Any photocopy costs incurred shall be borne by the requestor. If the successor IPA finds that the predecessor IPA's audit documentation does not comply with applicable auditing standards and this rule, or does not support the financial data presented in the audit report, the successor IPA shall notify the state auditor in writing specifying all deficiencies. If the state auditor determines that the nature of deficiencies indicate that the audit was not performed in accordance with auditing or accounting standards generally accepted in the United States of America and related laws, rules and regulations and this rule, any or all of the following actions may be taken:

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

**(b)** the state auditor may deny or limit the issuance of future audit contracts; or

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

**F. Auditor communication requirements:**

**(1)** The IPA shall comply with the requirements for auditor communication with those charged with governance as set forth in AU-C 260 and GAGAS 4.03 and 4.04.

**(2)** After the agency and IPA have an approved audit contract in place, the IPA shall prepare a written and dated engagement letter during the planning stage of a financial audit, addressed to the appropriate officials of the agency, keeping a copy of the signed letter as part of the audit documentation. In addition to meeting the requirements of the AICPA professional standards and the GAGAS requirements, the engagement letter shall state that the engagement shall be performed in accordance with Section 2.2.2 NMAC.

**(3)** The audit engagement letter shall not include any fee contingencies. The engagement letter shall not be interpreted as amending the contract. Nothing in the engagement letter can impact or change the amount of compensation for the audit services. Only a contract amendment submitted pursuant to Subsection N of Section 2.2.2.8 NMAC may amend the amount of compensation for the audit services set forth in the contract.

**(4)** A separate engagement letter and list of client prepared documents is required for each fiscal year audited. The IPA shall provide a copy of the engagement letter and list of client prepared documents immediately upon request from the state auditor.

**(5)** The IPA shall conduct an audit entrance conference with the agency. The OSA has the authority to notify the agency or IPA that the state auditor shall be informed of the date of the entrance conference, any progress meetings and the exit conference. If such notification is received, the IPA and agency shall invite the state auditor or his designee to attend all such conferences no later than 72 hours before the proposed conference or meeting.

**(6)** All communications with management and the agency's oversight officials during the audit, regarding any instances of non-compliance or internal control weaknesses, shall be made in writing. The auditor shall obtain and report the views of responsible officials of the audited agency concerning the audit findings, pursuant to GAGAS 4.33. Any violation of law or good accounting practice, including instances of non-compliance or internal control weaknesses, shall be reported as audit findings per Section 12-6-5NMSA 1978. Separate management letter comments shall not be issued as a substitute for such findings.

**G. Reverting or non-reverting funds:** Legislation can designate a fund as reverting or non-reverting. The IPA shall review the state law that appropriated funds to the agency to confirm whether any unexpended, unencumbered balance of a specific appropriation shall be reverted and to whom. The law may also indicate the due date for the required reversion. Appropriate audit procedures shall be performed to evaluate compliance with the law and accuracy of the related liability account balances due to other funds, governmental agencies, or both. The financial statements and the accompanying notes shall fully disclose the reverting or non-reverting status of a fund or appropriation. The financial statements shall disclose the specific legislation that makes a fund or appropriation non-reverting and any minimum balance required. If non-reverting funds are commingled with reverting appropriations, the notes to the financial statements shall disclose the methods and amounts used to calculate reversions. For more information regarding state agency reversions, see Subsection A of Section 2.2.2.12 NMAC and the department of finance and administration (DFA) white papers "calculating reversions to

the state general fund," and "basis of accounting-modified accrual and the budgetary basis." The statewide CAFR is exempt from this requirement.

**H. Referrals and Risk Advisories:** The Audit Act (Section 12-6-1 et seq. NMSA 1978) states that "the financial affairs of every agency shall be thoroughly examined and audited each year by the state auditor, personnel of the state auditor's office designated by the state auditor or independent auditors approved by the state auditor." (Section 12-6-3 NMSA 1978). Further, audits of New Mexico governmental agencies "shall be conducted in accordance with generally accepted auditing standards and rules issued by the state auditor." (Section 12-6-3 NMSA 1978).

**(1)** In an effort to ensure that the finances of state and local governments are thoroughly examined, OSA may provide IPAs with written communications to inform the IPA that OSA received information that suggests elevated risk in specific areas relevant to a particular agency's annual financial and compliance audit. These communications shall be referred to as "referrals." Referrals may relate to any topic relevant to the scope of the annual financial and compliance audit. IPAs shall take the circumstances described in OSA referral communications into account in their risk assessment and perform such procedures as, in the IPA's professional judgment, are necessary to determine what further action, if any, in the form of additional disclosure, findings and recommendations are appropriate in connection with the annual audit of the agency. After the conclusion of fieldwork but at least 14 days prior to submitting the draft annual audit report to the OSA for review, IPAs shall provide written confirmation to the OSA that the IPA took appropriate action in response to the referral. This written confirmation shall respond to all aspects of the referral and list any findings associated with the subject matter of the referral. IPAs shall retain adequate documentation in the audit workpapers to support the written confirmation to OSA that the IPA took appropriate action in response to the referral. As outlined in Section 2.2.2.13 NMAC the OSA may review IPA workpapers associated with the annual audit of any agency. OSA workpaper review procedures shall include examining the IPA documentation associated with referrals. Insufficient or inadequate documentation may result in deficiencies noted in the workpaper review letter and may negatively impact the IPA during the subsequent firm profile review process. In accordance with Subsection D of Section 2.2.2.8 NMAC IPAs may be placed on restriction if an IPA refuses to comply with OSA referrals in a timely manner.

**(2)** OSA may issue written communications to inform agencies and IPAs that OSA received information that suggests elevated risk in specific areas relevant to the annual financial and compliance audits of some agencies. These communications shall be referred to as "risk advisories." Risk advisories shall be posted on the OSA website in the following location: https://www.saonm.org/risk_advisories. Risk advisories may relate to any topic relevant to annual financial and compliance audits of New Mexico agencies. IPAs shall take the circumstances described in OSA risk advisories into account in their risk assessment and perform such procedures and testwork as, in the IPA's professional judgment, are necessary to determine what further action, if any, in the form of disclosure, findings and recommendations are appropriate in connection with the annual audit of the agency.

**I. State auditor workpaper requirement:** The state auditor requires that audit workpapers include a written audit program for fund balance and net position that includes tests for proper classification of fund balance pursuant to GASBS 54 and proper classification of net position pursuant to GASBS 34.34-.37 (as amended) and GASBS 46.4-.5 (as amended).

**J. State compliance audit requirements:** An IPA shall identify significant state statutes, rules and regulations applicable to the agency under audit and perform tests of compliance. In designing tests of compliance, IPAs may reference AU-C 250 relating to consideration of laws and regulations in an audit of financial statements and AU-C 620 relating to using the work of an auditor's specialist. As discussed in AU-C 250.A23, in situations where management or those charged with governance of the agency, or the agency's in-house or external legal counsel, do not provide sufficient information to satisfy the IPA that the agency is in compliance with an applicable requirement, the IPA may consider it appropriate to consult the IPA's own legal counsel. AU-C 620.06 and 620.A1 discuss the use of an auditor's specialist in situations where expertise in a field other than accounting or auditing is necessary to obtain sufficient, appropriate audit evidence, such as the interpretation of contracts, laws and regulations. In addition to the significant state statutes, rules and regulations identified by the IPA, compliance with the following shall be tested if applicable (with the exception of the statewide CAFR audit):

**(1)** Procurement Code, Sections 13-1-1 to 13-1-199 NMSA 1978 including providing the state purchasing agent with the name of the agency's chief procurement officer, pursuant to Section 13-1-95.2 NMSA 1978, and Procurement Code Regulations, Section 1.4.1 NMAC, or home rule equivalent.

**(2)** Per Diem and Mileage Act, Sections 10-8-1 to 10-8-8 NMSA 1978, and Regulations Governing the Per Diem and Mileage Act, Section 2.42.2 NMAC.

**(3)** Public Money Act, Sections 6-10-1 to 6-10-63 NMSA 1978, including the requirements that county and municipal treasurers deposit money in their respective counties, and that the agency receive a joint safe keeping

receipt for pledged collateral.

**(4)** Public School Finance Act, Sections 22-8-1 to 22-8-48 NMSA 1978.

**(5)** Investment of Public Money Act, Sections 6-8-1 to 6-8-25 NMSA 1978.

**(6)** Public Employees Retirement Act, Sections 10-11-1 to 10-11-142 NMSA 1978. IPAs shall test to ensure one hundred percent of payroll is reported to PERA. PERA membership is mandatory, unless membership is specifically excluded pursuant to Subsection B of Section 10-11-3 NMSA 1978.

**(7)** Educational Retirement Act, Sections 22-11-1 to 22-11-55 NMSA 1978.

**(8)** Sale of Public Property Act, Sections 13-6-1 to 13-6-8 NMSA 1978.

**(9)** Anti-Donation Clause, Article IX, Section 14, New Mexico Constitution.

**(10)** Special, Deficiency, and Supplemental Appropriations (appropriation laws applicable for the year under audit).

**(11)** State agency budget compliance with Sections 6-3-1 to 6-3-25 NMSA 1978, and local government compliance with Sections 6-6-1 to 6-6-19 NMSA 1978.

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

**(13)** Accounting and control of fixed assets of state government, Sections 2.20.1.1 to 2.20.1.18 NMAC, (updated for GASBS 34 as applicable).

**(14)** Requirements for contracting and conducting audits of agencies, Section 2.2.2 NMAC.

**(15)** Article IX of the state constitution limits on indebtedness.

**(16)** Any law, regulation, directive or policy relating to an agency's use of gasoline credit cards, telephone credit cards, procurement cards, and other agency-issued credit cards.

**(17)** Retiree Health Care Act, Sections 10-7C-1 to 10-7C-19 NMSA 1978. IPAs shall test to ensure one hundred percent of payroll is reported to NMRHCA. NMRHCA employer and employee contributions are set forth in Section 10-7C-15 NMSA 1978.

**(18)** Governmental Conduct Act, Sections 10-16-1 to 10-16-18 NMSA 1978.

**(19)** School Personnel Act, Sections 22-10A-1 to 22-10A-39 NMSA 1978.

**(20)** School Athletics Equity Act, Sections 22-31-1 to 22-31-6 NMSA 1978. IPAs shall test whether the district has submitted the required school-district-level reports, but no auditing of the reports or the data therein is required.

**K. Federal requirements:** IPAs shall conduct their audits in accordance with the requirements of the following government pronouncements and shall test federal compliance audit requirements as applicable:

**(1)** government auditing standards (GAGAS) issued by the United States government accountability office, most recent revision;

**(2)** uniform administrative requirements, cost principles, and audit requirements for federal awards;

**(3)** compliance supplement, latest edition;

**(4)** catalog of federal domestic assistance (CFDA), latest edition; and

**(5)** internal revenue service **(**IRS) employee income tax requirements. IRS Publication 15-B, employer's tax guide to fringe benefits, available online, provides detailed information regarding the taxability of fringe benefits.

**L. Audit finding requirements:**

**(1)** Communicating findings: IPAs shall communicate findings in accordance with generally accepted auditing standards and the requirements of GAGAS 4.23. All finding reference numbers shall follow a standard format with the four digit audit year, a hyphen and a three digit sequence number (e.g. 2013-001, 2013-002… 2013-999). All prior year findings shall include all finding numbers used under historical numbering systems in brackets, following the current year finding reference number, to enable the report user to see what year the finding originated and how it was identified in previous years. Finding reference numbers for single audit findings reported on the data collection form shall match those reported in the schedule of findings and questioned costs and the applicable auditor's report. Depending on the IPA's classification of the finding, the finding reference number shall be followed by one of the following descriptions: "material weakness"; "significant deficiency"; "material non-compliance"; "other non-compliance"; or "findings that do not rise to the level of a significant deficiency."

**(a)** IPAs shall evaluate deficiencies to determine whether individually or in combination they are significant deficiencies or material weaknesses in accordance with AU-C 260.

**(b)** Findings that meet the requirements described in AAG GAS 4.12 shall be included in the report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in accordance with government auditing standards. AAG GAS 13.35 table 13-2 provides guidance on whether a finding shall be included in the schedule of findings and questioned costs.

**(c)** Section 12-6-5NMSA 1978 requires that "each report set out in detail, in a separate section, any violation of law or good accounting practices found by the audit or examination." When auditors detect violations law or good accounting practices that shall be reported per Section 12-6-

5NMSA 1978, but that do not rise to the level of significant deficiencies or material weaknesses, such findings are considered to warrant the attention of those charged with governance due to the statutory reporting requirement. The auditor shall communicate such violations in the "compliance and other matters" paragraph in the report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in accordance with government auditing standards. Findings required by Section 12-6-5NMSA 1978 shall be presented in a separate schedule of findings labeled "Section 12-6-5NMSA 1978 findings". This schedule shall be placed in the back of the audit report following the financial statement audit and federal award findings. Per AAG GAS 13.48 there is no requirement for such findings to be included or referenced in the uniform guidance compliance report.

**(d)** Each audit finding (including current year and unresolved prior-year findings) shall specifically state and describe the following:

**(i)** condition (provides a description of a situation that exists and includes the extent of the condition and an accurate perspective, the number of instances found, the dollar amounts involved, if specific amounts were identified, and *for repeat findings, management's progress or lack of progress towards implementing the prior year planned corrective actions*);

**(ii)** criteria (identifies the required or desired state or what is expected from the program or operation; cites the specific section of law, regulation, ordinance, contract, or grant agreement if applicable);

**(iii)** effect (the logical link to establish the impact or potential impact of the difference between the situation that exists (condition) and the required or desired state (criteria); demonstrates the need for corrective action in response to identified problems or relevant risks);

**(iv)** cause (identifies the reason or explanation for the condition or the factors responsible for the difference between what the auditors found and what is required or expected; the cause serves as a basis for the recommendation);

**(v)** recommendation addressing each condition and cause; and

**(vi)** agency response (the agency's comments about the finding, *including specific planned corrective actions with a timeline and designation of what employee position(s) are responsible for meeting the deadlines in the timeline*).

**(e)** Uniform guidance regarding single audit findings (uniform guidance 200.511): The auditee is responsible for follow-up and corrective action on all audit findings. As a part of this responsibility, the auditee shall prepare a summary schedule of prior audit findings and a corrective action plan for current year audit findings in accordance with the requirements of uniform guidance 200.511. The corrective action plan and summary schedule of prior audit findings shall include findings relating to the financial statements which shall be reported in accordance with GAGAS. The summary schedule of prior year findings and the corrective action plan shall be included in the reporting package submitted to the federal audit clearinghouse (AAG GAS 13.48 fn 38). In addition to being included in the agency response to each audit finding, the corrective action plan shall be provided on the audited agency's letterhead in a document separate from the auditor's findings. (COFAR frequently asked questions on the office of management and budget's uniform administrative requirements, cost principles, and audit requirements for federal awards at 2 CFR 200, Section 511-1).

**(2)** Prior year findings:

**(a)** IPAs shall comply with the requirements of GAGAS Section 4.05 relating to findings and recommendations from previous audits and attestation engagements. In addition, IPAs shall report the status of *all* prior-year findings and *all* findings from special audits performed under the oversight of the state auditor in the current year audit report in a summary schedule of prior year audit findings. The summary schedule of prior year audit findings shall include the prior year finding number, the title, and whether the finding was resolved, repeated, or repeated and modified in the current year. No other information shall be included in the summary schedule of prior year audit findings. All findings from special audits performed under the oversight of the state auditor shall be included in the findings of the annual financial and compliance audits of the related fiscal year.

**(b)** Uniform guidance regarding single audit prior year findings (uniform guidance 200.511): The auditor shall follow up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with the uniform guidance, and report, as a current-year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding (AAG GAS 13.51).

**(3)** Current-year audit findings: Written audit findings shall be prepared and submitted to management of the agency as soon as the IPA becomes aware of the findings so the agency has time to respond to the findings prior to the exit conference. The agency shall prepare "planned corrective actions" as required by GAGAS 4.33. The agency shall respond, in writing, to the IPA's audit findings within 10 business days. Lack of agency responses within the 10 business days does not warrant a delay of the audit report. The agency's responses to the audit findings and the "planned corrective

actions" shall be included in the finding after the recommendation. If the IPA disagrees with the management's comments in response to a finding, they may explain in the report their reasons for disagreement, after the agency's response (GAGAS 4.38). Pursuant to GAGAS 4.39, "if the audited agency refuses to provide comments or is unable to provide comments within a reasonable period of time, the auditors may issue the report without receiving comments from the audited entity. In such cases, the auditors should indicate in the report that the audited entity did not provide comments."

**(4)** If appropriate in the auditor's professional judgment, failure to submit the completed audit contract to the OSA by the due date at Subsection F of Section 2.2.2.8 NMAC may be reported as a current year compliance finding.

**(5)** If an agency has entered into any professional services contract with the IPA who performs the agency's annual financial audit, or the scope of work on any professional services contract relates to fraud, waste, or abuse, and the contract was not approved by the state auditor, the IPA shall report a finding of non-compliance with Subsection L of Section 2.2.2.8 NMAC.

**(6)** If an agency subject to the procurement code failed to meet the requirement to have a certified chief procurement officer during the fiscal year, the IPA shall report a finding of non-compliance with Section 1.4.1.94 NMAC.

**(7)** Component unit audit findings shall be reported in the primary government's financial audit report. This is not required for the statewide CAFR unless a finding of a legally separate component unit is significant to the state as a whole.

**(8)** Except as discussed in Subsections A and E of Section 2.2.2.12 NMAC, release of any portion of the audit report by the IPA or agency prior to being officially released by the state auditor is a violation of Section 12-6-5NMSA 1978 and requires a compliance finding in the audit report.

**(9)** In the event that an agency response to a finding indicates in any way that the OSA is the cause of the finding, the OSA may require that a written response from the OSA be included in the report, below the other responses to that finding.

**M. Exit conference and related confidentiality issues:**

**(1)** The IPA shall hold an exit conference with representatives of the agency's governing authority and top management including representatives of any component units (housing authorities, charter schools, hospitals, foundations, etc.) if applicable. The OSA has the authority to notify the agency or IPA that the state auditor shall be informed of the date of the entrance conference, any progress meetings and the exit conference. If such notification is received, the IPA and agency shall invite the state auditor or his designee to attend all such conferences. If component unit representatives cannot attend the combined exit conference, a separate exit conference shall be held with the component unit's governing authority and top management. Unless the cost of the audit is five thousand dollars ($5,000) or less (excluding GRT), the exit conference shall be held in person; a telephone or webcam exit conference shall not meet this requirement. If extraordinary circumstances exist that prevent the exit conference from taking place in person, the IPA shall submit a written request for an exemption from this requirement to the state auditor at least seven days prior to the scheduled exit conference. The written request for the exemption shall include the justification for the request and the concurring signature of the agency. The IPA may not hold a telephonic or webcam exit conference without prior written approval of the state auditor if the cost of the audit is greater than five thousand dollars ($5,000). The date of the exit conference(s) and the names and titles of personnel attending shall be stated in the last page of the audit report.

**(2)** The IPA, with the agency's cooperation, shall provide to the agency for review a draft of the audit report (stamped "draft"), a list of the "passed audit adjustments," and a copy of all the adjusting journal entries at or before the exit conference. The draft audit report shall include, at minimum, the following elements: independent auditor's report, basic financial statements, audit findings, summary schedule of prior year audit findings, and the reports on internal control and compliance required by government auditing standards and uniform guidance.

**(3)** Agency personnel and the agency's IPA shall not release information to the public relating to the audit until the audit report is released by the OSA, and has become a public record.

**(4)** Once the audit report is officially released to the agency by the state auditor (by a release letter) and the required waiting period of five calendar days has passed, unless waived by the agency in writing, the audit report shall be presented by the IPA, to a quorum of the governing authority of the agency at a meeting held in accordance with the Open Meetings Act, if applicable. This requirement only applies to agencies with a governing authority, such as a board of directors, board of county commissioners, or city council, which is subject to the Open Meetings Act. The IPA shall ensure that the required communications to those charged with governance are made in accordance with AU-C 260.12 to 260.14.

**(5)** At all times during the audit and after the audit report becomes a public record, the IPA shall follow applicable standards and Section 2.2.2 NMAC regarding the release of any information relating to the audit. Applicable standards include but are not limited to the AICPA Code of Conduct ET Section 1.700.001 and related interpretations and guidance,

and GAGAS 4.30-32 and GAGAS 4.40-.44.

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

**(1)** IPAs shall comply with the requirements of GAGAS 4.06-.09 relating to fraud, noncompliance with provisions of laws, regulations, contracts and grant agreements, and abuse. Relating to contracts and grant agreements, IPAs shall extend the AICPA requirements pertaining to the auditors' responsibilities for laws and regulations to also apply to consideration of compliance with provisions of contracts or grant agreements. Concerning abuse, if an IPA becomes aware of abuse that could be quantitatively, or qualitatively material to the financial statements or other financial data significant to the audit objectives, the IPA shall apply audit procedures specifically directed to ascertain the potential effect on the financial statements or other financial data significant to the audit objectives.

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

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

**O. Special revenue funds authority:** The authority for creation of special revenue funds and any minimum balance required shall be shown in the audit report (i.e., cite the statute number, code of federal regulation, executive order, resolution number, or other specific authority) on the divider page before the combining financial statements or in the notes to the financial statements. This requirement does not apply to the statewide CAFR.

**P. Public monies:**

**(1)** All monies coming into all agencies (i.e., vending machines, fees for photocopies, telephone charges, etc.) shall be considered public monies and be accounted for as such. For state agencies, all revenues generated shall be authorized by legislation (MAPS FIN 11.4).

**(2)** If the agency has investments in securities and derivative instruments, the IPA shall comply with the requirements of AU-C 501.04-.10. If the IPA elects to use the work of an auditor's specialist to meet the requirements of AU-C 501, the requirements of AU-C 620 shall also be met.

**(3)** Pursuant to Section 12-6-5NMSA 1978, each audit report shall include a list of individual deposit and investment accounts held by the agency. The information presented in the audit report shall include at a minimum:

**(a)** name of depository (i.e., bank, credit union, state treasurer, state investment council, etc.);

**(b)** account name;

**(c)** type of deposit or investment account (also required in separate component unit audit reports):

**(i)** types of deposit accounts include non-interest bearing checking, interest bearing checking, savings, money market accounts, certificates of deposit, etc.;

**(ii)** types of investment accounts include state treasurer general fund investment pool (SGFIP), state treasurer local government investment pool (LGIP), U.S. treasury bills, securities of U.S. agencies such as Fannie Mae (FNMA), Freddie Mac (FHLMC), government national mortgage association (GNMA), Sallie Mae, small business administration (SBA), federal housing administration (FHA), etc.

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

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

**(f)** for state agencies only, statewide human resources accounting and management reporting system (SHARE) fund number. In auditing the balance of a state agency's investment in the SGFIP, the IPA shall review the individual state agency's cash reconciliation procedures and determine whether those procedures would reduce the agency's risk of misstatement in the investment in SGFIP, and whether the agency is actually performing those procedures. The IPA shall also take into consideration the complexity of the types of cash transactions that the state agency enters into and whether the agency processes its deposits and payments through SHARE. The IPA shall use professional judgment to determine each state agency's risk of misstatement in the investment in the SGFIP and write findings and modify opinions as deemed appropriate by the IPA. The state auditor requires the IPAs auditing cash of state agencies to obtain a confirmation of cash at the individual agency level from STO.

**(4)** Pledged

collateral:

**(a)** All audit reports shall disclose applicable collateral requirements in the notes to the financial statements. In addition, there shall be a supplementary schedule or note to the financial statements that discloses the collateral pledged by each depository for public funds. The schedule or note shall disclose the type of security (i.e., bond, note, treasury, bill, etc.), security number, committee on uniform security identification procedures (CUSIP) number, fair market value and maturity date.

**(b)** Pursuant to Section 6-10-17 NMSA 1978, the pledged collateral for deposits in banks and savings and loan associations shall have an aggregate value equal to one-half of the amount of public money held by the depository. If this requirement is not met the audit report shall include a finding. No security is required for the deposit of public money that is insured by the federal deposit insurance corporation (FDIC) or the national credit union administration (NCUA) in accordance with Section 6-10-16 NMSA 1978. Collateral requirements shall be calculated separately for each bank and disclosed in the notes.

**(c)** All applicable GASB 40 disclosure requirements relating to deposit and investment risk shall be met. In accordance with GASBS 40.8, relating to custodial credit risk, the notes to the financial statements shall disclose the dollar amount of deposits subject to custodial credit risk, and the type of risk the deposits are exposed to. To determine compliance with the fifty percent pledged collateral requirement of Section 6-10-17 NMSA 1978, the disclosure shall include the dollar amount of each of the following for each financial institution: fifty percent pledged collateral requirement per statute, total pledged collateral, uninsured and uncollateralized.

**(d)** Repurchase agreements shall be secured by pledged collateral having a market value of at least one hundred two percent of the contract per Subsection H of Section 6-10-10 NMSA 1978. To determine compliance with the one hundred two percent pledged collateral requirement of Section 6-10-10 NMSA 1978, the disclosure shall include the dollar amount of each of the following for each repurchase agreement: one hundred two percent pledged collateral requirement per statute, total pledged collateral.

**(e)** Per Section 6-10-16.A NMSA 1978, "deposits of public money shall be secured by: securities of the United States, its agencies or instrumentalities; securities of the state of New Mexico, its agencies, instrumentalities, counties, municipalities or other subdivisions; securities, including student loans, that are guaranteed by the United States or the state of New Mexico; revenue bonds that are underwritten by a member of the financial industry regulatory authority (known as FINRA), and are rated "BAA" or above by a nationally recognized bond rating service; or letters of credit issued by a federal home loan bank."

**(f)** Securities shall be accepted as security at market value pursuant to Subsection C of Section 6-10-16 NMSA 1978.

**(g)** State agency investments in the state treasurer's general fund investment pool do not require disclosure of specific pledged collateral for amounts held by the state treasurer. However, the notes to the financial statements shall refer the reader to the state treasurer's separately issued financial statements which disclose the collateral pledged to secure state treasurer cash and investments.

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

**(5)** Agencies that have investments in the state treasurer's local government investment pool shall disclose the information required by GASBS 79 in the notes to their financial statements. Agencies with questions about the content of these required note disclosures may contact STO (http://www.nmsto.gov) for assistance.

**Q. Budgetary presentation:**

**(1)** Prior year balance included in budget:

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

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

**(2)** The differences between the budgetary basis and GAAP basis revenues and expenditures shall be reconciled. If the required budgetary comparison information is included in the basic financial statements, the reconciliation shall be included on the statement itself or in the notes to the financial statements. If the required budgetary comparison is presented as RSI, the reconciliation to GAAP basis shall appear in either a separate schedule or in the notes to the RSI (AAG SLV 11.14). The notes to the financial

statements shall disclose the legal level of budgetary control for the entity and any excess of expenditures over appropriations at the legal level of budgetary control. The legal level of budgetary control for local governments is at the fund level. The legal level of budgetary control for school districts is at the function level. The legal level of budgetary control for state agencies is explained at Subsection A of Section 2.2.2.12 NMAC. For additional information regarding the legal level of budgetary control the IPA may contact the applicable oversight agency (DFA, HED, or PED).

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

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

**(b)** Budgetary comparisons for the general fund and major special revenue funds shall be presented as RSI if the agency budget structure differs from the GAAP fund structure enough that the budget information is unavailable for the general fund and major special revenue funds. An example of this "perspective difference" would occur if an agency budgets by program with portions of the general fund and major special revenue funds appearing across various program budgets. In a case like that the budgetary comparison would be presented for program budgets and include information in addition to the general fund and major special revenue funds budgetary comparison data (GASBS 41.03 and .10).

**R. Appropriations:**

**(1)** Budget related findings:

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

**(b)** If budgeted expenditures exceed budgeted revenues (after prior-year cash balance and any applicable federal receivables used to balance the budget), that fact shall be reported in a finding. This type of finding shall be confirmed with the agency's budget oversight entity (if applicable).

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

**(a)** Special, deficiency, specific, and capital outlay appropriations funded by severance tax bonds or general obligation bonds of the state shall be disclosed in the notes to the financial statements. The original appropriation, the appropriation period, expenditures to date, outstanding encumbrances and unencumbered balances shall be shown in a supplementary schedule or in a note to the financial statements. The accounting treatment of any unexpended balances shall be fully explained in the supplementary schedule or in a note to the financial statements. This is a special requirement of the state auditor and it does not apply to the statewide CAFR audit.

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

**S. Consideration of internal control and risk assessment in a financial statement audit:** Audits performed under this rule shall include tests of internal controls (manual or automated) over assertions about the financial statements and about compliance related to laws, regulations, and contract and grant provisions. IPAs and agencies are encouraged to reference the U.S. GAOs' *standards for internal control in the federal government*, known as the "*green book*", which may be adopted by state, local, and quasi-governmental entities as a framework for an internal control system.

**T. Required auditor's reports:**

**(1)** The AICPA provides examples of independent auditor's reports in the appendix to chapter 4 of AAG GAS and appendix A to chapter 16 of AAG SLV. Guidance is provided in footnote 3 to appendix A to chapter 16 of AAG SLV regarding wording used when opining on budgetary statements on the GAAP basis. IPAs conducting audits under this rule shall follow the AICPA report examples. All independent auditor's reports shall include a statement that the audit was performed in accordance with auditing standards generally accepted in the United States of America *and with applicable government auditing standards* per GAGAS 4.18. This statement shall be modified in accordance with GAGAS 2.24b if some GAGAS requirements were not followed. Reports for single audits of fiscal years beginning on or after December 26, 2014 shall have references to OMB Circular A-133 replaced with references to Title 2 U.S. Code of Federal Regulations (CFR) Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance 200.110(b), AAG GAS 4.88 Example 4-1).

**(2)** The AICPA provides examples of the report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in accordance with government auditing standards in the appendix to chapter 4 of AAG GAS. IPAs conducting audits under this rule shall follow the AICPA report examples.

**(a)** The state auditor requires the report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in

accordance with government auditing standards be dated the same date as the independent auditor's report.

**(b)** No separate management letters shall be issued to the agency by the auditor. Issuance of a separate management letter to an agency shall be considered a violation of the terms of the audit contract and may result in further action by the state auditor. See also Subsection F of Section 2.2.2.10 NMAC regarding this issue.

**(3)** The AICPA provides examples of the report on compliance for each major federal program and on internal control over compliance required by the uniform guidance in the appendix to chapter 13 of AAG GAS. IPAs conducting audits under this rule shall follow the AICPA report examples.

**(4)** The state auditor requires the financial statements, RSI, SI, and other information required by this rule, and the following reports to be *included under one report cover*: the independent auditor's report; the report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in accordance with government auditing standards; and the report on compliance for each major federal program and on internal control over compliance required by the uniform guidance. If applicable, the independent auditor's report shall include the AU-C 725 opinion on SI, the schedule of expenditures of federal awards and the HUD financial data schedule (required by HUD guidelines on reporting and attestation requirements of uniform financial reporting standards). The report shall also contain a table of contents and an official roster. The IPA may submit a written request for an *exemption* from the "one report cover" requirement, but shall receive prior written approval from the state auditor in order to present any of the above information under a separate cover.

**U. Disposition of property:** Sections 13-6-1 and 13-6-2 NMSA 1978 govern the disposition of tangible personal property owned by state agencies, local public bodies, school districts, and state educational institutions. At least 30 days prior to any disposition of property included on the agency inventory list described at Subsection W of Section 2.2.2.10 NMAC, written notification of the official finding and proposed disposition duly sworn and subscribed under oath by each member of the authority approving the action shall be sent to the state auditor.

**V. Joint powers agreements:**

**(1)** All joint powers agreements (JPA) shall be listed in a supplementary schedule in the audit report. The statewide CAFR schedule shall include JPAs that are significant to the state as a whole. The schedule shall include the following information for each JPA: participants; party responsible for operations; description; beginning and ending dates of the JPA; total estimated amount of project and portion applicable to the agency; amount the agency contributed in the current fiscal year; audit responsibility; fiscal agent if applicable; and name of government agency where revenues and expenditures are reported.

**(2)** For self-insurance obtained under joint powers agreements, see the GASB Codification Section J50.113.

**W. Capital asset inventory:**

**(1)** The Audit Act (Section 12-6-10 NMSA 1978) requires agencies to capitalize only chattels and equipment that cost over five thousand dollars ($5,000). All agencies shall maintain a capitalization policy that complies with the law. All agencies shall maintain an inventory listing of capitalized chattels and equipment that cost over five thousand dollars ($5,000).

**(2)** Agencies shall conduct an annual physical inventory of chattels and equipment on the inventory list at the end of each fiscal year in accordance with the requirements of Section 12-6-10 NMSA 1978. The agency shall certify the correctness of the inventory after the physical inventory. This certification shall be provided to the agency's auditors. The IPA shall audit the inventory listing for correctness and compliance with the requirements of the Audit Act.

**X. Schedule of changes in assets and liabilities for agency funds:** Agency funds are excluded from the statement of changes in fiduciary net position (GASBS 34.110 as amended by GASBS 63) because they have no "net position." It is a requirement of the state auditor that a schedule of changes in assets and liabilities for agency funds be included as SI for all agencies that have agency funds, except school districts which are subject to different requirements. The schedule shall show additions and deductions for each agency fund. The schedule should appear toward the end of the table of contents and requires an AU-C 725 opinion in the independent auditor's report. The requirements for school districts regarding the presentation of the statement of changes in assets and liabilities for agency funds are detailed in Subsection C of 2.2.2.12 NMAC.

**Y. Tax increment development districts:** Pursuant to Subsection C of Section 5-15-9 NMSA 1978, tax increment development districts (TIDDs) are political subdivisions of the state, and they are separate and apart from the municipality or county in which they are located. Section 5-15-10 NMSA 1978 states that the district shall be governed by the governing body that adopted a resolution to form the district or by a five-member board composed of four members appointed by that governing body; provided, however, that the fifth member of the five-member board is the secretary of finance and administration or the secretary's designee with full voting privileges. However, in the case of an appointed board of directors that is not the governing body, at the end of the appointed directors' initial terms, the board shall hold an election

of new directors by majority vote of owners and qualified resident electors. Therefore, a TIDD and its audit firm shall apply the criteria of GASBS 14, 39, 61, and 80 to determine whether the TIDD is a component unit of the municipality or county that approved it, or whether the TIDD is a related organization of the municipality or county that approved it. If the TIDD is determined to be a related organization per the GAAP requirements, then the TIDD shall contract separately for an audit separate from the audit of the municipality or county that approved it.

**Z. GASBS 68, accounting and financial reporting for pensions:**

**(1)** PERA and ERB shall each prepare schedules of employer allocations as of June 30 of each fiscal year. The state auditor requires the following:

**(a)** Prior to distribution of the schedule of employer allocations, PERA and ERB shall obtain audits of their respective schedules. These audits shall be conducted in accordance with government auditing standards and AU-C 805, special considerations - audits of single financial statements and specific elements, accounts, or items of a financial statement.

**(b)** Pursuant to AU-C 805.16, the PERA and ERB auditors shall each issue a separate auditor's report and express a separate opinion on the AU-C 805 audit performed (distinct from the agency's regular financial statement and compliance audit). Additionally, the auditor shall apply the procedures required by AU-C 725 to all supplementary information schedules included in the schedule of employer allocations report in order to determine whether the supplementary information is fairly stated, in all material respects, in relation to the financial statements as a whole. The IPA shall include the supplementary information schedules in the related reporting in the other-matter paragraph pursuant to AU-C 725.09, regarding whether such information is fairly stated in all material respects in relation to the schedule of employer allocations as a whole.

**(c)** PERA and ERB shall include note disclosures in their respective schedule of employer allocations reports that detail each component of allocable pension expense at the fund level, excluding employer-specific pension expense for changes in proportion. Each plan shall also include note disclosures by fund detailing collective fund-level deferred outflows of resources and deferred inflows of resources. The disclosures shall include a summary of changes in the collective deferred and inflows outflows of resources (excluding employer specific amounts), by year of deferral.

**(d)** PERA and ERB shall each obtain at least one concurring review of their respective schedules of employer allocations by an outside IPA firm (different from the firm performing the AU-C 805 audit). The firm selected to perform the concurring review is subject to OSA approval.

**(e)** The AU-C 805 audits and resulting separate reports on the PERA and ERB schedules of employer allocations shall be submitted to the OSA for review and release pursuant to Subsection A of Section 2.2.2.13 NMAC, prior to distribution to the participant employers.

**(f)** As soon as the AU-C 805 reports become public record, PERA and ERB shall make the information available to their participant employers.

**(g)** PERA and ERB shall each prepare an employer guide that illustrates the correct use of their respective schedule of employer allocations report by their participant employers. The guides shall explicitly distinguish between the plan-level reporting and any employer-specific items. The calculations and record-keeping necessary at the employer level (for adjusting journal entries, amortization of deferred amounts, etc.) shall be described and illustrated. The employer guides shall be made available to the participant employers by June 30 of the subsequent fiscal year.

**(2)** Regarding whether the pension liability shall be included in the stand-alone financial statements of funds, see the GASB's comprehensive implementation guide, chapter 5, question and answer 5.129.1, which says, "except for blended component units, which are discussed in questions 5.125.2 and 5.125.3, statement 68 does not establish specific requirements for allocation of the employer's proportionate share of the collective net pension liability or other pension-related measures to individual funds. However, for proprietary and fiduciary funds, consideration shall be given to NCGA statement 1, paragraph 42, as amended, which requires that long-term liabilities that are "directly related to and expected to be paid from" those funds be reported in the statement of net position or statement of fiduciary net position, respectively." Stand-alone state agency financial statements that exclude the proportionate share of the collective net pension liability of the state of New Mexico based on the above guidance, shall include note disclosure referring the reader to the statewide CAFR for the state's net pension liability and other pension-related information. The stand-alone report for the New Mexico component appropriation funds shall include note disclosure of the net pension liability for all the state agencies of the state of New Mexico.

**AA. Federal Single Audit:** OMB Circular A-133 audits of states, local governments, and non-profit organizations has been replaced by Title 2 U.S. Code of Federal Regulations Part 200, *uniform administrative requirements, cost principles, and audit requirements for federal awards* (uniform guidance). The standards set forth in Subpart F - audit requirements, became effective December 26, 2013, and apply to audits of fiscal years beginning on or after December 26, 2014 (calendar-

year-end December 31, 2015 and FY16 audits).

**BB. GASBS 77:** GASB Statement 77, tax abatement disclosures, is effective for reporting periods beginning after December 15, 2015 (FY17 for agencies with a June 30 fiscal year end). The GAO may aggregate, analyze and publish GASBS 77 information. Unaudited, but final, GASBS 77 disclosure information in the format prescribed below shall be provided to any agency whose tax revenues are affected by the reporting agency's tax abatement agreements no later than September 15 of the subsequent fiscal year. Failure to meet this due date results in a compliance finding. This due date does not apply if the reporting agency does not have any tax abatement agreements that reduce the tax revenues of another agency. In addition to the requirements of GASBS 77, the state auditor requires:

**(1)** All tax abatement agreements entered into by an agency's component unit(s) shall be disclosed in the same manner as the tax abatement agreements of the primary government.

**(2)** Agencies that make a GASBS 77 disclosure shall use the template GASBS 77 disclosure spreadsheet available on the OSA website and submit that electronic file with the final version of the audit report.

**(3)** If an agency does not need to make a GASBS 77 disclosure, that fact shall be disclosed in the notes to the financial statements.

**(4)** If an agency determines that any required disclosure is confidential, the agency shall cite the legal authority for that determination.

**(5)** If an agency has GASBS 77 disclosures to make as an agency that entered into a tax abatement agreement, all information contained in the OSA GASBS 77 disclosure spreadsheet must be included in the notes to the financial statements. If an agency received intergovernmental disclosures from another agency, all information contained in the OSA GASBS 77 disclosure spreadsheet must be included in the notes to the financial statements.

**CC. New standards that become effective in FY18 for agencies with a June 30 fiscal year end are:**

**(1)** GASBS 75, accounting and financial reporting for postemployment benefits other than pensions;

**(2)** GASBS 81, irrevocable split-interest agreements;

**(3)** Some provisions of GASBS 82, pension issues - an amendment of GASB statements No. 67, No. 68, and No. 73;

**(4)** GASBS 85, Omnibus 2017;

**(5)** GASBS 86, certain debt extinguishment issues;

**(6)** Implementation Guide No. 2017-1, implementation guidance update - 2017; and

**(7)** Implementation Guide No. 2017-2, financial reporting for postemployment benefit plans other than pension plans.

**DD. GASBS 75, accounting and financial reporting for postemployment benefits other than pensions:** The retiree health care authority (RHCA) shall prepare a schedule of employer allocations as of June 30 of each fiscal year. The state auditor requires the following:

**(1)** Prior to distribution of the schedule of employer allocations, RHCA shall obtain an audit of the schedule. This audit shall be conducted in accordance with government auditing standards and AU-C 805, special considerations - audits of single financial statements and specific elements, accounts, or items of a financial statement.

**(2)** Pursuant to AU-C 805.16, the RHCA auditors shall issue a separate auditor's report and express a separate opinion on the AU-C 805 audit performed (distinct from the agency's regular financial statement and compliance audit). Additionally, the auditor shall apply the procedures required by AU-C 725 to all supplementary information schedules included in the schedule of employer allocations report in order to determine whether the supplementary information is fairly stated, in all material respects, in relation to the financial statements as a whole. The IPA shall include the supplementary information schedules in the related reporting in the other-matter paragraph pursuant to AU-C 725.09, regarding whether such information is fairly stated in all material respects in relation to the schedule of employer allocations as a whole.

**(3)** RHCA shall include note disclosures in the schedule of employer allocations report that detail each component of allocable OPEB expense at the fund level, excluding employer-specific OPEB expense for changes in proportion. RHCA shall also include note disclosures by fund detailing collective fund-level deferred outflows of resources and deferred inflows of resources. The disclosures shall include a summary of changes in the collective deferred outflows and inflows of resources (excluding employer specific amounts), by year of deferral.

**(4)** RHCA shall each obtain at least one concurring review of the schedule of employer allocations by an outside IPA firm (different from the firm performing the AU-C 805 audit). The firm selected to perform the concurring review is subject to OSA approval.

**(5)** The AU-C 805 audit and resulting separate report on the RHCA schedule of employer allocations shall be submitted to the OSA for review and release pursuant to Subsection A of Section 2.2.2.13 NMAC, prior to distribution to the participant employers.

**(6)** As soon as the AU-C 805 reports become public record, RHCA shall make the information available to its participant employers.

**(7)** RHCA shall prepare an employer guide that illustrates the correct use of the schedule of employer allocations report by its participant employers. The guide shall explicitly distinguish between the plan-level reporting and any employer-specific items. The calculations and record-keeping necessary at the employer level (for adjusting journal entries, amortization of deferred amounts, etc.) shall be described and illustrated. The employer guide shall be made available to the participant employers by June 30 of the subsequent fiscal year.

[2.2.2.10 NMAC - Rp, 2.2.2.10 NMAC, 2/27/2018]

**2.2.2.11 THE ACCOUNTABILITY IN GOVERNMENT ACT:**

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

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

**C.** The auditor's responsibilities for performing procedures and reporting on SI are provided in AU-C Section 725, supplementary information in relation to the financial statements as a whole. The auditor shall apply the procedures required by AU-C 725 to the agency's performance data included in the schedule in order to determine whether it is fairly stated, in all material respects, in relation to the financial statements as a whole.

**D.** The IPA shall include this schedule in the related reporting in the other-matter paragraph pursuant to AU-C 725.09, regarding whether such information is fairly stated in all material respects in relation to the financial statements as a whole.

[2.2.2.11 NMAC - Rp, 2.2.2.11 NMAC, 2/27/2018]

**2.2.2.12 SPECIFIC CRITERIA:** The specific criteria described in this section shall be considered in planning and conducting governmental audits. These requirements are not intended to be all-inclusive; therefore, OSA recommends that IPAs review the NMSA and NMAC while planning governmental audits.

**A. Pertaining to audits of state agencies:**

**(1)** Due dates for agency audits: audit reports of agencies under the oversight of DFA FCD are due to OSA in accordance with the requirements of Subsection D of Section 12-6-3 NMSA 1978 and Subsection A of Section 2.2.2.9 NMAC.

**(2)** All the individual SHARE funds shall be reported in the financial statements, either within the basic financial statements or as SI.

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

**(4)** Net position/fund balance:

**(a)** Pursuant to GASBS 63.8 the government-wide statement of net position and the proprietary fund statement of net position show net position as:

**(i)** net investment in capital assets as defined by GASBS 63.9;

**(ii)** restricted (distinguishing between major categories of restrictions) as defined by GASBS 63.10; and

**(iii)** unrestricted as defined by GASBS 63.11.

**(b)** Governmental fund financial statement fund balances shall be reported in accordance with GASBS 54.

**(5)** Book of record:

**(a)** The state maintains the centralized accounting system SHARE. The SHARE data and reports are the original book of record that the auditor is auditing. Each fiscal year, the agency shall record all audit adjusting journal entries in SHARE. The financial information in SHARE shall agree to the agency's audited financial statements, with the exception of accounts payable as explained in Subsection A of Section 2.2.2.12 NMAC. If the agency maintains a separate accounting system, it shall be reconciled with the SHARE system and all applicable adjustments shall be recorded in SHARE in the month in which the transactions occurred. DFA FCD provides guidance to agencies, which IPAs shall review, regarding policy

and procedure requirements. These documents are available on the DFA FCD website and include:

**(i)** the manual of model accounting practices (MAPs);

**(ii)** various white papers, yearly closing instructions; and

**(iii)** various accounting guideline memos.

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

| Appropriation unit code/ appropriation unit description | |
|---|---|
| 200 | personal services & employee benefits |
| 300 | contractual services |
| 400 | other |
| 500 | other financing uses |
| 600 | non-budgeted |

**(c)** Revenue categories of appropriations to state agencies are listed below. The budgetary comparison statements for state agencies shall be presented in the audit report by the revenue categories shown below and by the expenditure categories that appear in the agency's final approved budget.

**(i)** state general fund;

**(ii)** other state funds;

**(iii)** internal service funds/inter-agency transfers; or

**(iv)** federal funds.

**(d)** For more detail about the SHARE chart of accounts see the DFA website.

**(6)** Reversions to state general fund:

**(a)** All reversions to the state general fund shall be identified in the financial statements by the fiscal year of appropriation (i.e., reversion to state general fund - FY 16). The gross amount of the appropriation and the gross amount of the reversion shall be shown separately.

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

**(7)** Non-reciprocal (not payments for materials or services rendered) interfund (internal) activity includes;

**(a)** transfers; and

**(b)** reimbursements (GASBS 34.410):

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

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

**(c)** Regarding inter-agency transfers between legally separate component units and the primary government (the state of New Mexico):

**(i)** if the inter-agency transfer is between a blended component unit of the state and other funds of the state, then the component unit's separately issued financial statements report such activity between itself and the primary government as revenues and expenses. When the blended component unit is included in the primary government's financial statements, such inter-agency transfers are reclassified as transfers (GASBS 34.318);

**(ii)** all resource flows between a discretely presented component unit of the state and other funds of the state shall be reported as external transactions - revenues and expenses - in the primary government's financial statements and the component unit's separately issued financial statements (GASBS 34.318);

**(d)** All transfers to and from SHARE fund 853, the state general fund appropriation account, shall be clearly identifiable in the audit report as

state general fund appropriations, reversions, or collections;

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

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

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

**(10)** Independent auditor's report: The independent auditor's report for state agencies, district attorneys, district courts, and the educational institutions created by New Mexico Constitution Article XII, Sec. 11 shall include an emphasis of matter paragraph referencing the summary of significant accounting principles disclosure regarding the reporting agency. The emphasis of matter paragraph shall indicate that the financial statements are not intended to present the financial position and changes in financial position of the primary government, the state of New Mexico, but just the financial position and the changes in financial position of the department. The emphasis of matter paragraph shall follow the example provided in AAG SLV 16.103 ex. A-17.

**(11)** Budgetary basis for state agencies: the state budget is adopted on the modified accrual basis of accounting except for accounts payable accrued at the end of the fiscal year that do not get accrued by the statutory deadline per Section 6-10-4 NMSA 1978. Those accounts payable that do not get paid timely or accrued by the statutory deadline shall be paid out of the next year's budget. If an agency needs to recognize additional accounts payable amounts that were not accrued by the statutory deadline, then the budgetary statements and the fund financial statements require a reconciliation of expenditures, as discussed at Subsection Q of Section 2.2.2.10 NMAC. All transactions are recorded in the state's book of record, SHARE, under the modified accrual basis of accounting except for accounts payable not meeting the statutory deadline; therefore, the "actual" expenditures in the budgetary comparison schedules equal the expenditures as recorded in SHARE for the fund. Encumbrances related to single year appropriations lapse at year end. Appropriation periods are sometimes for periods in excess of 12 months (multiple-year appropriations). When multiple-year appropriation periods lapse, the authority for the related budgets also lapse and encumbrances can no longer be charged to those budgets. The legal level of budgetary control shall be disclosed in the notes to the financial statements. Per Subsection C of Section 9 of the General Appropriation Act of 2017, all agencies, including legislative agencies, may request category transfers among personal services and employee benefits, contractual services and other. Therefore, the legal level of budgetary control is the appropriation program level (A-Code, P-Code, and Z-Code). A-Codes pertain to capital outlay appropriations (general obligation/severance tax or state general fund). P-Codes pertain to program/operating funds. Z-Codes pertain to special appropriations. The IPA shall compare total expenditures for each program to the program's approved final budget to evaluate compliance.

**(12)** Budgetary comparisons of state agencies shall show the original and final appropriated budget (same as final budget approved by DFA), the actual amounts on the budgetary basis, and a column with the variance between the final budget and actual amounts. If a state agency presents budgetary comparisons by fund, the appropriation program code(s) (A-Code, P-Code, and Z-Code) shall be reported on the budgetary comparison schedule.

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

**(a)** STO administers the debt service funds for various bond issues that are obligations of the state of New Mexico. STO does not report in its departmental financial statements bonds payable that are obligations of the state of New Mexico. These payables and the related bond face amounts (proceeds) are reported in the state's CAFR. The note disclosures associated with STO's departmental financial statements shall explain that, by statute, STO is responsible for making the state's bond payments and keeping the related records; however, it is not responsible for the related debt, the state is. Additionally, the note disclosures associated with STO's departmental financial statements shall refer the reader to detailed SI in the STO audit report and the statewide CAFR. The STO departmental financial statements shall include SI regarding the state of New Mexico bond obligations. The SI schedules shall show;

**(i)** the beginning and end-of-year bond payable balances, increases and decreases (separately presented), and the portions of each bond issuance

that are due within one year, as required by GASBS 34.119;

**(ii)** the details of debt service requirements to maturity, as required by GASBS 38.10; and

**(iii)** any violations of bond covenants and related actions taken to address violations of bond covenants, as required by GASBS 38.9 and Section 12-6-5NMSA 1978.

**(b)** DFA has provided accounting and reporting guidance for state agencies that receive or administer special capital outlay appropriations from the state legislature that are financed by bond proceeds. DFA's guidance is available in the "FYI 2008 Audit Forum 9/30/08" section of DFA's website at http://www.nmdfa.state.nm.us/Forums.aspx. In the notes to the financial statements, agencies disclose that the bond proceeds were allocated by the legislature to the agency to administer disbursements to the project recipients, and the agency is not obligated in any manner for the related indebtedness. Agencies also disclose the specific revenue recognition policy for these appropriations. Each agency's IPA shall audit the agency's financial statement presentation of this capital outlay project information to ensure that they are presented in accordance with accounting principles that are generally accepted in the United States.

**(14)** Amounts "due from other state agencies" and "due to other state agencies": if a state agency reports amounts "due from" or "due to" other state agencies the notes shall disclose the amount "due to" or "due from" each agency, the name of each agency, the SHARE fund account numbers, and the purpose of the account balance.

**(15)** Investments in the state general fund investment pool (SGFIP): these balances are presented as cash and cash equivalents in the statements of net position and the balance sheets of the participant agencies, with the exception of the component appropriation funds (state general fund). The notes to the financial statements of the component appropriation funds shall contain GASBS 40 disclosures for the SGFIP. This disclosure may refer the reader to the separate audit report for STO for additional information regarding the SGFIP.

**(16)** Format for the statement of activities: state agencies that have more than one program or function shall use the financial statement format presented in GASBS 34, Illustrations B-1 through B-4. The simplified statement of activities (GASBS 34, Illustration B-5) may not be used for agencies that have multiple programs or functions. GASBS 34.41 requires governments to report direct expenses for each function.

**(17)** Oversight duties of DFA FCD: on October 3, 2008, the state controller and the state auditor distributed a letter to agencies regarding FCD's request for agencies' draft financial statements for the preparation of the CAFR for the state. Agencies were concerned about violating Section 12-6-5NMSA 1978. However, Subsections of Section 6-5-2.1 NMSA 1978 states that FCD shall "have access to and authority to examine books, accounts, reports, vouchers, correspondence files and other records, bank accounts, money and other property of a state agency." In addition, Section 6-5-4.1 NMSA 1978 mandates that FCD shall compile the CAFR. After some consideration and discussion of the conflicting statutes, the state controller and the state auditor concluded that "pursuant to these rules, Sections 6-5-4.1 and Section 12-6-5NMSA 1978 should be construed to give effect to both statutes and the corresponding administrative rules. Therefore, an agency shall provide a copy of its draft audited financial statements to FCD in order that FCD may compile the CAFR. However, the agency may only release that information to FCD and not to the public. The agency's audit report also is not public record unless released in accordance with Section 12-6-5NMSA 1978." The unaudited draft financial statements submitted to DFA shall exclude the opinions and findings. The entire letter is available at: http://www.nmdfa.state.nm.us/uploads/FileLinks/293b21bdbc044c04bd0dbc6de01def7e/DFA-FCD%20Oversight%20Letter.pdf.

**B. Pertaining to audits of housing authorities:**

**(1)** Housing authorities within the state of New Mexico consist of regional housing authorities, component units or departments of local governments, component units of housing authorities, and housing authorities created by intergovernmental agreements between cities and counties that are authorized to exercise all powers under the Municipal Housing Law, Section 3-45-1 et seq. NMSA 1978.

**(2)** The financial statements of a housing authority that is a department, program or component unit of a primary government shall be included in the financial audit report of the primary government by discrete presentation unless an exemption from this requirement has been obtained from the state auditor. In the event that a primary government determines that a housing authority is a department or program of, rather than a component unit of, the primary government, a request for exemption from the discrete presentation requirement shall be submitted to the state auditor, by the primary government. The request for exemption shall include evidence that the housing authority is not a separate legal entity from the primary government and that the corporate powers of the housing authority are held by the primary government. Evidence included in the request shall address these issues:

**(a)** the housing authority is not a corporation registered with the secretary of state;

**(b)** there was never a resolution or ordinance making the housing authority a public body corporate; and

**(c)** the housing authority was authorized under Section 3-45-1 et seq. NMSA 1978.

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

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

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

**(b)** The IPA shall include the housing authority's governing board and management representatives in the entrance and exit conferences with the primary government. If it is not possible to hold such combined conferences, the IPA shall hold separate entrance and exit conferences with housing authority's management and a member of the governing board. The OSA has the authority to notify the agency or IPA that the state auditor shall be informed of the date of the entrance conference, any progress meetings and the exit conference. If such notification is received, the IPA and agency shall invite the state auditor or his designee to attend all such conferences no later than 72 hours before the proposed conference.

**(4)** The following information relates to housing authorities that are component units of a local government.

**(a)** The housing authority shall account for financial activity in proprietary funds.

**(b)** At the public housing authority's discretion, the agency may "be audited separately from the audit of its local primary government entity. If a separate audit is made, the public housing authority audit shall be included in the local primary government entity audit and need not be conducted by the same auditor who audits the financial affairs of the local primary government entity" (Subsection E of Section 12-6-3 NMSA 1978). Statute further stipulates in Subsection A of Section 12-6-4 NMSA 1978 that "a public housing authority other than a regional housing authority shall not bear the cost of an audit conducted solely at the request of its local primary government entity."

**(c)** Audit reports of separate audits of component unit housing authorities shall be released by the state auditor separately from the primary government's report under a separate release letter to the housing authority.

**(5)** Public housing authorities and their IPAs shall follow the requirements of *guidelines on reporting and attestation requirements of uniform financial reporting standards* (UFRS), which is available on the U.S. department of housing and urban development's website under a search for UFRS. Additional administrative issues related to audits of public housing authorities follow.

**(a)** Housing authority audit contracts include the cost of the audit firm's AU-C 725 opinion on the financial data schedule (FDS). The preparation and submission cost for this HUD requirement shall be included in the audit contract. The public housing authority shall electronically submit a final approved FDS based on the audited financial statements no later than nine months after the public housing authority's fiscal year end. The IPA shall:

**(i)** electronically report on the comparison of the electronic FDS submission in the REAC staging database through the use of an identification (ID) and password;

**(ii)** include a hard copy of the FDS in the audit report;

**(iii)** render an AU-C 725 opinion on the FDS; and

**(iv)** explain in the notes any material differences between the FDS and the financial statements.

**(b)** The IPA shall consider whether any fee accountant used by the housing authority is a service organization and, if applicable, follow the requirements of AU-C 402 regarding service organizations.

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

**(6)** Single audit reporting issue: If a single audit is performed on the separate audit report for the public housing authority, including the housing authority's schedule of expenditures of federal awards, the housing authority federal funds do not need to be subjected a second time to a single audit during the single audit of the primary government. In this situation, the housing authority's federal expenditures do not need to be included in the primary government's schedule of expenditures of federal awards. See AAG GAS 6.15 for more information.

**C. Pertaining to audits of school districts:**

**(1)** In the event that a state-chartered charter school subject to oversight by PED is not subject to the requirement to use the same auditor as PED, that charter school is reminded that their audit contract shall be submitted to PED for approval. Charter schools shall ensure that sufficient time is allowed for PED review refer to Subsection F of Section 2.2.2.8 NMAC for the due date for submission of the audit contract to the OSA.

**(2)** Regional

education cooperative (REC) audits:

**(a)** A separate financial and compliance audit is required on activities of RECs. The IPA shall provide copies of the REC report to the participating school districts and PED once the report has been released by the state auditor.

**(b)** Audits of RECs shall include tests for compliance with Section 6.23.3 NMAC.

**(c)** Any 'on-behalf' payments for fringe benefits and salaries made by RECs for employees of school districts shall be accounted for in accordance with GASB Cod. Sec. N50.135 and communicated to the employer in accordance with GASB Cod. Sec. N50.131.

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

**(3)** School district audits shall address the following issues:

**(a)** Audits of school districts shall include tests for compliance with Section 6.20.2 NMAC and PED's manual of procedures for public schools accounting and budgeting (PSAB), with specific emphasis on supplement 7, cash controls.

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

**(c)** Any joint ventures or other entities created by a school district are agencies subject to the Audit Act.

**(d)** Agency fund reporting: under GASBS 34 a statement of changes in fiduciary net position is required for pension trust funds, investment trust funds, and private-purpose trust funds. However, agency funds have no net position and are excluded from this presentation (GASBS 34.110 as amended by GASBS 63). It is a requirement of the state auditor that a schedule of changes in assets and liabilities - agency funds for the fiscal year be included as SI in the audit report for each school district and each charter school. The schedules shall show the changes (both additions and deductions) in the agency funds summarized by school or for each activity. The schedule requires an AU-C 725 opinion in the independent auditor's report.

**(e)** Relating to capital expenditures by the New Mexico public school facilities authority (PSFA), school districts shall review capital expenditures made by PSFA for repairs and building construction projects of the school district. School districts shall also determine the amount of capital expenditures that shall be added to the capital assets of the school district and account for those additions properly. The IPA shall test the school district capital asset additions for proper inclusion of these expenditures.

**(f)** Functions of the general fund: school district audit reports shall include individual fund financial statements and budgetary comparisons for the following functions of the general fund: operational, transportation, instructional materials and teacherage (if applicable).

**(4)** Pertaining to charter schools:

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

**(b)** Certain GASBS 14 criteria (as amended by GASBS 39, 61, and 80) shall be applied to determine whether a charter school is a component unit of the chartering entity (the district or PED). The chartering agency (primary government) shall make the determination whether the charter school is a component unit of the primary government.

**(c)** No charter school that has been determined to be a component unit may be omitted from the financial

statements of the primary government based on materiality. All charter schools that are component units shall be included in the basic financial statements using one of the presentation methods described in GASBS 34.126, as amended.

**D. Pertaining to audits of counties:** Tax roll reconciliation county governments: Audit reports for counties shall include two supplementary schedules.

**(1)** The first one is a "tax roll reconciliation of changes in the county treasurer's property taxes receivable" showing the June 30 receivable balance and a breakout of the receivable for the most recent fiscal year ended, and a total for the previous nine fiscal years. Per Subsection C of Section 7-38-81 NMSA 1978, property taxes that have been delinquent for more than 10 years, together with any penalties and interest, are presumed to have been paid.

**(2)** The second schedule titled "county treasurer's property tax schedule" shall show by property tax type and agency, the amount of taxes: levied; collected in the current year; collected to-date; distributed in the current year; distributed to-date; the amount determined to be uncollectible in the current year; the uncollectible amount to-date; and the outstanding receivable balance at the end of the fiscal year. This information is necessary for proper revenue recognition on the part of the county as well as on the part of the recipient agencies, under GASBS 33. If the county does not have a system set up to gather and report the necessary information for the property tax schedule, the IPA shall issue a finding.

**E. Pertaining to audits of educational institutions:**

**(1)** Educational institutions are reminded that audit contracts shall be submitted to HED for approval. Refer to Subsection F of Section 2.2.2.8 NMAC for the due date for submission of the audit contract to the OSA.

**(2)** Budgetary comparisons: the legal level of budgetary control per Section 5.3.4.10 NMAC shall be disclosed in the notes to the financial statements. The state auditor requires that every educational institution's audit report include budgetary comparisons as SI. The budgetary comparisons shall be audited and an auditor's opinion shall be rendered. An AU-C 725 opinion does not meet this requirement. The budgetary comparisons shall show columns for: the original budget; the revised budget; actual amounts on the budgetary basis; and a variance column. The IPA shall confirm the final adjusted and approved budget with HED. The IPA shall compare the financial statement budget comparison to the related September 15 budget submission to HED. The only differences that should exist between the HED budget submission and the financial statement budgetary comparisons are adjustments made by the institution after September 15 and audit adjustments. If the HED budget submission does not tie to the financial statement budgetary comparison, taking into account only those differences, then the IPA shall write a related finding. A reconciliation of actual revenue and expense amounts on the budgetary basis to the GAAP basis financial statements shall be disclosed at the bottom of the budgetary comparisons or in the notes to the financial statements. The reconciliation is required only at the "rolled up" level of "unrestricted and restricted - all operations" and shall include revenues and expenses. HED approved the following categories which shall be used for the budgetary comparisons.

**(a)** Unrestricted and restricted - All operations (schedule 1): beginning fund balance/net position; unrestricted and restricted revenues; state general fund appropriations; federal revenue sources; tuition and fees; land and permanent fund; endowments and private gifts; other; total unrestricted & restricted revenues; unrestricted and restricted expenditures; instruction; academic support; student services; institutional support; operation and maintenance of plant; student social & cultural activities; research; public service; internal services; student aid, grants & stipends; auxiliary services; intercollegiate athletics; independent operations; capital outlay; renewal & replacement; retirement of indebtedness; total unrestricted & restricted expenditures; net transfers; change in fund balance/net position (budgetary basis); ending fund balance/net position.

**(b)** Unrestricted instruction & general (schedule 2); beginning fund balance/net position; unrestricted revenues; tuition; miscellaneous fees; federal government appropriations; state government appropriations; local government appropriations; federal government contracts/grants; state government contracts/grants; local government contracts/grants; private contracts/grants; endowments; land & permanent fund; private gifts; sales and services; other; total unrestricted revenues; unrestricted expenditures; instruction; academic support; student services; institutional support; operation & maintenance of plant; total unrestricted expenditures; net transfers; change in fund balance/net position (budgetary basis); ending fund balance/net position.

**(c)** Restricted instruction & general (schedule 3); beginning fund balance/net position; restricted revenues; tuition; miscellaneous fees; federal government appropriations; state government appropriations; local government appropriations; federal government contracts/grants; state government contracts/grants; local government contracts/grants; private contracts/grants; endowments; land & permanent fund; private gifts; sales and services; other; total restricted revenues; restricted expenditures; instruction; academic support; student services; institutional support; operation & maintenance of plant; total restricted expenditures; net transfers; change in fund balance/net position (budgetary basis); ending fund balance/net position.

**(3)** Educational institutions shall present their financial statements using the business type activities model.

**(4)** Compensated absence liability is reported as follows: the statement of net position reflects the current portion of compensated absences under current liabilities and the long-term portion of compensated absences under noncurrent liabilities.

**(5)** Component unit issues: educational institutions shall comply with the requirements of Subsection A of Section 2.2.2.10 NMAC. Additionally:

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

**(b)** there is no level of materiality for reporting findings of component units that do not receive public funds. All component unit findings shall be disclosed in the primary government's audit report.

**(6)** Management discussion and analysis (MD&A): The MD&A of educational institutions shall include analysis of significant variations between original and final budget amounts and between final budget amount and actual budget results. The analysis shall include any currently known reasons for those variations that are expected to have a significant effect on future services or liquidity.

**(7)** Educational institutions established by Section 11 of Article XII of the New Mexico state constitution shall provide the department of finance and administration's financial control division with a draft copy of their financial statements excluding opinions and findings, pursuant to Subsection A of Section 2.2.2.12 NMAC.

**F. Pertaining to audits of hospitals:** hospitals subject to this rule shall prepare *indigent care cost and funding reports* and *calculations of cost of providing indigent care worksheets* schedules in accordance with the definitions for indigent care cost and funding components and the applicable financial assistance policies, using the form provided by the OSA, for the three-year period ending June 30 of the year under audit. These schedules shall be included as supplementary information in the audit report and the auditor shall apply the procedures required by AU-C 725 in order to determine whether the schedules are fairly stated, in all material respects, in relation to the financial statements as a whole. The IPA shall include these supplementary information schedules in the related reporting in the other-matter paragraph pursuant to AU-C 725.09, regarding whether such information is fairly stated in all material respects in relation to the financial statements as a whole. The IPA shall submit an electronic excel version of the indigent care schedules using the form provided by the OSA with the final PDF version of the audit report as required by Subsection B of Section 2.2.2.9 NMAC. If a hospital subject to the requirements of this subsection is a component unit of another government, and the component unit issues a separate audit report outside of the primary government's audit report, the primary government is not required to include this information in its audit report. The GAO may aggregate, analyze and publish indigent care information. IPAs performing audits of hospitals shall perform the procedures described below.

**(1)** On the *indigent care cost and funding reports*:

**(a)** recalculate the mathematical accuracy;

**(b)** compare funding amounts associated with Legislative appropriations to the amounts listed in the corresponding New Mexico Appropriations Act;

**(c)** compare amounts listed under 'funding for indigent care' to supporting detail;

**(d)** compare amounts listed under 'cost of providing indigent care' to the *calculations of cost of providing indigent care worksheets*;

**(e)** compare the amounts listed under 'patients receiving indigent care services' to supporting detail.

**(2)** On the *calculations of cost of providing indigent care worksheets*: compare amounts listed under each line item to supporting detail by patient account.

**(3)** Select a sample of the supporting detail by patient account associated with the *calculations of cost of providing indigent care worksheets* and perform the following procedures on the sampled items:

**(a)** obtain documentation supporting management's determination that the patient qualified for indigent care and compare with the policies in effect during the three-year period ending June 30 of the year under audit;

**(b)** compare the total charges on the patient's account to the supporting detail;

**(c)** note if a co-pay was required from the patient in accordance with the policies. Obtain information from management as to whether any required payment was received. If a payment was received, compare it to the supporting detail provided for the 'funding for indigent care' on the *indigent care cost and funding reports*;

**(d)** for 'direct costs paid to other providers on behalf of patients qualifying for indigent care', compare the costs to supporting invoices;

**(e)** obtain supporting information with respect to each percentage listed under 'ratio of cost to charges'. Compare the support to the calculation of the percentage and

recalculate the mathematical accuracy of the percentage.

**G. Pertaining to audits of investing agencies:** Investing agencies, which are defined as STO, PERA, ERB, and the state investment council, shall prepare *schedules of asset management costs* which include management fee information by investment class.

**(1)** For all asset classes except private asset classes and alternative investment classes, the schedules shall, at minimum, include the following information:

**(a)** relating to consultants: the name of the firm or individual, the location of the consultant (in-state or out-of-state), a brief description of investments subject to the agreement, and fees;

**(b)** relating to third-party marketers (as defined in Section 6-8-22 NMSA 1978): the name of the firm or individual, the location of the marketer (in-state or out-of-state), a brief description of investments subject to the agreement, and any fees, commissions or retainers;

**(c)** relating to traditional asset classes: name of the investment, asset class, value of the investment, and fees (including both "direct" and "embedded" costs).

**(2)** For private asset classes and alternative investment classes, the schedules shall, at minimum, include the following information:

**(a)** relating to consultants: the aggregate fees by asset class and consultant location (in-state or out-of-state), and a brief description of investments included in each asset class;

**(b)** relating to third-party marketers (as defined in Section 6-8-22 NMSA 1978): aggregate fees, commissions and retainers by asset class and third-party marketer location (in-state or out-of-state), and a brief description of investments included in each asset class;

**(c)** relating to alternative asset classes: the total fees by asset class (including both "direct" and "embedded" costs), and a brief description of the investments included in each asset class.

**(3)** These schedules shall be included as unaudited other information in the audit report. The IPA shall submit an electronic excel version of the schedules of asset management costs using the form provided by the OSA with the final PDF version of the audit report as required by Subsection B of Section 2.2.2.9 NMAC. The GAO may aggregate, analyze and publish asset management cost information. [2.2.2.12 NMAC, Rp, 2.2.2.12 NMAC, 2/27/2018]

**2.2.2.13 REVIEW OF AUDIT REPORTS AND AUDIT DOCUMENTATION:**

**A. Statutory requirement to review audit reports:** Subsection B of Section 12-6-14 NMSA 1978 requires the state auditor or personnel of his office designated by him examine all reports of audits of agencies made pursuant to contract. All audits performed under contracts approved by the state auditor are subject to review. The OSA shall review all reports submitted by the IPA to determine if the reports are presented in accordance with the requirements of this rule and applicable auditing, accounting and financial reporting standards. The OSA shall review all audit reports submitted by the report due date before reviewing reports that are submitted after the report due date. As discussed in Subsection B of Section 2.2.2.9 NMAC, audit reports reissued by the agency and IPA, pursuant to AU-C 560, are also subject to OSA review procedures.

**B. Comprehensive reviews:** Released audit reports are subject to a comprehensive report and audit documentation review by the state auditor. The IPA's audit documentation shall be assembled in one complete file or one complete set of files in one location, whether the documentation is hardcopy or electronic. The documentation shall be either all hardcopy or all electronic. OSA reviews of audit and AUP working papers include inspection of firm documentation related to compliance with governmental auditing, accounting and financial reporting standards, rules and other requirements issued by GASB, AICPA, GAO, and the OSA.

**C. Consequences of deficiencies:** If during the course of its review of an audit report or the related audit documentation, the OSA finds significant deficiencies that warrant a determination that the audit was not made in accordance with the provisions of the contract or applicable standards and requirements, any or all of the following action(s) may be taken;

**(1)** the IPA may be required by OSA to correct the deficiencies in the report or audit documentation, and reissue the audit report to the agency and any others receiving copies;

**(2)** for future audit reports, for some or all audit contracts, the IPA may be required to submit working papers with the audit reports for review by the OSA prior to the release of the report; or

**(3)** the IPA may be referred to the New Mexico public accountancy board for possible licensure action.

**D. Results of work paper reviews:** After the review is completed, the OSA shall issue a letter to advise the IPA about the results of the review. The IPA shall respond in writing to all review comments when directed. If the firm disagrees with any comments, the firm shall provide references to professional standards supporting the firm's disagreement. Failure to respond shall be noted during the firm profile review process. [2.2.2.13 NMAC - Rp, 2 2.2.13 NMAC, 2/27/2018]

**2.2.2.14 CONTINUING PROFESSIONAL EDUCATION AND PEER REVIEW REQUIREMENTS:**

**A. Continuing professional education**: IPAs shall ensure that all members of their staff comply with the CPE requirements of the most recent revision of GAGAS. Accordingly, each auditor performing work in accordance with GAGAS shall complete, every two years, at least 24 hours of CPE that directly relates to government auditing, the government environment, or the specific or unique environment in which the audited agency operates. Auditors who are involved in planning, directing, or reporting on GAGAS audits and auditors who are not involved in those activities but charge twenty percent or more of their time annually to GAGAS audits shall also obtain at least an additional 56 hours of CPE that enhances the auditor's professional proficiency to perform audits.

**B. Peer review requirements:** IPAs shall comply with the requirements of GAGAS Sections 3.82 to 3.107 relating to quality control and assurance and external peer review.

**(1)** Per AICPA PR Section 100 standards for performing and reporting on peer reviews, a firm's due date for its initial peer review is 18 months from the date the firm enrolled in the peer view program or should have enrolled, whichever is earlier. A firm's subsequent peer review is due three years and six months from the previous peer review year end.

**(2)** The IPA firm profile submission to the state auditor shall include copies of the following peer review documentation:

**(a)** the peer review report for the auditor's firm;

**(b)** if applicable, detailed descriptions of the findings, conclusions and recommendations related to deficiencies or significant deficiencies required by GAGAS 3.103;

**(c)** if applicable, the auditor's response to deficiencies or significant deficiencies;

**(d)** the letter of acceptance from the peer review program in which the firm is enrolled; and

**(e)** a list of the governmental audits reviewed during the peer review.

**(6)** A peer review rating of "failed" on the auditor's peer review shall disqualify the IPA from performing New Mexico governmental audits.

**(7)** During the procurement process IPAs shall provide a copy of their most recent external peer review report to the agency with their bid proposal or offer. Any subsequent peer review reports received during the period of the contract shall also be provided to the agency.

**(8)** The peer review shall meet the requirements of GAGAS 3.96 to 3.107.

**(9)** The New Mexico public accountancy board's substantial equivalency provision has been replaced with mobility pursuant to the 1999 Public Accountancy Act (61-28B NMSA 1978). If a CPA is performing any type of attest work subject to this rule, his firm shall maintain a New Mexico firm permit.

**(10)** The peer reviewer shall be familiar with this rule. This is a requirement of the state auditor that can be achieved by attendance at audit rule training provided by the OSA.

**C. State auditor quality control reviews:** The state auditor performs its own quality control review of IPA audit reports and working papers. An IPA that is included on the state auditor's list of approved firms for the first time shall be subject to an OSA quality control review of the IPA's working papers. This review shall be conducted as soon as the documentation completion date, as defined by AU-C Section 230, has passed (60 days after the report release date). When the result of the state auditor's quality control review differs significantly from the external quality control report and corresponding peer review rating, the state auditor may no longer accept external peer review reports performed by that reviewer. In making this determination, the state auditor shall take into consideration the fact that AICPA peer reviews are performed on a risk-based or key-element approach looking for systemic problems, while the state auditor reviews are engagement-specific reviews.

[2.2.2.14 NMAC - Rp, 2.2.2.14 NMAC, 2/27/2018]

**2.2.2.15 SPECIAL AUDITS, ATTESTATION ENGAGEMENTS, PERFORMANCE AUDITS AND FORENSIC AUDITS:**

**A. Fraud, waste or abuse in government reported by agencies, IPAs or members of the public:**

**(1)** Definition of fraud: Fraud includes, but is not limited to, fraudulent financial reporting, misappropriation of assets, corruption, and use of public funds for activities prohibited by the constitution or laws of the state of New Mexico. Fraudulent financial reporting means intentional misstatements or omissions of amounts or disclosures in the financial statements to deceive financial statement users, which may include intentional alteration of accounting records, misrepresentation of transactions, or intentional misapplication of accounting principles. Misappropriation of assets means theft of an agency's assets, including theft of property, embezzlement of receipts, or fraudulent payments. Corruption means bribery and other illegal acts. (GAO-14-704G federal internal control standards paragraph 8.02).

**(2)** Definitions of waste and abuse: Waste is the act of using or expending resources carelessly, extravagantly, or to no purpose. Abuse involves behavior that is deficient or improper when compared with behavior that a prudent person would consider reasonable and necessary operational practice given the facts and circumstances. This includes the misuse of authority or position for personal gain or for the

benefit of another. Waste and abuse do not necessarily involve fraud or illegal acts. However, they may be an indication of potential fraud or illegal acts and may still impact the achievement of defined objectives. (GAO-14-704G federal internal control standards paragraph 8.03).

**(3)** Reports of fraud, waste & abuse: Pursuant to the authority set forth Section 12-6-3 NMSA 1978, the state auditor may conduct initial fact-finding procedures in connection with reports of financial fraud, waste and abuse in government made by agencies, IPAs or members of the public. Reports may be made telephonically or in writing through the fraud hotline or website established by the state auditor for the confidential reporting of financial fraud, waste, and abuse in government. Reports may be made telephonically to the fraud hotline by calling 1-866-OSA-FRAUD (1-866-672-3728) or reported in writing through the state auditor's website at www.saonm.org. Reports received or created by the state auditor are audit information and audit documentation in connection with the state auditor's statutory duty to examine and audit the financial affairs of every agency, or in connection with the state auditor's statutory discretion to audit the financial affairs and transactions of an agency in whole or in part.

**(4)** Confidential sources: The identity of a person making a report directly to the state auditor orally or in writing, or telephonically or in writing through the state auditor's fraud hotline or website, alleging financial fraud, waste, or abuse in government is confidential audit information and may not be disclosed, unless the person making the report agrees to the disclosure of that person's name.

**(5)** Confidentiality of files: A report alleging financial fraud, waste, or abuse in government that is made directly to the state auditor orally or in writing, or telephonically or in writing through the state auditor's fraud hotline or website, any resulting special audit, performance audit, attestation engagement or forensic audit, and all records and files related thereto are confidential audit documentation and may not be disclosed prior to the release of an audit report, except to an independent auditor, performance audit team or forensic audit team in connection with a special audit, performance audit, attestation engagement, forensic audit or other existing or potential engagement regarding the financial affairs or transactions of an agency.

**(6)** The OSA may make inquiries of agencies as part of the fact-finding process performed by the OSA's special investigations division. Agencies shall respond to OSA inquiries within 21 calendar days of receipt. IPAs shall test compliance with this requirement and report noncompliance as a finding in the annual financial and compliance audit report.

**B. Special audit or attestation examinations, performance audits and forensic audits:**

**(1)** Designation: Pursuant to Section 12-6-3 NMSA 1978, in addition to the annual audit, the state auditor may cause the financial affairs and transactions of an agency to be audited in whole or in part. Accordingly, the state auditor may designate an agency for special audit, attestation engagement, performance audit or forensic audit regarding the financial affairs and transactions of an agency or local public body based on information or a report received from an agency, IPA or member of the public. For purposes of this rule, the term "special audit, attestation engagement, performance audit or forensic audit" includes, without limitation, agreed-upon procedures, consulting, and contract close-out (results-based award) engagements that address financial fraud, waste or abuse in government. The state auditor shall inform the agency of the designation by sending the agency a notification letter. The state auditor may specify the audit subject matter, the scope and any procedures required, the AICPA professional standards that apply, and for a performance audit, performance aspects to be included and the potential findings and reporting elements that the auditors expect to develop. Pursuant to Section 200.503 of Uniform Guidance, if a single audit was previously performed, the special audit, attestation engagement, performance audit or forensic audit shall be planned and performed in such a way as to build upon work performed, including the audit documentation, sampling, and testing already performed by other auditors. The attestation and performance audit engagements may be conducted pursuant to government auditing standards if so specified by the OSA.

**(2)** Costs: All reasonable costs of special audits, attestation engagements, forensic audits, or single-entity performance audits conducted pursuant to this section shall be borne by the agency audited pursuant to Section 12-6-4 NMSA 1978. The state auditor, in its sole discretion, may apportion among the entities audited some or all of the reasonable costs of a multi-entity performance audit.

**(3)** Who performs the engagement: The state auditor may perform the special audit, attestation engagement, performance audit or forensic audit, alone or with other professionals selected by the state auditor. Alternatively, the state auditor may require the engagement to be performed by an IPA or a team that may be comprised of any of the following: independent public accountants; individuals with masters degrees or doctorates in a relevant field such as business, public administration, public policy, finance, or economics; individuals with their juris doctorate; CFE-certified fraud examiners; CFF-certified forensic auditors; CIA-certified internal auditors; or other specialists. If the state auditor designates an agency for an engagement to be conducted by an IPA or professional team, the agency shall:

**(a)** upon receipt of notification to proceed from the state auditor, identify all elements or services to be solicited,

obtain the state auditor's written approval of the proposed scope of work, and request quotations or proposals for each applicable element of the engagement;

**(b)** follow all applicable procurement requirements which may include, but are not limited to, Uniform Guidance, Procurement Code (Section 13-1 NMSA 1978), or equivalent home rule procurement provisions when selecting an IPA or team to perform the engagement;

**(c)** submit the following information to the state auditor by the due date specified by the state auditor:

**(i)** a completed recommendation form for special audits, attestation engagements, performance audits or forensic audits (the form) provided at www.osanm.org, which the agency shall print on agency letterhead; and

**(ii)** a completed audit contract form including the contract fee, start and completion date, and the specific scope of services to be performed in the format prescribed by the OSA, provided at www.osanm.org, with all required signatures on the contract.

**(d)** If the agency fails to select an IPA and submit the recommendation form and signed contract to OSA by the due date specified by the state auditor, or, if none within 60 days of notification of designation from the state auditor, the state auditor may conduct the audit or select the IPA for that agency in accordance with the process described at Subsection F of Section 2.2.2.8 NMAC.

**(4)** Errors**:** Recommendation forms and contracts that are submitted to the OSA with errors or omissions shall be rejected by the state auditor. The state auditor shall return the rejected recommendation form and contract to the agency indicating the reason(s) for the rejection.

**(5)** Recommendation rejections: In the event the agency's recommendation is not approved by the state auditor, the state auditor shall promptly communicate the decision, including the reason(s) for rejection, to the agency, at which time the agency shall promptly submit a different recommendation. This process shall continue until the state auditor approves a recommendation and related contract. During this process, whenever a recommendation and related contract are not approved, the agency may submit a written request to the state auditor for reconsideration of the disapproval. The agency shall submit its request no later than 15 calendar days from the date of the disapproval and shall include documentation in support of its recommendation. If warranted, after review of the request, the state auditor may hold an informal meeting to discuss the request. The state auditor shall set the meeting in a timely manner with consideration given to the agency's circumstances.

**(6)** Contract Amendments: Any proposed contract amendments shall be processed in accordance with Subsection N of Section 2.2.2.8 NMAC.

**(7)** Access to records and documents: For any special audit, attestation engagement, performance audit or forensic audit, the state auditor and any engaged professionals shall have available to them all documents necessary to conduct the special audit, attestation engagement, performance audit or forensic audit. Furthermore, pursuant to Section 12-6-11 NMSA 1978, when necessary for a special audit, attestation engagement, performance audit or forensic audit, the state auditor may apply to the district court of Santa Fe county for issuance of a subpoena to compel the attendance of witnesses and the production of books and records.

**(8)** Entrance, progress and exit conferences: The IPA or other professional shall hold an entrance conference and an exit conference with the agency, unless the IPA or other professional has submitted a written request to the state auditor for an exemption from this requirement and has obtained written approval of the exemption. The OSA has the authority to notify the agency or IPA or other professional that the state auditor shall be informed of the date of the entrance conference, any progress meetings and the exit conference. If such notification is received, the IPA or other professional and the agency shall invite the state auditor or his designee to attend all such conferences no later than 72 hours before the proposed conference or meeting. The state auditor may also require the IPA or other professional to submit its audit plan to the state auditor for review and approval.

**(9)** Required reporting: All reports for special audits, attestation engagements, performance audits, or forensic audits related to financial fraud, waste or abuse in government undertaken pursuant to Section 2.2.2.15 NMAC (regardless of whether they are conducted pursuant to AICPA standards for consulting services or for attestation engagements) shall report as findings any fraud, illegal acts, non-compliance or internal control deficiencies, pursuant to Section 12-6-5NMSA 1978. Each finding shall comply with the requirements of Subsection L of Section 2.2.2.10 NMAC.

**(10)** Report review: The state auditor shall review reports of any special audit, attestation engagement, performance audit or forensic audit made pursuant to this section for compliance with the professional services contract and this rule. Upon completion of the report, the IPA or other professional shall deliver the organized and bound report to the state auditor with a copy of any signed management representation letter. Unfinished or excessively deficient reports shall be rejected by the state auditor. If the report is rejected the firm shall submit an electronic version of the corrected rejected report for state auditor review. The name of the electronic file shall be "corrected rejected report" followed by the agency name and fiscal year. The IPA or other professional shall respond to

all review comments as directed by the state auditor.

**(11)** Report release: After OSA's review of the report for compliance with the professional services contract and this rule, the state auditor shall authorize the IPA to print and submit the final report. The required number of hardcopies specified in the professional services contract and an electronic version of the report, in the PDF format described at Subsection B of Section 2.2.2.9 NMAC, shall be delivered to the state auditor within five business days. The state auditor shall not release the report until all the required documents are received by the state auditor. The state auditor shall provide the agency with a letter authorizing final payment to the IPA and the release of the report pursuant to Section 12-6-5NMSA 1978. Agency and local public body personnel shall not release information to the public relating to the special audit, attestation engagement, performance audit or forensic audit engagement until the report is released and has become a public record pursuant to Section 12-6-5NMSA 1978. Except for the exception under Subsection B of Section 2.2.2.15 NMAC, at all times during the engagement and after the engagement report becomes a public record, the IPA or other professional(s) shall not disclose to the public confidential information about the auditee or about the engagement. Confidential information is information that is not generally known to the public through common means of providing public information like the news media and internet.

**(12)** Disclosure by professionals: The IPA or other professional shall not disclose confidential information provided to them by the state auditor unless otherwise specified by the state auditor. Disclosure of confidential information by the IPA or other professional may result in legal action by the state auditor, or in the case of an IPA, restriction pursuant to Subsection D of Section 2.2.2.8 NMAC.

**(13)** Payment: Progress payments up to (but not including) ninety percent of the contract amount do not require state auditor approval and may be made by the agency if the agency monitors the progress of the services procured. If requested by the state auditor, the agency shall provide a copy of the approved progress billing(s). Final payments of ninety percent and above may be made by the agency only after the state auditor has stated in a letter to the agency that the report has been released by the state auditor.

**C. Agency-initiated special audits, attestation engagements, performance audits and forensic audits:**

**(1)** Applicability: With the exception of agencies that are authorized by statute to conduct performance audits and forensic audits, this section applies to all instances in which an agency enters into a professional services contract for a special audit, attestation engagement, performance audit, or forensic audit relating to financial fraud, waste or abuse, but the agency has not been designated by the state auditor for the engagement pursuant to Subsection B of Section 2.2.2.15 NMAC. For purposes of this rule, the term "special audit, attestation engagement, performance audit or forensic audit" includes, without limitation, agreed-upon procedures, consulting, and contract close-out (results-based award) engagements that address financial fraud, waste or abuse in government.

**(2)** Contracting: An agency, IPA or other professional shall not enter into a professional services contract for a special audit, attestation engagement, performance audit, or forensic audit regarding the financial affairs and transactions of an agency and relating to financial fraud, waste or abuse in government without the prior written approval of the state auditor. The proposed professional services contract shall be submitted to the state auditor for review and approval after it has been signed by the agency and the IPA or other professional, unless the agency or IPA or other professional applies to the state auditor for an exemption and the state auditor grants the exemption. When contracting with an IPA or other professional, the agency shall contract only with an IPA or other professional that has been approved by the state auditor to conduct such work. The state auditor may, in its sole discretion, require a non-IPA professional to submit proof of qualifications, a firm profile or equivalent documentation prior to approving the contract. The contract shall include the contract fee, start and completion date, and the specific scope of services to be performed, and shall follow any template that the state auditor may provide.

**(3)** Applicability of other rules: The provisions outlined in Subsection B of Section 2.2.2.15 NMAC apply to agency-initiated special audits, attestation engagements, performance audits and forensic audits.

[2.2.2.15 NMAC - Rp, 2.2.2.15 NMAC, 2/27/2018]

**2.2.2.16 ANNUAL FINANCIAL PROCEDURES REQUIRED FOR LOCAL PUBLIC BODIES WITH ANNUAL REVENUES LESS THAN FIVE HUNDRED THOUSAND DOLLARS ($500,000) (TIERED SYSTEM)**:

**A. Annual revenue determines type of financial reporting:** All local public bodies shall comply with the requirements of Section 6-6-3 NMSA 1978. Pursuant to Section 12-6-3 NMSA 1978, the annual revenue of a local public body determines the type of financial reporting a local public body shall submit to the OSA. Local public bodies are mutual domestic water consumers associations, land grants, incorporated municipalities, and special districts. The annual revenue of a local public body shall be calculated on a cash basis, excluding capital outlay funds, federal and private grants. For the purpose of Section 2.2.2.16 NMAC "capital

outlay" is funding provided through capital appropriations of the New Mexico legislature. For the purpose of Section 2.2.2.16 NMAC "private grant" means funding provided by a non-governmental entity.

**B. Determination of revenue and services:** Annually, following the procedures described in Subsection F of Section 2.2.2.8 NMAC, the state auditor shall provide local public bodies written authorization to obtain services to conduct a financial audit or other procedures. Upon receipt of the authorization, a local public body shall determine its annual revenue in accordance with Subsection A of Section 2.2.2.16 NMAC. The following requirements for financial reporting apply to the following annual revenue amounts (tiers):

**(1)** if a local public body's annual revenue is less than ten thousand dollars ($10,000) and the local public body did not directly expend at least fifty percent of, or the remainder of, a single capital outlay award, then the local public body is exempt from submitting a financial report to the state auditor, except as otherwise provided in Subsection C of Section 2.2.2.16 NMAC;

**(2)** if a local public body's annual revenue is ten thousand dollars ($10,000) or more but less than fifty thousand dollars ($50,000), then the local public body is exempt from submitting a financial report to the state auditor, except as otherwise provided in Subsection C of Section 2.2.2.16 NMAC;

**(3)** if a local public body's annual revenue is less than fifty thousand dollars ($50,000), and the local public body expended at least fifty percent of, or the remainder of, a single capital outlay award, then the local public body shall procure the services of an IPA for the performance of a tier three agreed upon procedures engagement in accordance with the audit contract for a tier three agreed upon procedures engagement;

**(4)** if a local public body's annual revenue is greater than fifty thousand dollars ($50,000) but less than two hundred-fifty thousand dollars ($250,000), then the local public body shall procure the services of an IPA for the performance of a tier four agreed upon procedures engagement in accordance with the audit contract for a tier four agreed upon procedures engagement;

**(5)** if a local public body's annual revenue is greater than fifty thousand dollars ($50,000) but less than two hundred-fifty thousand dollars ($250,000), and the local public body expended any capital outlay funds, then the local public body shall procure the services of an IPA for the performance of a tier five agreed upon procedures engagement in accordance with the audit contract for a tier five agreed upon procedures engagement;

**(6)** if a local public body's annual revenue is two hundred-fifty thousand dollars ($250,000) or greater, but less than five hundred thousand dollars ($500,000), the local public body shall procure services of an IPA for the performance of a tier six agreed upon procedures engagement in accordance with the audit contract for a tier six agreed upon procedures engagement;

**(7)** if a local public body's annual revenue is five hundred thousand dollars ($500,000) or more, this section shall not apply and the local public body shall procure services of an IPA for the performance of a financial and compliance audit in accordance with other provisions of this rule;

**(8)** notwithstanding the annual revenue of a local public body, if the local public body expended seven hundred-fifty thousand dollars ($750,000) or more of federal funds subject to a federal single audit during the fiscal year then the local public body shall procure a single audit.

**C. Exemption from financial reporting:** A local public body that is exempt from financial reporting to the state auditor pursuant to Subsection B of Section 2.2.2.16 NMAC shall submit written certification to LGD and the state auditor. The certification shall be provided on the form made by the state auditor, available through OSA-Connect. The local public body shall certify, at a minimum:

**(1)** the local public body's annual revenue for the fiscal year; and

**(2)** that the local public body did not expend fifty percent of or the remainder of a single capital outlay award.

**D. Procurement of IPA services:** A local public body required to obtain an agreed-upon procedures engagement shall procure the services of an IPA in accordance with Subsection F of Section 2.2.2.8 NMAC.

**E. Requirements of the IPA selected to perform the agreed-upon procedures:**

**(1)** The IPA shall provide the local public body with a dated engagement letter during the planning stages of the engagement, describing the services to be provided. See Subsection F of Section 2.2.2.10 NMAC for applicable restrictions on the engagement letter.

**(2)** The IPA may not subcontract any portion of the services to be performed under the contract with the local public body except for the activation of a contingency subcontractor form in the event the IPA is unable to complete the engagement.

**(3)** The IPA shall hold an entrance conference and an exit conference with the local public body unless the IPA has submitted a written request to the OSA for an exemption from this requirement and has obtained written approval of the exemption from the OSA. Unless the cost of the AUP is five thousand dollars ($5,000) (excluding GRT) or less, the exit conference shall be held in person; a telephone or webcam exit conference shall not meet this requirement. The OSA has the authority to notify the agency or IPA that the state auditor shall be informed of the date of the entrance conference, any progress meetings and the exit conference.

If such notification is received, the IPA and agency shall invite the state auditor or his designee to attend all such conferences no later than 72 hours before the proposed conference or meeting.

**(4)** The IPA shall submit the report to the OSA for review in accordance with the procedures described at Subsection B of Section 2.2.2.9 NMAC. Before submitting the report to OSA for review, the IPA shall review the report using the AUP report review guide available on the OSA's website at www.saonm.org. The report shall be submitted to the OSA for review with the completed AUP report review guide. Once the audit report is officially released to the agency by the state auditor (by a release letter) and the required waiting period of five calendar days has passed, unless waived by the agency in writing, the audit report shall be presented by the IPA, to a quorum of the governing authority of the agency at a meeting held in accordance with the Open Meetings Act, if applicable. This requirement only applies to agencies with a governing authority, such as a board of directors, board of county commissioners, or city council, which is subject to the Open Meetings Act. The IPA shall ensure that the required communications to those charged with governance are made in accordance with AU-C 260.12 to 260.14.

**F. Progress payments:**

**(1)** Progress payments up to ninety percent of the contract amount do not require state auditor approval and may be made by the local public body if the local public body ensures that progress payments made do not exceed the percentage of work completed by the IPA. If requested by the state auditor, the local public body shall provide the OSA a copy of the approved progress billing(s).

**(2)** Final payments from ninety percent to one hundred percent may be made by the local public body only after the state auditor has stated in a letter to the local public body that the agreed-upon procedures report has been released by the state auditor and the engagement and management representation letter have been received by the state auditor.

**G. Report due dates, notification letters and confidentiality:**

**(1)** For local public bodies with a June 30 fiscal year-end that qualify for the tiered system, the report or certification due date is December 15. Local public bodies with a fiscal year end other than June 30 shall submit the agreed-upon procedures report or certification no later than five months after the fiscal year-end. Late agreed-upon procedures reports (not the current reporting period) are due not more than six months after the date the contract was executed. An organized bound hard copy of the report shall be submitted to the OSA. Agreed-upon procedures reports submitted via fax or email shall not be accepted. A copy of the signed dated management representation letter shall be submitted with the report. If a due date falls on a weekend or holiday, or if the OSA is closed due to inclement weather, the report is due the following business day by 5:00 pm. If the report is mailed to the state auditor, it shall be postmarked no later than the due date to be considered filed by the due date. If the due date falls on a weekend or holiday the audit report shall be postmarked by the following business day.

**(2)** As soon as the IPA becomes aware that circumstances exist that will make the local public body's agreed-upon procedures report be submitted after the applicable due date, the auditor shall notify the state auditor and oversight agency of the situation in writing. This notification shall consist of a letter, not an email. However, a scanned version of the official letter sent via email is acceptable. There shall be a separate notification for each late agreed-upon procedures report. The notification shall include a specific explanation regarding why the report will be late, when the IPA expects to submit the report and a concurring signature by the local public body. If the IPA will not meet the expected report submission date, then the IPA shall send a revised notification letter. In the event the contract was signed after the report due date, the notification letter shall still be submitted to the OSA explaining the reason the agreed-upon procedures report will be submitted after the report due date. A copy of the letter shall be sent to the LGD, if LGD oversees the local public body. The late report notification letter is not required if the report was submitted to the OSA for review by the deadline, and then rejected by the OSA, making the report late when resubmitted.

**(3)** Local public body personnel shall not release information to the public relating to the agreed-upon procedures engagement until the report is released and has become a public record pursuant to Section 12-6-5NMSA 1978. At all times during the engagement and after the agreed-upon procedures report becomes a public record, the IPA shall follow applicable professional standards and Section 2.2.2 NMAC regarding the release of any information relating to the agreed-upon procedures engagement.

**H. Findings:** All agreed upon procedures engagements shall report as findings any fraud, illegal acts, non-compliance or internal control deficiencies, consistent with Section 12-6-5NMSA 1978. The findings shall include the required content listed at Subsection L of Section 2.2.2.10 NMAC.

**I. Review of agreed-upon procedures reports and related workpapers:** Agreed-upon procedures reports shall be reviewed by the OSA for compliance with professional standards and the professional services contract. Noncompliant reports shall be rejected and not considered received. Such reports shall be returned to the firm and a copy of the rejection letter shall be sent to the local public body. If the OSA rejects and returns an agreed upon procedures report to the IPA, the report shall be corrected and

resubmitted to the OSA by the due date, or the IPA shall include a finding for non-compliance with the due date. The IPA shall submit an electronic version of the corrected rejected report for OSA review. The name of the electronic file shall be "corrected rejected report" followed by the agency name and fiscal year. The OSA encourages early submission of reports to avoid findings for late reports. After its review of the agreed-upon procedures report for compliance with professional standards and the professional services contract, the OSA shall authorize the IPA to print and submit the final report. The required number of hardcopies of the final report as specified in the professional services contract, an electronic excel version of the findings summary form and an electronic version of the agreed upon procedures report, in PDF format as described at Subsection B of Section 2.2.2.9 NMAC, shall all be delivered to the OSA within five business days. The OSA shall not release the agreed-upon procedures report until the electronic version of the report is received by the OSA. The OSA shall provide the local public body with a letter authorizing the release of the report after the required five day waiting period, and final payment to the IPA. Released reports may be selected by the OSA for comprehensive report and workpaper reviews. After such a comprehensive report and workpaper review is completed, the OSA shall issue a letter to advise the IPA about the results of the review. The IPA shall respond to all review comments as directed. If during the course of its review, the OSA finds significant deficiencies that warrant a determination that the engagement was not performed in accordance with provisions of the contract, applicable AICPA standards, or the requirements of this rule, any or all of the following action(s) may be taken:

**(1)** the IPA may be required to correct the deficiencies in the report or audit documentation, and reissue the agreed upon procedures report to the agency and any others receiving copies;

**(2)** the IPA's eligibility to perform future engagements may be limited in number or type of engagement pursuant to Subsection D of Section 2.2.2.8 NMAC;

**(3)** for future reports, for some or all contracts, the IPA may be required to submit working papers with the reports for review by the OSA prior to the release of the report; or

**(4)** the IPA may be referred to the New Mexico public accountancy board for possible licensure action.

**J. IPA Independence:** IPA's that perform agreed-upon procedure engagements under Section 2.2.2.16 NMAC shall maintain independence in fact and appearance, in all matters relating to the engagement.

**(1)** An IPA who performs the local public body's annual agreed-upon procedures engagement shall not enter into any special audit or non-attest service contracts with that local public body without the prior written approval of the state auditor.

**(2)** To obtain this approval, the IPA shall follow the requirements set forth in Subsection L of Section 2.2.2.8 NMAC.

[2.2.2.16 NMAC, Rp, 2.2.2.16, 2/27/2018]

**HISTORY of 2.2.2 NMAC:**

Pre-NMAC Regulatory Filing History: The material in this part was derived from that previously filed with the State Records Center and Archives under SA Rule No. 71-1, Regulations of State Auditor Relating to Audit Contracts with Independent Auditors by State Agencies, filed 5/14/1971; SA Rule No. 71-2, Regulations of State Auditor for Audits by Independent Auditors, filed 5/27/1971; SA Rule No. 72-1, Regulations of State Auditor Relating to Audit Contracts With Independent Auditors by Agencies of the State of New Mexico, filed 6/1/1972; SA Rule No. 72-2, Regulations of State Auditor for Audits by Independent Auditors, filed 6/1/1972; SA Rule No. 74-1, Regulations of State Auditor Relating to Reporting Statutory Violations, filed 2/28/1974; SA Rule No. 74-2, Rotation of Assignments, filed 2/28/1974; SA No. 78-1, Regulations Governing the Auditing of New Mexico Governmental Agencies, filed 11/3/1978; Amendment No. 1 to SA Rule 78-1, Regulations Governing the Auditing of New Mexico Governmental Agencies, filed 5/28/1980; SA Rule No. 82-1, Regulation Governing the Auditing of New Mexico Governmental Agencies, filed 12/17/1982; SA Rule No. 84-1, Regulations Governing the Auditing of Agencies of the State of New Mexico, filed 4/10/1984; SA Rule No. 85-1, Regulations Governing the Auditing of Agencies of the State of New Mexico, filed 1/28/1985; SA Rule No. 85-3, Regulation for State Agencies Concerning NCGA Statement No. 4 - Accounting and Financial Reporting Principles for Claims and Judgements and Compensated Absences, filed 4/16/1980; SA Rule No. 85-4, Regulations Governing the Auditing of Housing Authorities of the State of New Mexico, filed 6/12/1985; SA Rule No. 85-5, Regulations Pertaining to Single Audits of State Agencies and Local Public Bodies, filed 6/17/1985; SA Rule No. 85-6, Audits of Grants to Subrecipients, filed 6/17/1985; SA Rule 86-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 1/20/1986; SA Rule No. 86-2, Regulation Governing Violations of Criminal Statutes in Connection with Financial Affairs, filed 3/20/1986; SA Rule No. 86-3, Professional Services Contracts, filed 7/9/1986; SA Rule 87-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 2/13/1987; SA Rule 87-2, Approval of Audit Contracts, filed 4/2/1987; SA Rule 87-3, Audit Requirements for Deferred Compensation, Retirement Plans, Budget and Public Money for the State of New Mexico, filed 8/14/1987; SA Rule 88-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed

2/10/1988; SA Rule 89-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 3/10/1989; SA Rule 90-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 3/1/1990; SA Rule 90-3, Auditor's Responsibilities Related to Fees Collected on Convictions Relating to Intoxicating Liquor and Controlled Substances, filed 5/7/1990; SA Rule 91-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 3/13/1991; SA Rule 92-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 3/6/1992; SA Rule 93-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 2/25/1993; SA Rule 94-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 2/25/1994; Amendment 1 to SA Rule 94-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 5/16/1994; SA Rule 95-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 3/16/1995; and 2 NMAC 2.2, Requirements for Contracting and Conducting Audits of Agencies, filed 4/2/1996.

**History of Repealed Material:**
2 NMAC 2.2, Requirements for Contracting and Conducting Audits of Entities - Repealed, 3/30/2001.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 3/29/2002.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 4/30/2003.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 3/31/2004.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 5/13/2005.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 3/16/2006.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 4/16/2007.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 4/15/2008.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 2/27/2009.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 2/12/2010.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 2/28/2011.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 2/15/2012.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 2/28/2013.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 2/28/2014.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 3/16/2015.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 3/15/2016.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 3/14/2017.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Entities - Repealed, 2/27/2018.

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## ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

### ENERGY CONSERVATION AND MANAGEMENT DIVISION

The Energy, Minerals and Natural Resources Department repeals its rule entitled Necessity for Hearing, 19.14.110 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Emergency Orders, 19.14.111 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Method of Initiating a Hearing, 19.14.112 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Method of Giving Legal Notice for Hearing, 19.14.113 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Contents of Notice of Hearing, 19.14.114 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Personal Service of Notice, 19.14.115 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Preparation of Notices, 19.14.116 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Filing Pleadings: Copy Delivered to Adverse Party or Parties, 19.14.117 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Continuance of Hearing Without New Service, 19.14.118 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Conduct of Hearings, 19.14.119 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Power to Require Attendance of Witnesses and Production of Evidence, 19.14.120 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Rules of Evidence, 19.14.121 NMAC, filed 11/1/1983, effective

February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Examiners' Qualifications and Appointment, 19.14.122 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Referral of Cases to Examiners, 19.14.123 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Examiner's Power and Authority, 19.14.124 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Hearings Which Must Be Held Before Commission, 19.14.125 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Examiner's Manner of Conducting Hearing, 19.14.126 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Report and Recommendations, Examiner's Hearings, 19.14.127 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Disposition of Cases Heard by Examiners, 19.14.128 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled De Novo Hearing Before Commission, 19.14.129 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Notice of Commission and Division Orders, 19.14.130 NMAC, filed 11/1/1983, effective February 27, 2018.

The Energy, Minerals and Natural Resources Department repeals its rule entitled Rehearings, 19.14.131 NMAC, filed 11/1/1983, effective February 27, 2018.

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## ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
### ENERGY CONSERVATION AND MANAGEMENT DIVISION

**TITLE 19 NATURAL RESOURCES AND WILDLIFE**
**CHAPTER 11 GEOTHERMAL RESOURCES DEVELOPMENT**
**PART 1 GENERAL PROVISIONS**

**19.11.1.1 ISSUING AGENCY:** Energy, Minerals and Natural Resources Department, Energy Conservation and Management Division.
[19.11.1.1 NMAC - N, 2/27/2018]

**19.11.1.2 SCOPE:** All persons who engage in the exploration, development or production of a geothermal resource.
[19.11.1.2 NMAC - N, 2/27/2018]

**19.11.1.3 STATUTORY AUTHORITY:** Geothermal Resources Development Act, Section 71-9-1 et seq. NMSA 1978 (2016).
[19.11.1.3 NMAC - N, 2/27/2018]

**19.11.1.4 DURATION:** Permanent.
[19.11.1.4 NMAC - N, 2/27/2018]

**19.11.1.5 EFFECTIVE DATE:** February 27, 2018, except where a later date is cited at the end of a section.
[19.11.1.5 NMAC - N, 2/27/2018]

**19.11.1.6 OBJECTIVE:** The objective of 19.11.1 NMAC is to set forth general provisions and definitions pertaining to the authority of the energy conservation and management division pursuant to the Geothermal Resources Development Act, Section 71-9-1 et seq. NMSA 1978 (2016).
[19.11.1.6 NMAC - N, 2/27/2018]

**19.11.1.7 DEFINITIONS:** These definitions apply to 19.11.1 through 19.11.4 NMAC. See Section 71-9-3 NMSA 1978 (2016) for the definitions of **"correlative rights"**, **"division"**, **"geothermal reservoir"**, **"geothermal resources"** and **"person"**.

**A. Definitions beginning with the letter "A".**

**(1) "Act"** means the Geothermal Resources Development Act, Section 71-9-1 et seq. NMSA 1978 (2016).

**(2) "Affected person"** means a person having a property interest, water right or geothermal resource interest (correlative right) within the public notice area specified in Subsection B of 19.11.2.13 NMAC.

**(3) "Applicant"** means any person who applies with the division for a permit to construct, modify or operate a well or facility used for the exploration, development or production of geothermal resources.

**(4) "Annular space"** means the space between the walls of the well as drilled and the casing or between a permanent casing and the borehole.

**(5) "ASL"** means above sea level.

**B. Definitions beginning with the letter "B".**

**(1) "Blowout"** means an uncontrolled escape of liquids or gases, or both, from a geothermal well.

**(2) "Blowout prevention equipment"** means equipment that is designed to be attached to the casing in a geothermal well to prevent a blowout.

**(3) "BOPE"** means blowout prevention equipment.

**C. Definitions beginning with the letter "C".**

**(1) "Casing"** means the conduit required to prevent waste and contamination of the ground water, the geothermal resource or both, and to hold the formation open during the well's construction or use.

**(2) "Closed-loop system"** as used in 19.11.4 NMAC means a system that uses above ground tanks for the management of drilling fluids.

**(3) "Contaminant"** means any physical, chemical, biological or radiological substance or matter in water.

**D. Definitions beginning with the letter "D".**

**(1) "Department"** means the energy, minerals and natural resources department.

**(2) "Director"** means the director of the energy conservation and management division of the department.

**(3) "Drilling operations"** means the actual drilling, re-drilling, completion or recompletion of a well for exploration, observation, production or injection including the running and cementing of casing, the performance of such operations as logging and perforating and the installation of pumps and well-head equipment.

**E. Definitions beginning with the letter "E".**

**(1) "EPA"** means the United States environmental protection agency.

**(2) "Exploratory well"** means a well drilled for the discovery or evaluation of geothermal resources either in an identified geothermal reservoir or in unexplored areas.

**F. Definitions beginning with the letter "F".**

**"Fresh water"** means the water in lakes and playas (regardless of quality, unless the water exceeds 10,000 mg/l TDS and it can be shown that degradation of the water body will not adversely affect hydrologically connected ground water), the surface waters of streams regardless of the water quality within a given reach and ground water that has an existing concentration of 10,000 mg/l or less.

**G. Definitions beginning with the letter "G".**

**"GRCA"** means the Geothermal Resources Conservation Act, Section 71-5-1 et seq. NMSA 1978.

**H. Definitions beginning with the letter "H". [RESERVED]**

**I. Definitions beginning with the letter "I".**

**"Injection well"** means any well employed for injecting material into a geothermal area or adjacent area to maintain pressures in a geothermal reservoir, pool or other source, or to provide new material to serve as a material medium therein, or for reinjecting any material medium (including fluids) or the residue thereof, or any by-product of geothermal resource exploration or development into the earth.

**J. Definitions beginning with the letter "J". [RESERVED]**

**K. Definitions beginning with the letter "K". [RESERVED]**

**L. Definitions beginning with the letter "L".**

**"LLDPE"** means linear low-density polyethylene.

**M. Definitions beginning with the letter "M".**

**(1) "Material medium"** means any substance including, but not limited to, naturally heated fluids, brines, associated gases and steam in whatever form, found at any depth and in any position below the surface of the earth, which contains or transmits the natural heat energy of the earth, but excluding petroleum, oil, hydrocarbon gas or other hydrocarbon substances.

**(2) "Mg/l"** means milligrams per liter.

**(3) "Mg/kg"** means milligrams per kilogram.

**(4) "MIT"** means mechanical integrity test.

**(5) "Monitoring well"** means, for purposes of 19.11.4 NMAC, any well used to observe the level of the water and its temperature, pressure and chemistry in a shallow protected water aquifer above or near a potential geothermal resource.

**N. Definitions beginning with the letter "N".**

**"Notice"** means, for purposes of 19.11.4 NMAC, a written statement to the division that the permittee intends to do work.

**O. Definitions beginning with the letter "O".**

**"Observation well"** means any well used to observe the level of the water and its temperature, pressure and chemistry in an area of potential geothermal resource. This includes a thermal gradient well.

**P. Definitions beginning with the letter "P".**

**(1) "Permittee"** means the person issued a permit by the director, or a person required to have a permit pursuant to 19.11.2 NMAC including a person who is required to have a permit but has not applied for or obtained a permit. The permittee shall be the owner of the geothermal lease or geothermal interest and any well(s) or facility located upon the geothermal lease or interest or the operator of the geothermal facility if it is someone other than the owner of the geothermal lease or interest.

**(2) "Pit"** means a drilling, workover or blow-down pit, which is constructed with the intent that the pit will hold liquids and mineral solids. Pits may be used for one or more wells and must be located at one of the associated permitted well drilling locations or surface facilities. Any containment structure such as a pond or other impoundment that holds only fresh water that has not been treated for drilling, workover or blow-down purposes is not a pit.

**(3) "Production well"** means a well which is used to transmit fluids derived from a geothermal resource to the surface where the fluids are available for industrial, commercial or domestic purposes.

**Q. Definitions beginning with the letter "Q".**

**[RESERVED]**

**R. Definitions beginning with the letter "R".**

**"Responsible official"** means a corporate officer (president, secretary, treasurer or vice president), general partner or proprietor or public principal executive officer or elected official who is authorized to execute documents on behalf of the corporation, entity or office.

**S. Definitions beginning with the letter "S".**

**(1) "Sump"** means a subgrade impermeable vessel that is partially buried in the ground, is in contact with the ground surface or is a collection device incorporated within a secondary containment system, which remains predominantly empty, serves as a drain or receptacle for de minimis releases on an intermittent basis and is not used to store, treat, dispose of or evaporate products or geothermal wastes. Buckets, pails, drip pans or similar vessels that are not in contact with the ground surface are not sumps.

**(2) "Suspension of operations"** means the cessation of drilling, re-drilling or alteration of casing before the well is officially abandoned or completed.

**T. Definitions beginning with the letter "T".**

**"TDS"** means total dissolved solids.

**U. Definitions beginning with the letter "U".**

**(1) "UIC"** means Underground Injection Control.

**(2) "UTM"** means Universal Transverse Mercator.

**V. Definitions beginning with the letter "V".**

**[RESERVED]**

**W. Definitions beginning with the letter "W".**

**(1) "Waste"** means any physical waste including, but not limited to:

**(a)** underground waste resulting from inefficient, excessive or improper use, or dissipation of geothermal energy, or of any geothermal resource pool, reservoir or other source; or the locating, spacing, constructing, equipping, operating or producing of any well in a manner that results, or tends to result, in reducing the quantity of geothermal energy to be recovered from any geothermal area; or

**(b)** the inefficient above-ground transporting and storage of geothermal energy; and the locating, spacing, equipping, operating or producing of any well or injection well in a manner causing or tending to cause unnecessary or excessive surface loss or destruction of geothermal energy; the escape into the open air from a well of steam or hot water that exceeds what is reasonably necessary in the efficient development or production of a well.

**(2) "Well"** means, (a) a bored, drilled or driven shaft; (b) a dug hole whose depth is greater than the largest surface dimension; (c) an improved sinkhole; or (d) a subsurface fluid distribution system.

[19.11.1.7 NMAC - N, 2/27/2018]

**19.11.1.8 CONFIDENTIAL INFORMATION PROTECTION:**

**A.** Applicants or permittees who submit information to the division may claim such information as confidential. Applicants or permittees must assert any claim of confidentiality at the time of submittal.

**B.** To claim confidentiality of information in a submittal, the applicant or permittee must clearly mark each page in the document on which the applicant or permittee claims there is confidential information, and submit to the division a written description of the basis for the claim of confidentiality and why the information meets the requirements for a claim of confidentiality at the time it submits the document to the division. The division shall review the claim of confidentiality based on the written submittal and determine whether the information may be maintained as confidential pursuant to the Inspection of Public Records Act, Section 14-2-1 et seq. NMSA 1978 (1993, as amended). The division shall determine whether the information may be maintained as confidential prior to reviewing an application or request for approval. If the division determines that information in a submittal is confidential, the division may require submission of redacted copies of the submittal for the public record.

**C.** If no claim of confidentiality is made at the time of submission, any such claims are deemed waived and the division may make the information available to the public without further notice.

**D.** The division will deny claims of confidentiality for the name and address of any applicant or permittee or any information that deals with the existence, absence or level of contaminants in drinking water or the document is otherwise publicly available.

**E.** Information the division determines is confidential may be disclosed to officers, employees or authorized representatives of the division, or may be used in any proceedings conducted pursuant to the Act when such information is essential to such proceeding. The division may close that part of a proceeding where confidential information covered by Section 71-2-8 NMSA 1978 is discussed by the division.

[19.11.1.8 NMAC - N, 2/27/2018]

**19.11.1.9 OTHER REQUIREMENTS:** A permittee shall allow any division employee upon notice and presentation of proper credentials to:

**A.** enter the property where wells are located or the facility at reasonable times;

**B.** inspect and copy records required by an abatement plan;

**C.** inspect any treatment works, monitoring and analytical equipment;

**D.** sample any wastes, ground water, surface water, stream sediment, plants, animals or vadose-zone material including vadose-zone vapor, geothermal resources or

material medium;

**E.** use monitoring systems and wells under the permittee's control to collect samples of any media listed in Subsection D of 19.11.1.9 NMAC; and

**F.** gain access to off-site property the permittee does not own or control, but is accessible to the permittee through a third-party access agreement, provided the agreement allows it.

[19.11.1.9 NMAC - N, 2/27/2018]

**19.11.1.10 TRANSITIONAL PROVISIONS:** Pursuant to the Act, Section 71-9-11 NMSA 1978, all permits, orders and determinations issued pursuant to the Geothermal Resources Conservation Act shall be administered by the division and shall remain in effect as provided in 19.11.1.10 NMAC.

**A.** The permittee under any permit, order or determination issued pursuant to the GRCA which authorizes the drilling and operation of a geothermal well may apply at any time, pursuant to the Act and 19.11.1 through 19.11.4 NMAC, for the issuance of a geothermal well permit covering such well or the inclusion of the geothermal well in a geothermal facility permit. Upon issuance of the permit or inclusion of the well in the geothermal facility permit, the permit, order or determination issued pursuant to the GRCA shall expire.

**B.** A permittee under a permit, order or determination issued pursuant to the GRCA may seek a minor permit modification, as defined in 19.11.2.10 NMAC, and shall follow the procedures in 19.11.2 NMAC. Any modification other than a minor permit modification shall be considered an application for a new geothermal well permit pursuant to Subsection A of 19.11.1.10 NMAC. Any hearings initiated concerning a permit, order or determination issued pursuant to the GRCA shall be conducted in accordance with 19.11.3 NMAC.

**C.** All permits, orders or determinations issued pursuant to the GRCA shall expire five years from the effective date of 19.11.1 through 19.11.4 NMAC unless there is a pending application submitted pursuant to Subsection A of 19.11.1.10 NMAC.

[19.11.1.10 NMAC - N, 2/27/2018]

**HISTORY of 19.11.1 NMAC: [RESERVED]**

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## ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

### ENERGY CONSERVATION AND MANAGEMENT DIVISION

**TITLE 19 NATURAL RESOURCES AND WILDLIFE**
**CHAPTER 11 GEOTHERMAL RESOURCES DEVELOPMENT**
**PART 2 PERMITS**

**19.11.2.1 ISSUING AGENCY:** Energy, Minerals and Natural Resources Department, Energy Conservation and Management Division.

[19.11.2.1 NMAC - N, 2/27/2018]

**19.11.2.2 SCOPE:** All persons who engage in the exploration, development or production of a geothermal resource.

[19.11.2.2 NMAC - N, 2/27/2018]

**19.11.2.3 STATUTORY AUTHORITY:** Geothermal Resources Development Act, Section 71-9-1 et seq. NMSA 1978 (2016).

[19.11.2.3 NMAC - N, 2/27/2018]

**19.11.2.4 DURATION:** Permanent.

[19.11.2.4 NMAC - N, 2/27/2018]

**19.11.2.5 EFFECTIVE DATE:** February 27, 2018, except where a later date is cited at the end of a section.

[19.11.2.5 NMAC - N, 2/27/2018]

**19.11.2.6 OBJECTIVE:** The objective of 19.11.2 NMAC is to require persons to obtain a permit prior to commencing exploration, development and production of geothermal resources and to establish procedures for application for and approval or denial of permits.

[19.11.2.6 NMAC - N, 2/27/2018]

**19.11.2.7 DEFINITIONS: [RESERVED]**

[See 19.11.1.7 NMAC for definitions.]

[19.11.2.7 NMAC – N, 2/27/2018]

**19.11.2.8 INFORMATION TO STATE ENGINEER:**

**A.** The division shall notify the office of state engineer when it receives an application for a geothermal well permit or geothermal facility permit.

**B.** When the applicant proposes to reinject all ground water as soon as practicable into the same ground water source from which it was diverted, resulting in no new depletion to the source, the division shall also provide the state engineer all information available to the division regarding the proposed diversion and reinjection and shall request the opinion of the state engineer as to whether existing ground water rights sharing the same ground water source may be impaired.

**C.** If the state engineer determines that the information provided is sufficient to render an opinion and it is the opinion of the state engineer that any existing ground water rights may be impaired, the division, upon receipt of the opinion of the state engineer, shall notify the applicant or permittee who shall submit to the division by the date specified in the notification a plan of replacement for any existing ground water rights that are likely to be impaired.

[19.11.2.8 NMAC - N, 2/27/2018]

**19.11.2.9 PERMIT REQUIRED:** Except as provided in 19.11.1.10 NMAC, no person shall explore, develop or produce a geothermal resource including drilling or operating an injection well except pursuant to and in accordance with the terms and conditions of a permit issued by the division under the Act. The applicant for a permit or permit modification, renewal or transfer shall be the person who has the right

to produce the geothermal resource either through ownership, lease, permit or other right. The permittee is responsible for the actions of its officers, employees, consultants, contractors and subcontractors as they relate to the exploration, development or production of the geothermal resource. Any person who is involved in the exploration, development or production of a geothermal resource shall comply with the act, 19.11.1 through 19.11.4 NMAC and the permit.

[19.11.2.9 NMAC - N, 2/27/2018]

**19.11.2.10 APPLICATION TO DRILL, MODIFY OR OPERATE WELLS OR FACILITIES IN A GEOTHERMAL RESOURCE:**

**A. Application for a permit to drill an exploratory well or to drill or operate a production or observation well.** Any person who proposes to drill or operate an exploratory, production or observation well shall first apply for a permit by filing a written application with the division. The applicant shall submit two paper copies and one electronic copy of the application. The applicant shall submit the information listed below in the application:

**(1)** name and contact information of the owner or operator of the well and the drilling contractor and whether the owner or operator is a corporation, partnership, single proprietorship, association or other business entity and the names of the applicant's officers and directors;

**(2)** name and contact information of the applicant's registered agent;

**(3)** location of the proposed or existing well (UTM coordinates or latitude-longitude) and a map showing location and distances to property lines;

**(4)** estimated or actual (if existing) top of well-elevation;

**(5)** name and contact information of the surface land owner;

**(6)** signature of a responsible official or designated agent of the applicant;

**(7)** name and contact information of the geothermal resource owner and documentation such as deeds, leases, permits or other documentation showing applicant has the authority or right to produce the geothermal resource;

**(8)** for production wells, actual (when available) or estimated data regarding the physical characteristics of the geothermal resource including volume, temperature, permeability, thermal capacity and water quality of both the geothermal resource waters and any fresh water resources in the proposed drilling area;

**(9)** whether the applicant proposes to reinject all ground water as soon as practicable into the same ground water source from which it was diverted, resulting in no new depletion to the source and information regarding the proposed diversion and reinjection;

**(10)** a map and accompanying list showing the names, addresses and locations of adjacent landowners within one-half mile of the proposed geothermal well or facility; the location of water wells within one mile of the proposed geothermal well or facility; the names, addresses and locations of any geothermal resource owners or lessees currently owning or leasing a geothermal resource within five miles of the proposed geothermal well or facility; and the names, addresses and locations of any local, state, federal or tribal government property within five miles of the proposed geothermal well or facility;

**(11)** a statement of the purpose and estimated or actual (if existing) depth of the well;

**(12)** for production wells, the proposed production rate of geothermal resource waters;

**(13)** a description of the geothermal well construction, BOPE and the drilling rig;

**(14)** a description of the logging, coring and testing program;

**(15)** plans for providing financial assurance prior to permit issuance pursuant to 19.11.2.18 NMAC;

**(16)** pit information pursuant to 19.11.4.17 NMAC;

**(17)** methods for disposal of geothermal resources, residue of geothermal resources or nondomestic waste from the exploration, development or production of geothermal resources pursuant to 19.11.4.20 NMAC;

**(18)** a geothermal well plugging and abandonment plan, including a responsible third-party contractor's cost estimate, sufficient to plug and abandon the wells in a manner that will protect life, health, property, natural resources, the environment and the public welfare, and comply with the requirements contained in 19.11.4.16 NMAC;

**(19)** a statement of whether the applicant or any subsidiary, affiliate or person controlled by or under common control with the applicant

**(a)** has had a federal or state UIC or geothermal drilling or operating permit suspended or revoked in the five years preceding the date of the application's submission; or

**(b)** has forfeited a performance bond or similar security deposited in lieu of bond; and

**(c)** a brief explanation of the facts involved if any such suspension, revocation or forfeiture referred to in Subparagraphs (a) and (b) of Paragraph (19) of Subsection A of 19.11.2.10 NMAC has occurred, including:

**(i)** the permit's identification number and issuance date, and the date and amount of bond or similar security involved;

**(ii)** identification of the authority that suspended or revoked the permit or forfeited the bond or similar security and the stated reasons for the action;

**(iii)**

the status of the permit, bond or other security involved;

**(iv)** the date, location and type of any administrative or judicial proceedings initiated concerning the suspension, revocation or forfeiture; and

**(v)** the proceeding's status; and

**(20)** a listing of all violation notices the applicant has received relating to any UIC or geothermal drilling or operation during the three-year period before the application date; for each violation notice reported include the following information as applicable:

**(a)** any identifying number for the operation including the federal or state permit number, the violation notice's issuance date, the name of the person or entity to whom the violation notice was issued and the name of the issuing regulatory authority, department or agency;

**(b)** a brief description of the violation alleged in the notice;

**(c)** the date, location and type of any administrative or judicial proceedings initiated concerning the violation, including proceedings initiated by any person or entity to obtain administrative or judicial review of the violation;

**(d)** the status of the proceedings and of the violation notice; and

**(e)** the actions, if any, taken by any person identified in Paragraph (20) of Subsection A of 19.11.2.10 NMAC to abate the violation.

**B. Application for permit to drill or operate an injection well.** Any person who proposes to drill or operate an injection well shall first apply for a permit by filing a written application with the division. The applicant shall submit two paper copies and one electronic copy of the application. The items listed below along with the items listed in Subsection A of 19.11.2.10 NMAC are required:

**(1)** a description of the well construction, or proposed well construction, and the proposed method for testing the well before the well is used for injection;

**(2)** the estimated maximum injection pressure, mass flowrate and temperature;

**(3)** an analysis of the proposed injection fluid; and

**(4)** a description of the proposed pipelines, metering equipment and safety devices that will be used to prevent accidental pollution.

**C. Application for a geothermal facility with multiple geothermal wells.** Any person who proposes to drill or operate multiple geothermal wells and operate a geothermal facility on an applicant's geothermal lease shall apply for a multi-well geothermal facility permit. The applicant shall submit two paper copies and one electronic copy of the application. The items listed below along with the items listed in Subsections A and B of 19.11.2.10 NMAC are required:

**(1)** a description of surface equipment and site plan, with proposed topography, of the power generating facility and associated well field with proposed and existing wells identified; and

**(2)** a facility closure plan, including a responsible third-party contractor's cost estimate, sufficient to close the facility in a manner that will protect life, health, property, natural resources, the environment and the public welfare, and comply with the closure requirements contained in 19.11.4 NMAC.

**D. Application to modify or renew a permit.** Any permittee who proposes to modify an individual geothermal well permit or a geothermal facility permit or renew an existing permit (individual or facility) shall first apply for a permit modification or permit renewal by filing a written application with the division. The permittee shall file an application to renew a permit one year prior to the expiration date of the current permit. All applications to modify or renew a permit shall follow the applicable requirements listed in Subsections A, B or C of 19.11.2.10 NMAC unless the modification is a minor permit modification or is approved under the permittee's notification requirements and requests for approval to division conditions listed in 19.11.4.9 NMAC. A minor permit modification includes:

**(1)** change in owner of the geothermal lease or geothermal interest;

**(2)** change in well name;

**(3)** change in previously proposed location of a well that is within the approved area of a geothermal well or facility permit;

**(4)** change in status of an injection well to another type of well;

**(5)** changing the construction of an injection well, including placing a plug in the hole or well and recovering or altering the casing;

**(6)** adding wells to a geothermal facility permit that have been approved previously per Subsections A or B of 19.11.2.10 NMAC;

**(7)** creation of a geothermal facility permit that includes only wells and equipment permitted previously under 19.11.2 NMAC;

**(8)** permitting of equipment that has been permitted or approved prior to the promulgation of 19.11.2 NMAC; the permittee may, upon promulgation of 19.11.2 NMAC, apply to permit all currently operating and previously approved geothermal wells and facilities under 19.11.1 through 19.11.4 NMAC pursuant to the minor permit modification procedures in Subsection E of 19.11.2.10 NMAC; and

**(9)** for an injection well permit or for that portion of a geothermal facility permit that pertains to injection wells, a modification listed under 40 CFR 144.41.

**E. Notification of application for minor permit modification or activity taken**

**pursuant to 19.11.4.9 NMAC.** When requesting approval of a minor permit modification or prior to taking an action listed in Paragraph (3) of Subsection A or Paragraphs (3), (6), (8) or (10) of Subsection B of 19.11.4.9 NMAC, the permittee shall provide written notification to the adjacent surface owners within one-half mile, water rights owners with a well that is within one mile and any geothermal resource owners or lessees within five miles of the geothermal well or facility.

**F. Application for a minor permit modification.** Any permittee who proposes a minor permit modification shall submit a written request, to the division, that fully explains the proposed modification and all information required to implement the requested change. The permittee may apply for approval of the activity listed in Paragraph (3) of Subsection D of 19.11.2.10 NMAC up to 30 days after the action.

**G. Pre-application meeting.** Any person who proposes to submit a permit application to the division may request a pre-application meeting with division staff.

**H. Transfer of a permit.**

**(1)** The permittee shall not transfer a permit without the division's prior written approval. If the transferee wants to change the conditions of the original permit, it shall apply for a new permit pursuant to 19.11.2.10 NMAC. Unless the division otherwise orders, public notice or hearing are not required for the division to approve a transfer request. If the division denies the transfer request, it shall notify the permittee and the proposed transferee of the denial by certified mail, return receipt requested and either the permittee or the proposed transferee may request a hearing within 10 days after receipt of the notice. Until the division approves the transfer and the required financial assurance is in place, the division shall not release the transferor's financial assurance.

**(2)** If the transferee will conduct operations in full compliance with the terms and conditions of the original permit, the transferee shall provide the division with the following information:

**(a)** name and contact information of the owner or operator of the well or facility and a statement as to whether the applicant is a corporation, partnership, single proprietorship, association or other business entity and the names of the transferee's officers and directors;

**(b)** name and contact information of the transferee's registered agent;

**(c)** the signature of a responsible official or designated agent of the transferee on the transfer request;

**(d)** proof that the transfer complies with the terms of any deed, lease or permit;

**(e)** a statement that the transferee will continue to conduct the operations involved in full compliance with the terms and conditions of the original permit, unless the transferee applies for a new permit; and

**(f)** plans for providing sufficient financial assurance to cover the original permit in its entirety from inception to completion of plugging and abandonment prior to the transfer.

**(3)** Nothing in 19.11.2 NMAC shall be construed to relieve any person of responsibility or liability for any act or omission that occurred while that person owned, controlled or was in possession of the well or facility.

[19.11.2.10 NMAC - N, 2/27/2018]

**19.11.2.11 CHANGING, SUPPLEMENTING OR CORRECTING APPLICATIONS:**

**A.** Prior to the division's final decision on an application, the applicant shall have a duty to promptly supplement and correct information submitted in the application. The duty to supplement shall include relevant information thereafter acquired or otherwise determined to be relevant.

**B.** The process provided in 19.11.2.10 NMAC is not intended to limit informal informational exchanges during the application review period or prior to submission of an application. The process also does not prohibit an applicant from withdrawing an application and submitting a new application.

[19.11.2.11 NMAC - N, 2/27/2018]

**19.11.2.12 PERMIT DECISIONS AND APPEALS:**

**A.** The division shall, in a timely manner after its receipt of an application for a permit, or modification or renewal of a permit, evaluate such application and determine whether it is acceptable for review. An application that is acceptable for review is one that includes the information 19.11.2.10 NMAC requires. If the division deems the application:

**(1)** acceptable for review, the division shall send a letter by e-mail and physical mail to the applicant notifying that applicant that the division will review the application;

**(2)** not acceptable for review, the division shall send a letter by e-mail and physical mail to the applicant stating what additional information or points of clarification are necessary to deem the application acceptable for review; upon receipt of the additional information or clarification, the division shall promptly review such information and determine whether the application is acceptable for review;

**(3)** acceptable for review but no permit is required, the division shall send a letter by e-mail and physical mail to the applicant informing the applicant of the determination.

**B.** Upon completion of the division's review of the application, the division shall either issue a draft permit or notice of intent to deny the application. A notice of intent to deny the application is a type of draft permit and follows the same procedure as a draft permit under 19.11.2 NMAC.

**C.** For draft permits for injection wells or facilities that include injection wells, the division shall prepare a fact sheet that includes a brief description of the type of facility or activity that is the subject of the draft permit; the type and quantity of wastes, fluids or pollutants that are proposed to be or are being treated, stored, disposed of, injected, emitted or discharged; a brief summary of the basis for the draft permit conditions including references to the administrative records; reasons why any requested variances or alternatives to required standards do or do not appear justified; a description of the procedures for reaching a final decision on the draft permit including the beginning and ending dates of the comment period and the address where comments will be received, procedures for requesting a hearing and the nature of that hearing and any other procedures by which the public may participate in the final decisions; the name and telephone number of a person to contact for additional information; and justification for waiver of any application requirements.

**D.** If after the applicant provides public notice as required in 19.11.2.13 NMAC, no requests for hearing are filed with the division within the 30 day public notice period as provided by 19.11.3.8 NMAC, or any such requests for hearing are filed by persons the division determines are not affected persons and the division does not otherwise schedule a hearing pursuant to 19.11.3.8 NMAC, the division's draft permit shall become final and the division, after receipt of acceptable financial assurance submitted by the applicant pursuant to 19.11.2.18 NMAC, shall issue the permit.

**E.** The division shall grant the permit or deny the permit based on information contained in the division's administrative record. The administrative record shall consist of the application, any other evidence the applicant submitted, any technical evidence or substantive written comments any person other than the division submitted, any other evidence considered by the division, a statement of matters officially noticed and, if a hearing is held, the evidence submitted at the hearing. The applicant has the burden of demonstrating that a permit or permit modification should be approved. If the division issues a permit, it shall issue a response to comments. The response to comments shall specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change, and briefly describe and respond to all significant comments on the draft permit raised during the public comment period or during any hearing. The response to comments shall be available to the public.

**F.** A person subject to a final decision of the division may appeal to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

[19.11.2.12 NMAC - N, 2/27/2018]

**19.11.2.13 PUBLIC NOTICE FOR PERMIT ACTIONS INVOLVING A GEOTHERMAL WELL OR FACILITY:** Except for Paragraphs (1) and (2) of Subsection A of 19.11.2.13 NMAC, 19.11.2.13 NMAC does not apply to permit actions pursuant to Subsection E of 19.11.2.10 NMAC or other approvals pursuant to 19.11.4.9 NMAC.

**A.** The division shall:

**(1)** make available for public inspection a list of all pending applications for permits or permit modifications or renewals;

**(2)** make available for public inspection the permit application and the division's draft permit and supporting analysis documentation; this material shall be available at the division's office; except those portions of which may be determined as confidential in accordance with 19.11.1.8 NMAC or the Inspection of Public Records Act, Section 14-2-1 et seq. NMSA 1978 (1993, as amended);

**(3)** subsequent to the division's production of a draft permit and supporting documentation, publish a public notice, on the division's website, which shall include: the division's name and address; the applicant's name and address, the location and brief description of the well or facility, a scope of the proposed operation and the division's preliminary intent to issue the permit at the end of the public notice period barring any substantive comments or new information or a permit hearing; the public notice shall identify the location of the permit application and division's draft permit and supporting analysis documentation for public review and describe the manner in which comments or evidence may be submitted to the division, including that persons must provide written comments or evidence to the division before the end of the 30 day public notice period; and a statement of the procedures for requesting a hearing on the application pursuant to 19.11.3.8 NMAC;

**(4)** provide the public notice under Paragraph (3) of Subsection A of 19.11.2.13 NMAC by mail, which may include e-mail, to the applicant;

**(5)** deliver written notice by ordinary first class United States mail to federal and state agencies with jurisdiction over fish and wildlife resources and state and tribal historic preservation officers;

**(6)** deliver written notice by ordinary first class United States mail to the EPA and any agency which the division knows has issued or is required to issue a Resource Conservation and Recovery Act permit, an air quality permit, a national pollutant discharge elimination system permit, 404 permit or sludge management permit for the same facility or activity;

**(7)** deliver written notice by ordinary first class United States mail to any unit of local government having jurisdiction over the area where the well or facility is to be located and to any state agency have authority with respect to the construction or operation of the well or facility;

**(8)** deliver written notice by ordinary first class United States mail or e-mail

to each person who has requested in writing to be notified of such permit applications, modifications or renewals;

**(9)** deliver written notice by ordinary first class United States mail or e-mail to persons on a mailing list developed by the division including those who request in writing to be on the list, soliciting persons for "area lists" from participants in past permit proceedings in that area and notifying the public of the opportunity to be put on the mailing list through periodic publications in the public press, etc.; and

**(10)** publishing notice in a newspaper of general circulation in the county where the geothermal well or facility is located or is proposed to be located or in a newspaper of general circulation in the state.

**B.** The applicant shall:

**(1)** upon receipt of the division's public notice, provide written notice, by certified mail, return receipt requested, of the division's public notice to the adjacent surface owners within one-half mile, water rights owners with a well that is within one mile and any geothermal resource owners or lessees within five miles of the geothermal well or facility;

**(2)** mail notice by ordinary first class United States mail or e-mail to all local, state, federal or tribal governmental agencies that own property within five miles of the geothermal well or facility; and

**(3)** provide the division with proof that the applicant has met the public notice requirements of Paragraphs (1) and (2) of Subsection B of 19.11.2.13 NMAC prior to the division scheduling a hearing, if any, pursuant to 19.11.3.8 NMAC or issuing the permit.

[19.11.2.13 NMAC - N, 2/27/2018]

**19.11.2.14 BASIS FOR DENIAL OF PERMIT:** The division shall deny an application for a permit or permit modification or renewal if the construction or operation of the geothermal well or facility will not or does not comply with the Act or the rules promulgated pursuant to the Act.

[19.11.2.14 NMAC - N, 2/27/2018]

**19.11.2.15 PERMIT CONDITIONS:**

**A.** The contents of the application specifically identified by the division shall become terms and conditions of the permit or permit modification.

**B.** The division shall, as appropriate, specify conditions upon a permit, including:

**(1)** placement of geothermal wells in accordance with the location limitations in 19.11.4.8 NMAC;

**(2)** financial assurance requirements in accordance with 19.11.2.18 NMAC;

**(3)** well-construction in accordance with 19.11.4.10 NMAC;

**(4)** blowout prevention requirements in accordance with 19.11.4.11 NMAC;

**(5)** operating limitations in accordance with 19.11.4.12 NMAC;

**(6)** testing and monitoring requirements in accordance with 19.11.4.13 NMAC;

**(7)** recordkeeping and reporting requirements in accordance with 19.11.4.14 NMAC;

**(8)** surface facility requirements in accordance with 19.11.4.15 NMAC;

**(9)** abandonment requirements in accordance with 19.11.4.16 NMAC;

**(10)** pit design, construction and operating plan and closure remediation plan requirements in accordance with 19.11.4.17 NMAC;

**(11)** disposal requirements in accordance with 19.11.4.20 NMAC; and

**(12)** other operational requirements, including additional testing, monitoring, recordkeeping and reporting or construction requirements deemed necessary to protect life, health, correlative rights, property, natural resources, the environment or the public welfare.

**C.** Any term or condition imposed by the division on a permit or permit modification is enforceable to the same extent as a rule.

**D.** The permit term for all permits shall not exceed 10 years.

[19.11.2.15 NMAC - N, 2/27/2018]

**19.11.2.16 PERMIT CANCELLATION, TERMINATION AND MODIFICATION:**

**A.** The division shall automatically cancel any permit for any well that has been plugged and abandoned or any facility that has been closed in accordance with the requirements of 19.11.4 NMAC and the permit.

**B.** The division may terminate or modify a permit during its term, or deny a permit renewal application, by following the procedures in 19.11.2.12 NMAC, for the following causes:

**(1)** the permittee's noncompliance with any condition of the permit or 19.11.4 NMAC;

**(2)** the permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at any time;

**(3)** a determination that the permitted activity has a reasonable likelihood to endanger life, health, property, natural resources (including geothermal and fresh water resources), the environment or the public welfare and can only be regulated to acceptable levels by permit modification or termination;

**(4)** a determination that the permitted activity is not protective of correlative rights of other geothermal resource leaseholders or owners;

**(5)** a determination that hazardous waste

as defined in 40 CFR 261.3 is being injected into an injection well either because the definition has been revised, or because a previous determination has been changed.

**C.** The division may modify a permit for the following causes:

**(1)** there are material and substantial alterations or additions to the permitted well, facility or activity that occurred after permit issuance that justify the application of permit conditions that are different or absent in the existing permit;

**(2)** the director has received information that was not available at the time of permit issuance (other than revised regulations or rules, guidance or test methods) and would have justified the application of different permit conditions at the time of issuance, including, for geothermal facility permits, any information indicating that cumulative effects on the environment are unacceptable;

**(3)** the standards or regulations or rules on which the permit was based have been changed by promulgation of new or amended standards or regulations or rules or by judicial decision after the permit was issued;

**(4)** the director determines good cause exists for modification of a compliance schedule such as an act of God, strike, flood or materials shortage or other events over which the permittee has little or no control and for which there is no reasonably available remedy.

**D.** Interested persons may request that a permit be modified or terminated. However, the director may only modify or terminate permits for the reasons specified in Subsection B of 19.11.2.16 NMAC. If the director decides the request is not justified, he or she shall send the requestor a brief written response giving a reason for the decision. Denials of requests for modification or termination are not subject to public notice, comment or hearings.

**E.** If the director decides to modify a permit, the director shall issue a draft permit and publish notice pursuant to 19.11.2.12 NMAC and 19.11.2.13 NMAC.
[19.11.2.16 NMAC - N, 2/27/2018]

**19.11.2.17 CORRECTIVE ACTION:**

**A.** Applicants for injection well permits or for geothermal facility permits that include injection wells shall identify the location of all known wells (applicant's wells or wells of other parties), within a two-mile radius of the injection well, that penetrates the injection zone. For wells that are improperly sealed, completed or abandoned, the applicant shall also submit a plan consisting of such steps or modifications as are necessary to prevent movement of fluid into underground sources of fresh water ("corrective action"). Where the plan is adequate, the division shall incorporate it into the permit as a condition. Where the division's review of an application indicates that the applicant's plan is inadequate, the division shall require the applicant to revise the plan, prescribe a plan for corrective action as a condition of the permit or deny the application. An applicant may request a hearing, pursuant to 19.11.3.8 NMAC, regarding the corrective action plan or the denial of the corrective action plan.

**B.** No permittee of a new injection well or for a geothermal facility permit that includes a new injection well may begin injection until the permittee has taken all required corrective action. Any permit issued for or that includes an existing injection well requiring corrective action shall include a compliance schedule requiring the permittee to complete any corrective action accepted or prescribed under Subsection A of 19.11.2.17 NMAC as soon as possible.

**C.** A permittee shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from non-compliance with the permit.
[19.11.2.17 NMAC - N, 2/27/2018]

**19.11.2.18 FINANCIAL ASSURANCE FOR GEOTHERMAL WELLS AND FACILITIES:** Upon notification by the division that it has approved a new geothermal well or facility permit, a geothermal well or facility permit modification or a geothermal well or facility renewal permit but prior to issuing the permit, an applicant shall submit acceptable financial assurance for the geothermal well or facility affected by the permit action.

**A.** The applicant shall submit acceptable financial assurance in the amount of the plugging and abandonment cost for each geothermal well being permitted or, if permitting a geothermal facility, the estimated closure cost of the entire facility, including the plugging and abandonment costs for all geothermal wells and pits. The geothermal well's estimated plugging and abandonment cost or the geothermal facility's estimated closure cost shall be the amount provided in the plugging and abandonment or closure plan the applicant submitted with its application unless the division determines that such estimate does not reflect a reasonable and probable well plugging and abandonment or facility closure cost, in which event, the division shall determine the estimated well plugging and abandonment or facility closure cost and shall include such determination in its draft permit. If the applicant disagrees with the division's determination of estimated well plugging and abandonment or facility closure cost, the applicant may request a hearing as provided in 19.11.3.8 NMAC. If the applicant so requests, and no other person files a request for a hearing regarding the application, the hearing shall be limited to determination of well plugging and abandonment or facility estimated closure cost.

**B. Terms of financial assurance.** The financial assurance shall be on division-prescribed forms, payable to the state of New Mexico and conditioned upon the geothermal well's or facility's proper operation, and proper well plugging and abandonment or facility closure

in compliance with state of New Mexico statutes, division rules and the geothermal well or facility permit terms. The permittee shall notify the division of a material change affecting the financial assurance within 30 days of discovery of such change.

**C. Forfeiture of financial assurance.** The division shall give the permittee and any surety 20 days' notice and an opportunity for a hearing prior to forfeiting financial assurance.

**D. Forms of financial assurance.** The division may accept the following forms of financial assurance.

**(1) Surety bonds.** A surety bond shall be executed by the applicant and by a corporate surety licensed to do business in the state, and shall be non-cancelable.

**(2) Letters of credit.** A letter of credit shall be issued by a bank organized or authorized to do commercial banking business in the United States, shall be irrevocable for a term of not less than 10 years and shall provide for automatic renewal for successive, like terms upon expiration, unless the issuer has notified the division in writing of non-renewal at least 90 days before its expiration date. The letter of credit shall be payable to the state of New Mexico in part or in full upon receipt from the director or the director's authorized representative of demand for payment accompanied by a notice of forfeiture.

**(3) Cash accounts.** An applicant may provide financial assurance in the form of a federally insured or equivalently protected cash account or accounts in a financial institution, provided the operator and the financial institution shall execute as to each such account a collateral assignment of the account to the division, which shall provide that only the division may authorize withdrawals from the account. In the event of forfeiture pursuant to Subsection C of 19.11.2.18 NMAC, the division may, at any time and from time to time, direct payment of all or part of the balance of such account (excluding interest accrued on the account) to itself or its designee for the well's plugging and abandonment or facility's closure.

**E. Replacement of financial assurance.**

**(1)** The division may allow a permittee to replace existing forms of financial assurance with other forms of financial assurance that provide equivalent coverage.

**(2)** The division shall not release existing financial assurance until the permittee has submitted, and the division has approved, an acceptable replacement.

[19.11.2.18 NMAC - N, 2/27/2018]

**HISTORY of 19.11.2 NMAC: [RESERVED**

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## ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

### ENERGY CONSERVATION AND MANAGEMENT DIVISION

**TITLE 19 NATURAL RESOURCES AND WILDLIFE**
**CHAPTER 11 GEOTHERMAL RESOURCES DEVELOPMENT**
**PART 3 HEARINGS**

**19.11.3.1 ISSUING AGENCY:** Energy, Minerals and Natural Resources Department, Energy Conservation and Management Division.
[19.11.3.1 NMAC - N, 2/27/2018]

**19.11.3.2 SCOPE:** All persons who engage in the exploration, development or production of a geothermal resource.
[19.11.3.2 NMAC - N, 2/27/2018]

**19.11.3.3 STATUTORY AUTHORITY:** Geothermal Resources Development Act, Section 71-9-1 et seq. NMSA 1978 (2016).
[19.11.3.3 NMAC - N, 2/27/2018]

**19.11.3.4 DURATION:** Permanent.
[19.11.3.4 NMAC - N, 2/27/2018]

**19.11.3.5 EFFECTIVE DATE:** February 27, 2018, except where a later date is cited at the end of a section.
[19.11.3.5 NMAC - N, 2/27/2018]

**19.11.3.6 OBJECTIVE:** The objective of 19.11.3 NMAC is to establish procedures for hearings before the energy conservation and management division pursuant to the Geothermal Resources Development Act, Section 71-9-1 et seq. NMSA 1978 (2016).
[19.11.3.6 NMAC - N, 2/27/2018]

**19.11.3.7 DEFINITIONS: [RESERVED]**
[See 19.11.1.7 NMAC for definitions.]
[19.11.3.7 NMAC – N, 2/27/2018]

**19.11.3.8 PERMIT HEARING:** The applicant or permittee, affected persons or interested persons may file a request with the division for a permit hearing. The person requesting a permit hearing or an attorney representing that person shall sign the hearing request. The director shall generally grant a permit hearing if the applicant or an affected person requests a hearing. However, the director has discretion to deny a hearing request if the issues are not substantial or have previously been heard and decided before the oil conservation division, the oil conservation commission or the division and the parties to the hearing, other than the division, would be the same as the parties to the original hearing. If the applicant or an affected person does not request a hearing, the director may grant a hearing if there is significant public interest in the application; or if the director determines, in his or her discretion, that a hearing may clarify one or more substantial issues involved in the permit. Permit hearings shall be held in Santa Fe. The hearing request shall be submitted in writing to the division and be postmarked or e-mailed by the close of the public comment period in Paragraph (3) of Subsection A of 19.11.2.13 NMAC. The hearing

request shall include:

**A.** the requestor's name;

**B.** the requestor's address, or the address of the requestor's attorney, including an e-mail address and phone number if available;

**C.** the division's action that is disputed or a copy of the public notice referencing the division's action;

**D.** the name or general description of the property interest that the division's action affects, if any;

**E.** briefly, the general nature of the dispute with the division's action or proposed action; and

**F.** any other matter division rules or a division order requires.

[19.11.3.8 NMAC - N, 2/27/2018]

**19.11.3.9 PERMIT HEARING NOTICE:**

**A.** The division shall publish notice of a permit hearing in the name of the "state of New Mexico", signed by the director stating:

**(1)** the time and place for the hearing;

**(2)** the hearing requestor's name and address, or address of the requestor's attorney, including an e-mail address, if available;

**(3)** a case name and number;

**(4)** brief description of the purpose of the hearing; and

**(5)** a reasonable description of the subject matter of the hearing that alerts persons who may be affected if the division approves or enacts the proposed action.

**B.** The division shall publish notice of each hearing at least 30 days before the hearing by:

**(1)** posting notice on the division's website;

**(2)** delivering written notice to the hearing requestor, by certified mail, return receipt requested and the applicant or permittee if not the hearing requestor;

**(3)** delivering written notice by ordinary first class United States mail to federal and state agencies with jurisdiction over fish and wildlife resources and state and tribal historic preservation officers;

**(4)** delivering written notice by ordinary first class United States mail to the EPA and any other agency which the division knows has issued or is required to issue a Resource Conservation and Recovery Act permit, an air quality permit, a national pollutant discharge elimination system permit, 404 permit or sludge management permit for the same facility or activity;

**(5)** delivering written notice by ordinary first class United States mail to any unit of local government having jurisdiction over the area where the well or facility is to be located and to any state agency having authority with respect to the construction or operation of the well or facility;

**(6)** delivering written notice by ordinary first class United States mail or e-mail to each person who has requested in writing to be notified of such hearings or of the hearing for a specific application;

**(7)** delivering written notice by ordinary first class United States mail or e-mail to persons on a mailing list developed by the division including those who request in writing to be on the list, soliciting persons for "area lists" from participants in past permit proceedings in that area and notifying the public of the opportunity to be put on the mailing list through periodic publications in the public press, etc.; and

**(8)** publishing notice in a newspaper of general circulation in the county where the well or facility is located or is proposed to be located or in a newspaper of general circulation in the state.

[19.11.3.9 NMAC - N, 2/27/2018]

**19.11.3.10 PARTIES TO PERMIT HEARINGS:** The parties to a permit hearing shall include:

**A.** the division;

**B.** the applicant or permittee of the geothermal well or facility; and

**C.** an affected person who has requested a hearing or to intervene in the hearing.

[19.11.3.10 NMAC - N, 2/27/2018]

**19.11.3.11 CONDUCT OF HEARINGS:**

**A. Testimony.** Hearings shall be conducted without rigid formality. The division shall take or have someone take a transcript or recording of the testimony and preserve it as part of the division's records. A person testifying shall do so under oath. The hearing examiner shall designate whether an interested person's unsworn comments and observations are relevant and, if relevant, include the comments and observations in the record.

**B. Pre-filed testimony.** The director or hearing examiner may order the parties to file prepared written testimony in advance of the hearing. The witness shall be present at the hearing and shall adopt, under oath, the prepared written testimony, subject to cross-examination and motion to strike the unless the witness' presence at hearing is waived upon notice to other parties and without their objection. The parties shall number pages of prepared written testimony, which shall contain line numbers on the left-hand side.

**C. Appearances pro se or through attorney.** Parties may appear and participate in hearings either pro se (on their own behalf) or through an attorney. Corporations, partnerships, governmental entities, political subdivisions, unincorporated associations and other collective entities may appear only through an attorney or duly authorized officer or member. Participation in hearings shall be limited to parties as defined in 19.11.3.10 NMAC, except that a representative of a federal, state or tribal governmental agency or political subdivision may make a statement on the agency's or political

subdivision's behalf. The hearing examiner shall have the discretion to allow other persons at the hearing to make a relevant statement, but not to present evidence or cross examine witnesses. A person making a statement shall be subject to cross-examination by the parties or their attorneys.

**D. Presentation of evidence.** The hearing examiner shall afford full opportunity to the parties at a hearing to present evidence and to cross-examine witnesses. The rules of evidence applicable in a trial before a court without a jury shall not control, but hearing examiners may use such rules as guidance in conducting hearings. The hearing examiner may admit relevant evidence, unless it is immaterial, repetitious or otherwise unreliable. The hearing examiner may take administrative notice of the authenticity of documents copied from the division's files.

**E.** Parties introducing exhibits at hearings shall provide a complete set for the court reporter, if applicable, the hearing examiner and other parties.

[19.11.3.11 NMAC - N, 2/27/2018]

**19.11.3.12 HEARING EXAMINER'S POWER AND AUTHORITY:** The hearing examiner to whom the director refers a matter shall have full authority to hold a hearing on the matter, subject only to such limitations as the director may order in a case. The hearing examiner shall have the power to perform all acts and take all measures necessary and proper for the hearing's efficient and orderly conduct, including administering oaths to witnesses, receiving testimony and exhibits offered in evidence and ruling upon such objections as may be interposed. The hearing examiner shall cause a complete record of the proceedings to be made and transcribed or recorded and shall certify the record of the proceedings to the director.

**A.** The hearing examiner may hold a pre-hearing conference prior to the hearing on the merits on cases pending before the division upon a party's request or upon the hearing examiner giving notice. The pre-hearing conference's purpose shall be to narrow issues, eliminate or resolve other preliminary matters and encourage settlement. The director or hearing examiner shall either provide or ensure that written or oral notice of a pre-hearing conference is given to the parties.

**B.** The director or hearing examiner may rule on motions that are necessary or appropriate for disposition prior to the hearing on the merits. Prior to ruling on a motion, the director or hearing examiner shall give written or oral notice to each party who has filed an appearance in the case and who may have an interest in the motion's disposition (except a party who has indicated that it does not oppose the motion), and shall allow parties a reasonable opportunity to respond to the motion. The director or hearing examiner may conduct a hearing on the motion, following written or oral notice to the parties.

[19.11.3.12 NMAC - N, 2/27/2018]

**19.11.3.13 REPORT AND RECOMMENDATIONS FROM HEARING EXAMINER:** Upon conclusion of a hearing, the hearing examiner shall promptly consider the proceedings in such hearing, and based upon the hearing's record prepare a written report with recommendations for the division's disposition of the matter or proceeding. The hearing examiner shall draft a proposed order and submit it to the director with the certified record of the hearing.

[19.11.3.13 NMAC - N, 2/27/2018]

**19.11.3.14 DISPOSITION OF CASES HEARD BY A HEARING EXAMINER:** After receipt of the hearing examiner's report, the director shall enter the division's order, which the director may have modified from the hearing examiner's proposed order disposing of the matter.

[19.11.3.14 NMAC - N, 2/27/2018]

**19.11.3.15 CIVIL PENALTIES AND HEARINGS:**

**A.** If a person violates the provisions of the act or the rules promulgated pursuant to the act or an order or permit issued pursuant to the act, the division may assess the person a civil penalty of $2,500 for each violation. In the case of a continuing violation, each day of violation shall constitute a separate violation.

**B.** To begin an action for a civil penalty, the division will issue a notice of violation. The notice of violation shall:

**(1)** identify the person against whom the order is sought;

**(2)** identify the provision of the Act or the provision of the rule, permit or order issued pursuant to the act allegedly violated;

**(3)** provide a general description of the facts supporting the allegations;

**(4)** state the sanction or sanctions sought; and

**(5)** provide the date, time and place of the public hearing.

**C.** The division shall provide notice by posting notice on the division's website and by delivering the notice of violation to the person against whom the order is sought by certified mail, return receipt requested to the person's last known address, and delivering notice by first class United States mail or e-mail to each person who has requested in writing to be notified of such hearings, and publishing notice in a newspaper of general circulation in the county where the violation occurred or in a newspaper of general circulation in the state.

**D.** The parties to the public hearing shall include the division and the person against whom the order is sought.

**E.** In determining the amount of the civil penalty, the division shall consider the person's history of previous violations of the act or the Geothermal Resources Act, Section 19-13-1 NMSA 1978 (1967, as amended) or the rules, permits or orders issued pursuant to those acts, the seriousness of the violation, any hazard to the health or safety of

the public or the environment and the demonstrated good faith of the person.

**F.** The division may assess a civil penalty only after a public hearing is held or the person has entered an agreed compliance order that waives the person's opportunity for a public hearing.

**G.** A public hearing to assess a civil penalty shall be held pursuant to 19.11.3.11 through 19.11.3.14 NMAC.

**H.** The director may enter an agreed compliance order with the permittee against whom a civil penalty is sought to resolve alleged violations of any provision of the act or any provision of any rule, permit or order issued pursuant to the act. The director may enter an agreed compliance order prior to or after the filing of a notice of violation. An agreed compliance order shall have the same force and effect as an order issued after a public hearing.

**I.** After the public hearing is held, or the person has failed to participate in the public hearing, the division shall issue an order requiring that the person pay any civil penalty imposed.

**J.** If the person fails to pay the civil penalty as ordered by the division, the division may file a civil suit to collect the penalty in the district court of the county in which the defendant resides or in which any defendant resides if there is more than one defendant or in the district court of any county in which the violation occurred.

[19.11.3.15 NMAC - N, 2/27/2018]

**HISTORY of 19.11.3 NMAC:**
**[RESERVED]**

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# ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

## ENERGY CONSERVATION AND MANAGEMENT DIVISION

**TITLE 19 NATURAL RESOURCES AND WILDLIFE**
**CHAPTER 11 GEOTHERMAL RESOURCES DEVELOPMENT**
**PART 4 CONSTRUCTION AND OPERATION**

**19.11.4.1 ISSUING AGENCY:** Energy, Minerals and Natural Resources Department, Energy Conservation and Management Division.
[19.11.4.1 NMAC - N, 2/27/2018]

**19.11.4.2 SCOPE:** All persons who engage in the exploration, development or production of a geothermal resource.
[19.11.4.2 NMAC - N, 2/27/2018]

**19.11.4.3 STATUTORY AUTHORITY:** Geothermal Resources Development Act, Section 71-9-1 et seq. NMSA 1978 (2016).
[19.11.4.3 NMAC - N, 2/27/2018]

**19.11.4.4 DURATION:** Permanent.
[19.11.4.4 NMAC - N, 2/27/2018]

**19.11.4.5 EFFECTIVE DATE:** February 27, 2018, except where a later date is cited at the end of a section.
[19.11.4.5 NMAC - N, 2/27/2018]

**19.11.4.6 OBJECTIVE:** The objective of 19.11.4 NMAC is to establish rules to ensure the exploration, development and production of geothermal resources is conducted in a manner that safeguards life, health, property, natural resources, the environment and the public welfare, and to encourage maximum economic recovery.
[19.11.4.6 NMAC - N, 2/27/2018]

**19.11.4.7 DEFINITIONS: [RESERVED]**
[See 19.11.1.7 NMAC for definitions.]
[19.11.4.7 NMAC - N, 2/27/2018]

**19.11.4.8 GEOTHERMAL WELL LOCATION LIMITATIONS:** Any well drilled for the exploration, development or production of geothermal resources or as an injection well shall be located 100 feet or more from and within the outer boundary of the parcel of land on which the well is situated, or 100 feet or more from a public road, street or highway dedicated prior to the commencement of drilling. The division may modify or waive this requirement upon written request if the applicant can demonstrate that public safety is preserved and that the integrity of the geothermal source is not jeopardized.
[19.11.4.8 NMAC - N, 2/27/2018]

**19.11.4.9 PERMITTEE'S NOTIFICATION REQUIREMENTS AND REQUESTS FOR APPROVAL TO DIVISION:** A permittee shall notify the division with:

**A.** a written notice of intent to engage in any one of the following activities:

**(1)** make a minor change in the operation of the well (minor changes include changing capillary tubing, pulling or replacing a pump or any other change the division considers a minor change);

**(2)** conduct a spinner, pressure or temperature survey test or another test that does not modify the well structure;

**(3)** conduct a flow test on a production well;

**(4)** perform routine maintenance on a well;

**(5)** removal of fluids from on-site pits or closed-loop systems per Paragraph (3) of Subsection D of 19.11.4.17 NMAC; or

**(6)** change in location of a well that is within the approved area of a geothermal well or facility permit (this will require the permittee to apply for a minor permit modification pursuant to Subparagraph F of 19.11.2.10 NMAC so that the permit will reflect the new

location).

**B.** a written notice of intent and request for approval for any one of the following activities:

**(1)** activities not specifically approved or exempted under an existing permit;

**(2)** activities that do not require a permit application per 19.11.2.10 NMAC;

**(3)** tracer tests;

**(4)** mechanical integrity tests;

**(5)** increasing depth of a well;

**(6)** conduct a flow test on an injection well;

**(7)** entering or opening a plugged well;

**(8)** shooting, acidizing or fracturing a well;

**(9)** abandoning and plugging a well;

**(10)** directional drilling (drilling in a direction not intended to be vertical);

**(11)** changing the construction of a hole or well, except for injection wells, including placing a plug in the hole or well and recovering or altering the casing;

**(12)** conducting a major workover or cleaning of a well; or

**(13)** any other activity for which the division conducts a field inspection or evaluates information or documentation regarding the construction of a hole or well.

**C.** The director may determine, based on the notices submitted under Subsections A or B of 19.11.4.9 NMAC, that the permittee is required to apply for a permit modification in accordance with 19.11.2.10 NMAC.

[19.11.4.9 NMAC - N, 2/27/2018]

**19.11.4.10 WELL CONSTRUCTION AND CASING REQUIREMENTS:** Permittees shall construct and case all geothermal wells in a manner to protect or minimize damage to life, health, property, ground water and surface waters, geothermal resources, other natural resources, the environment and the public welfare. No permittee shall construct, operate, maintain, convert, plug, abandon or conduct any other injection activity in a manner that allows the movement of fluid containing any contaminant into underground sources of drinking water, if the contaminant may cause a violation of drinking water regulations or rules or may otherwise adversely affect the health of persons. The permittee has the burden of showing that it meets these requirements. The permittee shall attach the permanent well head completion equipment to the production casing or to the intermediate casing if production casing does not reach the surface. The permittee shall install an annular blowout preventer on wells when the division deems it necessary. All surface, intermediate and production casing strings reaching the surface shall provide adequate anchorage for BOPE, pressure control and protection for all natural resources. The casing design criteria listed below represent minimum requirements.

**A. Conductor casing.** The permittee shall install a minimum of 40 feet of conductor casing. The permittee shall cement the annular space solid to the surface. The permittee shall allow a 24-hour cure period for the grout prior to drilling out the shoe unless the permittee uses additives, approved by the division, to obtain early strength.

**B. Surface casing.** A surface casing shall provide for control of formation fluids, for protection of shallow usable ground water and for adequate anchorage for BOPE. The permittee shall cement all surface casing solid to the surface. The permittee shall allow a 24-hour cure period prior to drilling out the shoe of the surface casing unless the permittee uses additives, approved by the division, to obtain early strength. The permittee shall set sufficient casing to reach a depth below all known or reasonably estimated levels of fresh water and water of present or future value for domestic, commercial or agricultural use and to protect those aquifers and to prevent blowout or uncontrolled flows.

**C. Intermediate casing.** Intermediate casing is required for protection against unusual pressure zones, cave-ins, wash-outs, abnormal temperature zones, uncontrollable lost circulation zones or other drilling hazards. The permittee shall cement intermediate casing strings solid to the surface or to the top of the liner hanger whenever the permittee runs intermediate casing string as a liner. The permittee shall pressure test the liner lap, of any unslotted liner, prior to resumption of drilling.

**D. Production casing.** The permittee shall set production casing above or through the producing or injection zone and cement it above the injection zones. The permittee shall use sufficient cement to exclude overlying formation fluids from the geothermal zone, to segregate zones and to prevent movement of fluids behind the casing into zones that contain fresh ground water. The permittee shall either cement production casing solid to the surface or lap it into intermediate casing, if run. If the permittee laps production casing into an intermediate casing, the casing overlap shall be at least 100 feet, cemented solid and pressure tested to ensure its integrity.

**E.** All casing materials shall be suitable for the proposed operating design stresses and temperatures.

[19.11.4.10 NMAC - N, 2/27/2018]

**19.11.4.11 BLOWOUT PREVENTION:** The permittee shall take all necessary precautions to always keep wells under operational control and mechanical integrity. The permittee shall install BOPE, capable of shutting in the well during any operation, on the surface casing and always maintained ready for use. If necessary, the permittee shall equip the BOPE to be remotely activated. The equipment shall be rated for operating at pressures and temperatures exceeding the maximum pressure and temperature anticipated for the well.

[19.11.4.11 NMAC - N, 2/27/2018]

**19.11.4.12 OPERATING LIMITATIONS:** The division shall establish operating limitations, for all production or injection wells, deemed necessary to protect life, health, correlative rights, property, natural resources, the environment or the public welfare. The permittee shall operate all wells within the operating parameter limits established in the permit. The permittee shall not operate a new injection well before receiving authorization to inject from the division.
[19.11.4.12 NMAC - N, 2/27/2018]

**19.11.4.13 TESTING AND MONITORING:**

**A. Well construction testing and monitoring.**

**(1)** The permittee shall log all injection or production wells with an induction electrical log, or equivalent, or by gamma-neutron log after running casing. The permittee shall log the well from the bottom of the hole to the bottom of the production casing. This requirement may vary from area to area, depending upon the amount of pre-existing subsurface geological data available. If sufficient subsurface geologic data is available, the division may not require the permittee to log the well. However, the permittee shall obtain the division's written permission to omit this requirement prior to running surface casing.

**(2)** The permittee shall take cuttings a minimum of every 10 feet for all geothermal wells. The cuttings must be cleaned, dried, marked for location and depth and placed in appropriate containers and maintained with the well or facility records per Subsection A of 19.11.4.14 NMAC.

**(3)** The permittee shall regularly monitor the temperature of the return mud during the drilling of the surface casing hole, below the conductor casing. The permittee shall either install and maintain in working condition a continuous temperature monitoring device, or read the temperature manually. In either case, the permittee shall log the return mud temperature after each joint of pipe has been drilled down 30 feet.

**(4)** After installation and prior to drilling out the guide shoe from the production or injection casing, the permittee shall test the well casing and BOPE under pressure. The test pressure shall be 1.5 times the saturated steam pressure (psia) of water at the predicted bottom hole mud return temperature. An acceptable test shall maintain pressure in the well between the guide shoe and BOPE, with no more than a ten percent drop from the initial test pressure, for 30 minutes.

**(5)** Prior to operation of an injection well, the permittee shall test the well construction to demonstrate that the casing cement has acceptably bonded to the casing. The permittee shall conduct the cement bond log test by a method approved by the division and submit the test results to the division for approval before placing the well into operation.

**(6)** Prior to operation, the permittee shall test all injection wells to demonstrate that the casing has complete integrity. The permittee shall conduct the MIT by a method approved by the division and submit the test results to the division for approval before placing the well into operation.

**(7)** For fresh water aquifers the division determines may be affected by the operation of an injection well, prior to operation, the permittee shall sample and analyze water quality from the fresh water aquifer through a monitoring or observation well, located down gradient (static water level of fresh water aquifer) and within 500 feet of each injection well. During sampling, the permittee shall also measure the static water level and water temperature. The division shall establish the scope of the water quality analysis based on the potential contaminants from the geothermal resource and geothermal ground operations.

**B. Well operation testing and monitoring.**

**(1)** To verify the integrity of the annular cement above the shoe of the casing of any injection well, the permittee shall make sufficient surveys within 30 days after the permittee begins injection into a well to prove that all the injected fluid is confined to the intended zone of injection. Thereafter, the permittee shall make surveys at least every five years or more often if necessary. If the permittee can substantiate by existing data that these tests are not necessary, then, after review of the data, the division may grant a waiver exempting the permittee from the tests.

**(2)** The permittee of a geothermal production well shall daily monitor the rate of flow of water or steam or both, and the surface pressure and temperature of the fluids from each production well.

**(3)** The permittee of an injection well shall daily monitor the rate of flow of injected geothermal fluid or wastewater, and the surface pressure and temperature of the fluids injected into each injection well.

**(4)** The permittee of a geothermal facility shall continuously monitor the rate of flow, pressure and temperature of geothermal resource water or steam or both at the inlet and outlet of the facility.

**(5)** Based on site conditions and the potential for geothermal resource intrusion into an underground source of usable water, the division may require the permittee to install one or more monitoring wells and to submit a water quality monitoring and analysis plan for division approval.

**(6)** The permittee shall perform all pit testing and monitoring in accordance with Subsection D of 19.11.4.17 NMAC.
[19.11.4.13 NMAC - N, 2/27/2018]

**19.11.4.14 RECORDKEEPING AND REPORTING:** The permittee shall maintain all records, notifications and reports, according to the following

timelines, at the well location, if the well is associated with an operating surface facility, or at the permittee's business office located within the state of New Mexico.

**A. Recordkeeping of well-construction testing and monitoring.** The permittee shall maintain records and reports associated with well-construction testing and monitoring in Subsection A of 19.11.4.13 NMAC, generated and collected during construction of all injection or production wells for the life of the well up to the time the well is plugged and abandoned.

**B. Recordkeeping of well-operation testing and monitoring.** The permittee shall maintain records and reports associated with well-operation testing and monitoring in Subsection B of 19.11.4.13 NMAC, generated and collected during operation of all injection or production wells for a period of five years from the date the record or report was created.

**C.** The permittee shall submit reports of well-construction testing and monitoring associated with Paragraphs (1) through (3) of Subsection A of 19.11.4.13 NMAC to the division no later than 60 days after completion of drilling activities. The permittee shall submit records of well-construction testing and monitoring associated with Paragraphs (4) through (5) of Subsection A of 19.11.4.13 NMAC to the division no later than 30 days prior to placing the well into operation. The responsible official shall sign reports.

**D.** The permittee shall submit reports of well-operation testing and monitoring associated with Paragraph (1) of Subsection B of 19.11.4.13 NMAC to the division no later than 60 days after injection is started. The permittee shall submit records of well-operation testing and monitoring associated with Paragraphs (2) through (5) of Subsection B of 19.11.4.13 NMAC to the division semi-annually in a format specified by permit. The responsible official shall sign reports.

**E.** The permittee shall perform all pit recordkeeping and reporting in accordance with Paragraphs (4) through (5) of Subsection D of 19.11.4.17 NMAC.
[19.11.4.14 NMAC - N, 2/27/2018]

**19.11.4.15 GEOTHERMAL SURFACE FACILITIES:**

**A. General.** The permittee shall maintain all well heads, separators, pumps, mufflers, manifolds, valves, pipelines and other equipment of geothermal resources in good condition to prevent loss of or damage to life, health, property, natural resources, the environment or the public welfare.

**B. Corrosion.** The permittee shall quarterly inspect all surface well-head equipment and pipelines and subgrade appurtenances and master valves for signs of corrosion to safeguard life, health, property, natural resources, the environment and the public welfare.

**C. Tests.** The division may require such tests or remedial work as in its judgment are necessary to prevent damage to life, health, property, natural resources, the environment and the public welfare and to protect geothermal reservoirs from damage or to prevent the infiltration of detrimental substances into underground or surface water suitable for irrigation or other beneficial uses to the best interest of the neighboring property owners and the public. Such tests may include casing tests, cementing tests and equipment tests.

**D. Reclamation.** Where the permittee is not the surface owner, the permittee shall maintain a post-geothermal resource production land use plan that details how the surface area disturbed by the geothermal surface facilities will be reclaimed to achieve the proposed use and written approval of the surface owner for the proposed use.
[19.11.4.15 NMAC - N, 2/27/2018]

**19.11.4.16 PLUGGING AND ABANDONMENT:**

**A.** Prior to plugging and abandoning a geothermal well, the permittee shall file with the division an application for permission to abandon and plug a geothermal well. The application shall be accompanied by a detailed statement of the proposed activity. This condition applies only to wells that have not received plugging and abandoning approvals in a well or facility permit.

**B.** The following provisions apply to the abandonment of an exploration or observation well.

**(1)** If the well was drilled with air and no water was encountered, the permittee shall backfill the hole with cuttings and place a cement plug of 50 linear feet at the top of the well.

**(2)** If the well was drilled with mud or drilled with air and water was encountered, the permittee shall fill the bore with mud and place a cement plug 50 linear feet at the top of the well.

**(3)** The permittee shall restore the surface to near original condition including the restoration of native vegetation.

**C.** The following provisions apply to the abandonment of a geothermal production or injection well.

**(1)** Except for cement used for surface plugging, the permittee shall plug the well by pumping cement in the hole through the drill pipe or tubing. The cement shall consist of a mix that resists high temperatures.

**(2)** The permittee shall place cement plugs in the uncased portion of wells to protect all subsurface resources. These plugs shall extend a minimum of 100 lineal feet above the producing zones and 100 lineal feet below the producing zones or to the total depth drilled, whichever is less. The permittee shall place cement plugs to isolate formations and to protect the fluids in those formations from interzonal migration.

**(3)** Where there is an open hole, the permittee shall place a cement plug in the deepest casing string by:

**(a)** placing a cement plug across the

guide shoe extending a minimum of 100 lineal feet above and below the guide shoe, or to the total depth drilled, whichever is less; or

**(b)** setting a cement retainer with effective control of back pressure approximately 100 lineal feet above the guide shoe, with at least 200 lineal feet of cement below, or to the total depth drilled, whichever is less, and 100 lineal feet of cement above the retainer.

**(4)** If there is a loss of drilling fluids into the formation or such a loss is anticipated or if the well has been drilled with air or another gaseous substance, a permanent bridge plug shall be set at the casing shoe and capped with a minimum of 200 lineal feet of cement.

**(5)** The permittee shall place a cement plug across perforations, extending 100 lineal feet below, or to the total depth drilled, whichever is less, and 100 lineal feet above the perforations. When the permittee uses a cement retainer to squeeze cement into or across the perforations, the permittee shall set the retainer a minimum of 100 lineal feet above the perforations. Where the casing contains perforations at or below debris or collapsed casing, which prevents cleaning, the permittee shall set a cement retainer at least 100 lineal feet above that point and squeeze cement in the interval below the retainer.

**(6)** The permittee shall obtain the division's approval before casing is cut and recovered. The permittee shall place a cement plug in such a manner as to isolate all uncased intervals and guide shoes that are not protected by an inner string of casing. The plug shall extend a minimum of 50 feet above and below any such interval or guide shoe.

**(7)** In the case of a well not constructed with cement in the annulus running the full length of each casing, the permittee shall plug all annular spaces extending to the surface with cement.

**(8)** The permittee shall cement the innermost string of casing that reaches ground level to a minimum depth of 50 feet below the top of the casing.

**(9)** The permittee shall verify the hardness and location of cement plugs placed across perforated intervals and at the top of uncased or open holes by setting down with tubing or drill pipe a minimum weight of 15,000 pounds on the plug or, if less than 15,000 pounds, the maximum weight of the available tubing or drill pipe string. If the permittee uses a cement retainer or bridge plug to set the bottom plug, a test is not required for that interval.

**(10)** The permittee shall fill any interval that is not filled with cement with good quality, heavy drilling fluids.

**(11)** All casing strings shall be cut off below ground level and capped by welding a steel plate on the casing stub. The steel plate shall include a corrosion resistant marking that identifies the well name or number. The permittee shall remove all structures and other facilities.

**(12)** The permittee shall restore the surface to near original condition including the restoration of native vegetation.

[19.11.4.16 NMAC - N, 2/27/2018]

**19.11.4.17 PIT AND CLOSED LOOP DESIGN, CONSTRUCTION AND OPERATING PLAN AND CLOSURE-REMEDIATION PLAN REQUIREMENTS:** All geothermal resources permit applications shall include details regarding the design, construction and operation of a system designed to temporarily store and dispose of drilling wastes and other process fluids during periods of well or facility maintenance. The division will approve two methods, pit or closed-loop system, for the handling of drilling fluids or other process fluids released during well or facility maintenance activities. The plan for design and construction of a pit shall follow the applicable liner manufacturer's requirements. The operating details shall include operating and maintenance procedures, a closure plan and hydrogeologic data that provides sufficient information and detail on the site's topography, soils, geology, surface hydrology and ground water hydrology to enable the division to evaluate compliance with acceptable siting criteria. In the absence of site-specific ground water data, the permittee may provide a reasonable determination of probable ground water depth using data generated by models, cathodic well lithology, published information or other tools as approved by the division.

**A. Siting.**

**(1)** A permittee may locate a pit containing fluids containing 10,000 mg/l or less of TDS and 1 mg/l or less of $H_2S$:

**(a)** where ground water is more than four feet below the bottom of the pit;

**(b)** 100 feet or more from any continuously flowing watercourse or any other significant watercourse;

**(c)** 100 feet or more from any lakebed, sinkhole or playa lake (measured from the ordinary high-water mark);

**(d)** 200 feet or more from an occupied permanent residence, school, hospital, institution or church in existence at the time of initial application;

**(e)** 200 feet or more from a spring or a private, domestic fresh water well used by less than five households for domestic or stock watering purposes; or 200 feet or more from any other fresh water well or spring, in existence at the time of the initial application;

**(f)** outside incorporated municipal boundaries or outside a defined municipal fresh water wellfield covered under a municipal ordinance adopted pursuant to Section 3-27-3 NMSA 1978, as amended, unless the municipality specifically approves;

**(g)** 100 or more feet from a wetland;

**(h)** outside the area overlying a subsurface mine, unless the division

grants a variance that approves the proposed location based upon the permittee's demonstration that the pit's construction and use will not compromise the subsurface integrity;

**(i)** outside an unstable area, unless the division grants a variance upon a demonstration that the permittee has incorporated engineering measures into the design to ensure that the pit's integrity is not compromised; and

**(j)** outside a 100-year floodplain unless the division grants a variance for temporary use.

**(2)** A permittee shall not locate a pit containing fluids containing more than 10,000 mg/l of TDS and more than one mg/l of $H_2S$:

**(a)** where ground water is less than 50 feet below the bottom of the pit;

**(b)** within 300 feet of any continuously flowing watercourse or any other significant watercourse;

**(c)** within 200 feet of any lakebed, sinkhole or playa lake (measured from the ordinary high-water mark);

**(d)** within 300 feet from an occupied permanent residence, school, hospital, institution or church in existence at the time of initial application;

**(e)** within:

**(i)** 500 feet of a spring or a private, domestic fresh water well used by less than five households for domestic or stock watering purposes; or

**(ii)** 1,000 feet of any other fresh water well or spring, in existence at the time of the initial application;

**(f)** within incorporated municipal boundaries or within a defined municipal fresh water wellfield covered under a municipal ordinance adopted pursuant to Section 3-27-3 NMSA 1978, as amended, unless the municipality specifically approves;

**(g)** within 300 feet of a wetland;

**(h)** within the area overlying a subsurface mine, unless the division grants a variance that approves the proposed location based upon the permittee's demonstration that the pit's construction and use will not compromise the subsurface integrity;

**(i)** within an unstable area, unless the division grants a variance upon a demonstration that the permittee has incorporated engineering measures into the design to ensure that the pit's integrity is not compromised; or

**(j)** within a 100-year floodplain.

**B. Design and construction**. A permittee shall design and construct a pit or closed-loop system to contain liquids and solids; prevent contamination of fresh water; and protect life, health, property, natural resources, the environment and the public welfare.

**(1)** The pit or closed-loop system shall ensure the confinement of liquids to prevent releases.

**(2)** A pit shall have a properly constructed foundation and interior slopes consisting of a firm, unyielding base, smooth and free of rocks, debris, sharp edges or irregularities to prevent the liner's rupture or tear. The permittee shall construct a pit so that the slopes are no steeper than two horizontal feet to one vertical foot (2H:1V).

**(3)** The permittee shall design and construct a pit with a geomembrane liner. The geomembrane liner shall consist of 20-mil string reinforced LLDPE or equivalent liner material that the division approves. The geomembrane liner shall be composed of an impervious, synthetic material that is resistant to petroleum hydrocarbons, salts and acidic and alkaline solutions. The liner material shall be resistant to ultraviolet light. Liner compatibility shall comply with EPA SW-846 Method 9090A.

**(4)** The permittee shall minimize liner seams and orient them up and down, not across, a slope. The permittee shall use factory welded seams where possible. Prior to field seaming, the permittee shall overlap liners four to six inches. The permittee shall minimize the number of field seams in corners and irregularly shaped areas. Qualified personnel shall field weld and test liner seams.

**(5)** Construction shall avoid excessive stress-strain on the liner.

**(6)** Geotextile is required under the liner where needed to reduce localized stress-strain or protuberances that may otherwise compromise the liner's integrity.

**(7)** The permittee shall anchor the edges of all liners in the bottom of a compacted earth-filled trench. The anchor trench shall be at least 18 inches deep, unless anchoring to encountered bedrock provides equivalent anchoring.

**(8)** The permittee shall ensure that the liner is protected from any fluid force or mechanical damage at any point of discharge into or suction from the lined pit.

**(9)** The permittee shall design and construct a pit to prevent run-on of surface water. A berm, ditch, proper sloping or other diversion shall surround a pit to prevent run-on of surface water. During drilling operations, the edge of the pit adjacent to the drilling or workover rig is not required to have run-on protection if the permittee is using the pit to collect liquids escaping from the drilling or workover rig and run-on will not result in a breach of the pit.

**(10)** The volume of a pit shall not exceed 10 acre feet, including freeboard.

**(11)** Stockpiling of topsoil. Prior to constructing a pit, the permittee shall strip and stockpile the topsoil for use as the final cover or fill at the time of closure.

**(12)** Signs. The permittee shall post an upright sign not less than 12 inches by 24 inches with lettering not less than two inches in height in a conspicuous

place on the fence surrounding the pit. The permittee shall post the sign in a manner and location such that a person can easily read the legend. The sign shall provide the following information: the permittee's name; the location of the site by quarter-quarter or unit letter, section, township and range; and emergency telephone numbers.

**(13)** A permittee who is using a closed-loop system with drying pads shall design and construct the drying pads to include the following:

**(a)** appropriate liners that prevent the contamination of fresh water and protect life, health, property, natural resources, the environment and the public welfare;

**(b)** sumps to facilitate the collection of liquids derived from drill cuttings; and

**(c)** berms that prevent run-on of surface water or fluids.

**C. Fencing.** The permittee shall fence or enclose a pit in a manner that deters unauthorized access and shall maintain the fences in good repair. Fences are not required if there is an adequate surrounding perimeter fence that prevents unauthorized access to the well site or facility, including the pit. During drilling or workover operations, the permittee is not required to fence the edge of the pit adjacent to the drilling or workover rig.

**D. Operation.** A permittee shall maintain and operate a pit or closed-loop system in accordance with the following requirements.

**(1)** The permittee shall operate and maintain a pit or closed-loop system, to contain liquids and solids and maintain the integrity of the liner, liner system or secondary containment system, prevent contamination of fresh water and protect life, health, property, natural resources, the environment and the public welfare.

**(2)** The permittee may only discharge fluids or mineral solids generated or used during the well drilling, completion or workover or facility maintenance operations process into a pit or closed-loop system. The permittee shall maintain a pit free of miscellaneous solid waste or debris.

**(3)** If the permittee elects to remove any stored fluids from a pit or a closed-loop system, the permittee shall dispose of the fluids pursuant to 19.11.4.20 NMAC.

**(4)** The permittee shall maintain at least two feet of freeboard in a pit. For temporary extenuating circumstances, a permittee may maintain a freeboard of less than two feet and shall maintain a log describing such circumstances and make the log available to the division upon request.

**(5)** The permittee shall inspect a pit or closed-loop system containing drilling fluids at least daily while the drilling or workover rig is on location. Thereafter, the permittee shall inspect the pit weekly so long as liquids remain in the pit. The permittee shall maintain a log of such inspections and make the log available for the division's review upon request.

**(6)** The permittee shall not discharge into or store any hazardous waste in a pit or drying pad associated with a closed-loop system.

**(7)** If a pit liner's integrity is compromised above the liquid's surface then the permittee shall repair the damage or initiate replacement of the liner within 48 hours of discovery.

**(8)** If a pit or closed loop system develops a leak, or if any penetration of the pit liner occurs below the liquid's surface, then the permittee shall remove all liquid above the damage or leak within 48 hours of discovery, notify the division and repair the damage or replace the pit liner or closed loop hardware.

**(9)** The permittee shall inject or withdraw liquids from a pit through a header, diverter or other hardware that prevents damage to the liner by erosion, fluid jets or impact from installation and removal of hoses or pipes.

**(10)** The permittee shall operate and install a pit to prevent the collection of surface water run-on.

**(11)** The permittee shall install, or maintain on site, a water absorbent boom or other device to contain an unanticipated release.

**E. Closure and remediation.** A closure plan shall describe the proposed closure method and the proposed procedures and protocols to implement and complete the closure.

**(1)** The permittee shall not commence closure without first obtaining division approval of the closure plan submitted with the permit application.

**(2)** Prior to closure the permittee shall remove all free liquids reasonably achievable from the pit or drying pad and tank associated with a closed-loop system and dispose of such liquids at a division-approved facility.

**(3)** When closing a pit, the permittee shall stabilize or solidify the remaining pit contents to a capacity sufficient to support the final cover of the pit. When transferring the geothermal waste contents from a drying pad and tank associated with a closed-loop system into a pit, the permittee shall stabilize or solidify the geothermal waste contents to a capacity sufficient to support the final cover of the pit. The permittee shall not mix the contents with soil or other material at a mixing ratio of greater than 3:1, soil or other material to contents. The geothermal waste mixture must pass the paint filter liquids test (EPA SW-846 Method 9095B or other test methods approved by the division).

**(4)** The permittee shall collect, at a minimum, a five-point composite of the contents of the pit to demonstrate that, after the geothermal waste is solidified or stabilized with soil or other non-geothermal waste material at a ratio of no more than 3:1 soil or other

non-geothermal waste material to geothermal waste, the concentration of any contaminant in the stabilized geothermal waste is not higher than the parameters listed in Table 2 (19.11.4.19 NMAC).

**(5)** If, after appropriate stabilization, the concentrations of all contaminants in the contents from a pit are less than or equal to the parameters of listed in Table 2 (19.11.4.19 NMAC), the permittee may proceed with closure and remediation of the pit.

**(6)** If the concentration of any contaminant in the contents, after mixing with soil or non-geothermal waste material to a maximum ratio of 3:1, from a pit or drying pad associated with a closed-loop system is higher than constituent concentrations shown in Table 2 (19.11.4.19 NMAC), then the permittee shall close the pit or drying pad by first removing all contents and, if applicable, synthetic liners and transferring those materials to a division-approved facility.

**(7)** Upon achieving all applicable geothermal waste stabilization in the pit or transfer of stabilized geothermal wastes to the pit, the permittee shall:

**(a)** fold the outer edges of the pit liner to overlap the geothermal waste material in the pit prior to installing the geomembrane cover;

**(b)** install a geomembrane cover over the geothermal waste material in the pit; the permittee shall install the geomembrane cover in a manner that prevents the collection of infiltration water in the pit and on the geomembrane cover after the soil cover is in place; the geomembrane cover shall consist of a 20-mil string reinforced LLDPE liner or equivalent cover that the division approves; the geomembrane cover shall be composed of an impervious, synthetic material that is resistant to petroleum hydrocarbons, salts and acidic and alkaline solutions; cover compatibility shall comply with EPA SW-846 Method 9090A; and

**(c)** cover the pit with non-geothermal waste containing uncontaminated, earthen materials and construct a soil cover prescribed by the division.

**(8)** If the permittee has removed the geothermal wastes and the liner from a drying pad associated with a closed-loop system to a pit, the permittee shall test the soils beneath the drying pad as follows.

**(a)** At a minimum, the permittee shall take a five-point composite sample to include any obvious stained or wet soils, or other evidence of contamination under the liner and have that sample analyzed for the constituents listed in Table 1 (19.11.4.18 NMAC).

**(b)** If any contaminant concentration is higher than the parameters listed in Table 1 (19.11.4.18 NMAC) the division may require additional delineation upon review of the results and the permittee must receive division approval before proceeding with closure.

**(c)** If all contaminant concentrations are less than or equal to the parameters listed in Table 1 (19.11.4.18 NMAC), the permittee can proceed to backfill the pad or excavation with non-geothermal waste containing, uncontaminated, earthen material.

**(9)** A permittee shall notify the division at least 60 days prior to cessation of operations and provide a proposed schedule for closure. If there is no closure plan on file with the division applicable to the pit, the permittee shall provide a closure plan with this notice. Upon receipt of the notice and proposed schedule, the division shall review the current closure plan for adequacy and inspect the site. When onsite burial occurs on private land, the permittee shall file a deed notice identifying the exact location of the onsite burial with the county clerk in the county where the onsite burial occurs.

**(10)** Within 60 days of closure completion, the permittee shall submit a closure report that documents all closure activities including sampling results; other information the division requires and details on back-filling, capping and covering, where applicable. In the closure report, the permittee shall certify that all information in the report and attachments is correct and that the permittee has complied with all applicable closure requirements and conditions specified in the approved closure plan. If the permittee elects to conduct onsite burial in an onsite pit, the permittee shall also provide a plat of the pit location. The permittee shall place a steel marker at the center of an onsite burial. The steel marker shall be not less than four inches in diameter and shall be cemented in a three-foot deep hole at a minimum. The steel marker shall extend at least four feet above mean ground level and at least three feet below ground level. The permittee name, lease name, well number and location, including unit letter, section, township and range, and that the marker designates an onsite burial location shall be welded, stamped or otherwise permanently engraved into the metal of the steel marker. A person shall not build permanent structures over an onsite burial without the division's written approval. A person shall not remove an onsite burial marker without the division's written permission.

**(11)** A permittee shall close a drying pad associated with a closed-loop system or a pit within one year from the date that the permittee releases the drilling or workover rig. The permittee shall note the date of the drilling or workover rig's release, upon the well's or workover's completion. The division may grant an extension not to exceed one year.

**(12) Reclamation of pit and drying pad locations.**

**(a)** A permittee shall reclaim the pit or drying pad location and all areas associated with the closed-loop system or pit including associated access roads to a safe and stable condition that blends with the

surrounding undisturbed area.

**(b)**

The permittee may propose an alternative to the re-vegetation or re-contouring requirement if the permittee demonstrates to the division that the proposed alternative provides equal or better prevention of erosion and protection from contamination of fresh water, and protection of life, health, property, natural resources, the environment and the public welfare.

**(c)**

The permittee shall compact, cover, pave or otherwise stabilize and maintain areas reasonably needed for production operations or for subsequent drilling operations in such a way as to minimize dust and erosion to the extent practicable.

**(d)**

The soil cover for closures after site contouring, where the permittee has removed the drying pad contents and liner, and if necessary remediated the soil beneath the drying pad liner to chloride concentrations less than 600 mg/kg as analyzed by EPA Method 300.0, shall consist of the background thickness of topsoil or one foot of suitable material, whichever is greater.

**(e)**

The soil cover for burial in-place pits shall consist of a minimum of four feet of non-geothermal waste containing uncontaminated, earthen material with chloride concentrations less than 600 mg/kg as analyzed by EPA Method 300.0. The soil cover shall include either the background thickness of topsoil or one foot of suitable material to establish vegetation at the site, whichever is greater.

**(f)**

The permittee shall construct the soil cover to the site's existing grade and prevent ponding of water and erosion of the cover material.

**(g)**

The permittee shall reclaim all areas disturbed by the closure of pits, except areas reasonably needed for production operations or for subsequent drilling operations, as early and as nearly as practicable to their original condition or their final land use and maintain them to control dust and minimize erosion to the extent practicable. The permittee shall replace top soils and subsoils to their original relative positions and contour them to achieve erosion control, long-term stability and preservation of surface water flow patterns. The permittee shall reseed disturbed area in the first favorable growing season following closure of a pit or drying pad associated with a closed-loop system. Reclamation of all disturbed areas no longer in use shall be considered complete when all ground surface disturbing activities at the site have been completed, and a uniform vegetative cover has been established that reflects a life-form ratio of plus or minus fifty percent of pre-disturbance levels and a total percent plant cover of at least seventy percent of pre-disturbance levels, excluding noxious weeds.

**(h)**

The permittee shall notify the division when reclamation and re-vegetation are complete.

[19.11.4.17 NMAC - N, 2/27/2018]

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**Continued on the following page**

**19.11.4.18 TABLE 1 – CLOSURE CRITERIA FOR SOILS BENEATH DRYING PADS ASSOCIATED WITH CLOSED-LOOP SYSTEMS:**

| Depth below bottom of pit to ground water less than 10,000 mg/l TDS | Constituent | Method* | Limit** |
|---|---|---|---|
| ≤50 feet | Chloride | EPA 300.0 | 600 mg/kg |
| 51-100 feet | Chloride | EPA 300.0 | 10,000 mg/kg |
| >100 feet | Chloride | EPA 300.0 | 20,000 mg/kg |

*Or other test methods approved by the division
**Numerical limits or natural background level, whichever is greater
[19.11.4.18 NMAC - N, 2/27/2018]

**19.11.4.19 TABLE 2 – CLOSURE CRITERIA FOR GEOTHERMAL WASTE LEFT IN PLACE IN PITS:**

| Depth below bottom of pit to ground water less than 10,000 mg/l TDS | Constituent | Method* | Limit** |
|---|---|---|---|
| 25-50 feet | Chloride | EPA 300.0 | 20,000 mg/kg |
| 51-100 feet | Chloride | EPA 300.0 | 40,000 mg/kg |
| >100 feet | Chloride | EPA 300.0 | 80,000 mg/kg |

*Or other test methods approved by the division
**Numerical limits or natural background level, whichever is greater
[19.11.4.19 NMAC - N, 2/27/2018]

**19.11.4.20 DISPOSAL OF GEOTHERMAL RESOURCES, RESIDUE OF GEOTHERMAL RESOURCES OR NONDOMESTIC WASTE FROM THE EXPLORATION, DEVELOPMENT OR PRODUCTION OF GEOTHERMAL RESOURCES:** Persons disposing of geothermal resources, residue of geothermal resources or nondomestic waste from the exploration, development or production of geothermal resources shall do so in a manner that does not constitute a hazard to life, health, property, natural resources, the environment or the public welfare. The permittee shall dispose of geothermal resources, residue of geothermal resources or nondomestic waste from the exploration, development or production of geothermal resources as provided in 19.11.4.17 or 19.11.4.20 NMAC, or at a facility permitted to accept the products.

**A.** The permittee may discharge geothermal resources, residue of geothermal resources or nondomestic waste from the exploration, development or production of geothermal resources to an above ground surface impoundment that meets the requirements of Subsection B of 19.11.4.20 NMAC, provided the other requirements of 19.11.4 NMAC are met and the permittee submits, and the division approves, a discharge plan that conforms to the following requirements:

**(1)** the effluent shall not contain any detectable toxic pollutant as defined in 20.6.2 NMAC;

**(2)** the amount of effluent that enters the subsurface from a surface impoundment shall not exceed 0.5 acre-feet per acre per year, calculated as a monthly rolling 12-month total;

**(3)** the effluent is in conformance with the New Mexico water quality standards in 20.6.2.3103 NMAC or the total weight of each water contaminant, that is not in conformance with the New Mexico water quality standards in 20.6.2.3103 NMAC, that enters the subsurface from a surface impoundment shall not exceed 200 pounds per acre per year, calculated as a monthly rolling 12-month total;

**(4)** the discharge plan shall include adequate provisions for sampling of effluent and adequate flow monitoring so that the amount being discharged onto or below the surface of the ground can be determined; and

**(5)** the discharge plan shall include a minimum annual reporting frequency of monitoring data to the division.

**B.** For discharges approved per Subsection A of 19.11.4.20 NMAC, the permittee shall construct and operate a surface impoundment in accordance with the following:

**(1)** the permittee shall design and construct a surface impoundment to prevent run-on of surface water and out flow of effluent; a berm, ditch, proper sloping or other diversion shall surround a surface impoundment to prevent run-on of surface water and out flow of effluent;

**(2)** the permittee shall site the surface impoundment according the requirements in Paragraph (1) of Subsection A of 19.11.4.17 NMAC;

**(3)** the permittee shall inject or withdraw liquids from a surface impoundment through a header, diverter or other hardware that prevents damage to the berm, ditch, sloping or other diversion system by erosion, fluid

jets or impact from installation and removal of hoses or pipes; and

**(4)** the permittee shall maintain a surface impoundment to prevent the collection of surface water run-on and surface ground flow of effluent out from the surface impoundment.
[19.11.4.20 NMAC - N, 2/27/2018]

**HISTORY of 19.11.4 NMAC:**
**[RESERVED]**

## HUMAN SERVICES DEPARTMENT
### MEDICAL ASSISTANCE DIVISION

The Human Services Department reviewed at its 11/29/2017 hearing, to repeal its rule 8.215.500 NMAC, Medicaid Eligibility Supplemental Security Income (SSI) Methodology - Income And Resource Standards (filed 2/15/2001) and replace it with 8.215.500 NMAC, Medicaid Eligibility Supplemental Security Income (SSI) Methodology - Income And Resource Standards, adopted 02/01/2018 and effective 3/1/2018.

The Human Services Department reviewed at its 10/13/17 hearing, to repeal its rule 8.314.3 NMAC, Medically Fragile Home and Community-Based Services Waiver Services (filed 4/16/2002) and replace it with 8.314.3 NMAC, Medically Fragile Home and Community-Based Services Waiver Services adopted 02/08/2018 and effective 3/1/2018.

## HUMAN SERVICES DEPARTMENT
### MEDICAL ASSISTANCE DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 215 MEDICAID ELIGIBILITY - SUPPLEMENTAL SECURITY INCOME (SSI) METHODOLOGY**
**PART 500 INCOME AND RESOURCE STANDARDS**

**8.215.500.1 ISSUING AGENCY:** New Mexico Human Services Department (HSD).
[8.215.500.1 NMAC - Rp, 8.215.500.1 NMAC, 3/1/2018]

**8.215.500.2 SCOPE:** The rule applies to the general public.
[8.215.500.2 NMAC - Rp, 8.215.500.2 NMAC, 3/1/2018]

**8.215.500.3 STATUTORY AUTHORITY:** The New Mexico medicaid program is administered pursuant to regulations promulgated by the federal department of health and human services under Title XIX of the Social Security Act, as amended and by the state human services department pursuant to state statute. See Section 27-2-12 et. seq., NMSA 1978 (Repl. Pamp. 1991).
[8.215.500.3 NMAC - Rp, 8.215.500.3 NMAC, 3/1/2018]

**8.215.500.4 DURATION:** Permanent.
[8.215.500.4 NMAC - Rp, 8.215.500.4 NMAC, 3/1/2018]

**8.215.500.5 EFFECTIVE DATE:** March 1, 2018 , unless a later date is cited at the end of a section.
[8.215.500.5 NMAC - Rp, 8.215.500.5 NMAC, 3/1/2018]

**8.215.500.6 OBJECTIVE:** The objective of these regulations is to provide eligibility policy and procedures for the medicaid program.
[8.215.500.6 NMAC - Rp, 8.215.500.6 NMAC, 3/1/2018]

**8.215.500.7 DEFINITIONS:**
**Relative:** A son/daughter; grandson/granddaughter; step-son/step-daughter; in-laws; mother/father; step-mother/step-father; half sister/half brother; grandmother/grandfather; aunt/uncle; sister/brother; step-brother/step-sister; and niece/nephew.
[8.215.500.7 NMAC - Rp, 8.215.500.7 NMAC, 3/1/2018]

**8.215.500.8 [RESERVED]**

**8.215.500.9 NEED DETERMINATION:** This section describes the methodology to be used in determining countable resources and income for medicaid eligibility categories which use supplemental security income (SSI) methodology. These guidelines are used for retroactive medicaid eligibility for SSI recipients as well as initial and on-going eligibility for qualified medicare beneficiaries (QMB), qualified disabled working individuals (QD), medicaid extension and specified low income medicare beneficiaries (SLIMB). Medicaid eligibility is determined prospectively. Applicants/recipients must meet, or expect to meet, all financial and nonfinancial eligibility criteria in the month for which a determination of eligibility is made. Applicants for and recipients of medicaid 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 30 days of the date the human services department (HSD) furnishes notice of the potential entitlement.

**A. Failure to apply for and take steps to determine eligibility for other benefits:** 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.

**B. Exceptions to general requirement:** Applicants/recipients who have elected a lower VA payment do not need to reapply for veterans administration improved pension (VAIP) benefits. Crime victims are not required to accept victims compensation payments from a state-administered fund as a condition of medicaid eligibility.
[8.215.500.8 NMAC - Rp, 8.215.500.8 NMAC, 3/1/2018]

**8.215.500.10 APPLICATION PROCESS:** [**RESERVED**]

**8.215.500.11 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/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 is made as of the first moment of the first day of the month of application. An applicant/recipient is ineligible for any month in which his/her 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/recipient until the following month becomes a resource.

[8.215.500.11 NMAC - Rp, 8.215.500.11 NMAC, 3/1/2018]

**8.215.500.12 APPLICABLE RESOURCE STANDARDS:** The resource standard for medicaid extension as well as retroactive SSI medicaid eligibility determinations is $2,000. See Section 8.240.500.10 NMAC for resource standards applicable to QMB. See Section 8.242.500.10 NMAC for standards applicable to the qualified disabled working individuals program. See Section 8.245.500.10 NMAC for standards applicable to the SLIMB program.

**A. Liquid resources:** The face value of liquid resources such as cash, savings or checking accounts is considered in determining medicaid eligibility. The countable value of resources such as securities, bonds, real estate contracts and promissory notes is based on their current fair market value.

**(1)** An applicant/recipient must provide verification of the value of all liquid resources. The resource value of a bank account is customarily verified by a statement from the bank showing the account balance as of the first moment of the first day of the month in question. If an applicant/recipient cannot provide this verification, the ISD worker sends a bank or postal savings clearance to the appropriate institution(s).

**(2)** If the applicant/recipient can demonstrate that a check was written and delivered to a payee but not cashed by the payee prior to the first moment of the first day of the month, the amount of that check is subtracted from the applicant/recipient's checking account balance to arrive at the amount to be considered a countable resource.

**B. Non-liquid resources:** The value of non-liquid resources is computed at current fair market value. See below for discussion of equity value.

**(1) Real property:** If an applicant/recipient is the sole owner of real property other than a home and has the right to dispose of it, the entire equity value is included as a countable resource. If an applicant/recipient owns property with one or more individuals and the applicant/recipient has the right, authority or power to liquidate the property or his/her 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 the individual. The applicant/recipient must provide a copy of the legal document which indicates his/her interest in the property.

**(2) Vehicles:** One automobile is totally excluded regardless of value if it is used for transportation for the individual or a member of the individual's household. Any other automobiles are considered to be Non-liquid resources. Equity in the other automobiles is counted as a resource. Recreational vehicles and boats are considered household goods and personal effects rather than vehicles.

**(3) 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, jewelry that is not worn or held for family significance, or collectibles.

[8.215.500.12 NMAC - Rp, 8.215.500.12 NMAC, 3/1/2018]

**8.215.500.13 COUNTABLE RESOURCES:** Before a resource can be considered countable, the three criteria listed below must be met.

**A. Ownership interest:** An applicant/recipient must have an ownership interest in a resource for it to be countable. The fact that an applicant/recipient has access to a resource, or has a legal right to use it, does not make it countable unless the applicant/recipient also has an ownership interest in it.

**B. Legal right to convert resource to cash:** An applicant/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/recipient does not have physical possession of a resource does not mean it is not his/her resource. If he/she has 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/recipient is considered to have free access to the unrestricted use of a resource even if he/she can take those actions only through an agent, such as a representative payee or guardian.

**(3)** If there is a legal bar to the sale of a resource, the resource is not countable. If

the co-owner of real property can bring an action to partition and sell the property, his/her 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/recipient's own support and maintenance, the resource is not countable.

**D. Joint ownership of resources:** If an applicant/recipient owns either liquid or non-liquid resources jointly with others, he/she has 30 days from the date requested by the ISD worker to submit all documentation required to prove his/her 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/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;

**(c)** if the value of countable resources exceeds the allowable maximum, advance notice is furnished to the applicant/recipient of the intent to close the case and his/her right to verify claims regarding ownership of, access to and legal ability to use the property for personal support and maintenance;

**(d)** if the applicant/recipient fails to provide required information or respond within the advance notice period, the case is closed; and

**(e)** if, after expiration of the advance notice period but prior to the end of the month in which the advance notice expires, the applicant/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/recipient's ownership interest, while the parties to the account are alive, is presumed to be proportionate to the applicant/recipient's contributions to the total resources on deposit.

**(a)** The applicant/recipient is presumed to own a proportionate share of the funds on deposit unless he/she presents clear and convincing evidence that the parties to the account intended the applicant/recipient to have a different ownership interest.

**(b)** To establish the applicant/recipient's ownership interest in a joint account, the following are required:

**(i)** statement by the applicant/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); if either the applicant/recipient or the other account holder is not capable of making a statement, the applicant/recipient or 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 days of the date requested by the ISD worker results in a determination that the entire account amount belongs to the applicant/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 days of the request, the case is closed.

**E. Other countable resources:** Other liquid or non-liquid resources must be considered in the calculation of total countable resources. Under certain circumstances, the following non-liquid resources may be included in the calculation of countable resources:

**(1)** burial funds;

**(2)** burial spaces;

**(3)** life estates;

**(4)** life insurance and other insurance products;

**(5)** income-producing property; and

**(6)** other financial investment products.

**F. The home as a countable resource:** If the applicant/recipient or his/her representative states the applicant/recipient does not intend to return to the home and it is not the residence of the applicant/recipient's spouse or dependent relative, the home is considered a countable resource. If the applicant/recipient or his/her representative puts the home up for sale and it is not the primary residence of the applicant/recipient's spouse or a dependent relative, the home is considered a countable resource.

**G. Value of property:** The applicant/recipient must supply the ISD worker with written documentation regarding the fair market value of the property from a real estate agent, title company or mortgage insurance company in and 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.

**H. ABLE ACT:** as Public Law 113-295, The Stephen Beck, Jr., Achieving a Better Life Experience Act (ABLE Act) - enacted December 19, 2014. The ABLE Act shall establish state-run tax

advantaged accounts for eligible individuals to use for disability related expenses. Tax-advantaged accounts allow an eligible individual to save and use the funds for disability-related expenses. An ABLE program has been established and maintained by the state. An eligible individual can open an ABLE account through the ABLE program in any state.

**(1)** Under the ABLE act, individual eligibility is determined if the person is:

**(a)** Entitled to benefits based on blindness or disability under Title II or Title XVI of the Social Security Act; or

**(b)** Has a disability certification filed with the U.S. secretary of the treasury and a disability that began before age 26.

**(2)** ABLE account balances and distributions are considered in determining eligibility for SSI.

**(a)** Amounts over $100,000 count toward the $2,000 SSI resource limit.

**(b)** If an ABLE account balance exceeds $100,000 by an amount that causes the recipient to exceed the SSI resource limit the recipient is ineligible for SSI.

**(c)** The social security administration (SSA) will place such an ineligible individual into a special ABLE suspension period where:

**(i)** The recipient's SSI benefits are suspended without time limit (as long as he or she remains otherwise eligible).

**(ii)** The recipient will still be considered to be SSI eligible for the SSI medical assistance program (MAP).

**(iii)** After 12 months of suspension, eligibility is terminated and the person must reapply for benefits.

**(iv)** If a person who does not meet other SSI eligibility criteria during a suspension period is ineligible for SSI during a suspension period he or she is also ineligible for the SSI MAP.

**(3)** Section 529A(d)(4) of the act requires that the state electronically submit on a monthly basis to the Commissioner of Social Security statements on relevant distributions and account balances from all ABLE accounts.

**(4)** Resource exclusions related to the ABLE ACT can be found at Subsection N of Section 8.215.500.14 NMAC *resource exclusions*.

**(5)** For how the ABLE ACT contributions treatment in regards to income please see Section 8.215.500.18 NMAC *income*.

**(6)** For how the ABLE ACT distributions please see Subsection D of Section 8.215.500.20 NMAC. *unearned income exclusions*.

[8.215.500.13 NMAC - Rp, 8.215.500.13 NMAC, 3/1/2018]

**8.215.500.14 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 ($1,500) can be excluded from the countable liquid resources of an applicant/recipient if designated as burial funds. An additional amount of up to one thousand five hundred dollars ($1,500) can be excluded from countable liquid resources if designated as burial funds for the spouse of the applicant/recipient. The burial fund exclusion is separate from the burial space exclusion.

**(1) Retroactive designation of burial funds:** An applicant/recipient can retroactively designate funds for burial back to the first day of the month in which the applicant/recipient intended the funds to be set aside for burial. The applicant/recipient must sign a statement indicating the month the funds were set aside for burial.

**(2) Limit on exclusion:** An applicant/recipient can designate as much of his/her liquid resources as he/she wishes for burial purposes. However, only one burial fund allowance of up to one thousand five hundred dollars ($1,500) each for the applicant/recipient and his/her spouse can be excluded from countable resources. A burial fund 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/recipient cannot "undesignate" 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/recipient purchased excluded life insurance or an irrevocable burial contract which partially or totally offsets the available burial fund exclusion; or

**(c)** the applicant/recipient uses the funds for another purpose.

**(4) Reduction of burial fund exclusion:** The one thousand five hundred dollars ($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/recipient;

**(c)** assets that are not burial space items held in irrevocable burial contracts;

**(d)** assets held in other irrevocable burial arrangements.

**(5) Interest from burial fund:** Interest derived from a burial fund is not considered a countable resource or income if all of the following conditions exist:

**(a)** the original amount is excluded;

**(b)**

the excluded burial fund is not commingled with non-excluded burial funds; and

**(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 is 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/recipient can designate a life insurance policy as a burial fund at the time of application. The ISD worker must first analyze the rule according to Subsection H of Section 8.215.500.14. NMAC, *life insurance exclusion*, and following subsections.

**(8) Burial contracts:** If an applicant/recipient has a prepaid burial contract, the ISD worker 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. An applicant/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. A revocable contract exists if the value can be returned to the applicant/recipient. An irrevocable contract exists when the value cannot be returned.

**(a)** 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/recipient's burial arrangements.

**(ii)** No exclusions can be made for burial space items because the applicant/recipient does not have a right to them if the contract is not paid for or the policy is not paid up.

**(b)** If the assignment is irrevocable, the life insurance or burial contract is not a countable resource because the applicant/recipient does not own it.

**(i)** The burial space exclusions can apply if the applicant/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 ($1,500) burial fund exclusion only if the applicant/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/recipient, his/her spouse, or any other member of his/her 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. When calculating the value of resources to be deemed to an applicant/recipient from his/her parent(s) or spouse, the value of spaces held by the parent(s)/spouse which are to be used for the burial of the applicant/recipient or any other member of the applicant/recipient's immediate family, including the deemer parent/spouse, must be excluded. The burial space exclusion is separate from, and in addition to, the burial fund exclusion.

**(1) Burial space definitions:** "Burial space" is defined as a(n) burial plot, gravesite, crypt, mausoleum, casket, urn, niche, or other repository customarily used for the deceased's bodily remains. 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. Items that serve the same purpose are excluded once per individual, such as excluding a cemetery lot and a casket, but not a casket and an urn.

**(2) 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/recipient or a member of his/her immediate family. Until all payments are made on the contract, the amounts paid are considered burial funds and no burial space exclusions apply. An eligible applicant/recipient's immediate family includes:

**(a)** the spouse;

**(b)** natural or adoptive parents;

**(c)** minor or adult children, including adoptive and stepchildren;

**(d)** siblings, including adoptive and stepsiblings; and

**(e)** spouse of any of the above relatives;

**(f)** if a relative's relationship to an applicant/recipient is by marriage only, the relationship ceases to exist upon the dissolution of the marriage.

**(3) Burial space "held" for an applicant/recipient:** A burial space is considered held for an applicant/recipient if:

**(a)** someone has title to or possesses a burial space intended for the use of the applicant/recipient or a member of his/her immediate family; or

**(b)** someone has a contract with a funeral service company for a specified burial space for the applicant/recipient or a member of his/her immediate family, such as an agreement which represents the individual's current right to the use of the items at the amount shown.

**(c)** until the purchase price is paid in

full, a burial space is not considered "held for" an individual under an installment sales contract or similar device if:

**(i)** the individual does not currently own the space;

**(ii)** the individual does not currently have the right to use the space; and

**(iii)** the seller is not currently obligated to provide the space.

**C. Life estate exclusion:** A life estate gives an applicant/recipient certain rights to real property. These rights determine how the resource is treated in determining eligibility for medicaid.

**(1) Possession:** An applicant/recipient has the right to live on the real property for the rest of his/her life. If it is his/her principal place of residence (home), the life estate is evaluated in accordance with Subsection E of Section 8.215.500.14 NMAC, *exclusions for real property and home*, and following subsections.

**(2) Use and profit:** An applicant/recipient has the right to use and obtain profit from the real property. If it is income producing property, such as a rental or farm, the life estate is evaluated as income producing property. See Subsection F of Section 8.215.500.14 NMAC, *income-producing property exclusion*, and following subsections.

**(3) Sale of the life estate interest:** An applicant/recipient has the right to sell his/her life estate interest. The value of this interest is less than the fair market value of the property and is similar to a lease because of the time frame involved. The value of the life estate is based on the age and life-expectancy of the applicant/recipient.

**(4) Valuation of life estates:** The "unisex life estate and remainder interest tables" are used to determine the value of a life estate. See Section 8.200.520.14 NMAC, *resource exclusions*. The value is computed by multiplying the current market value by the percentage reduction on the unisex table under the column for the applicant/recipient's age. If an applicant/recipient feels the value calculated based on this method is overstated, he/she can obtain a valuation of the life estate in the area for use as documentation of lesser value.

**(5) Legal documentation establishing life estate:** The legal document establishing a life estate may affect one or more of the rights discussed above. Joint ownership of a life estate may require the co-owner's approval for sale. See Section 8.215.500.13 NMAC, *countable resources*, and following subsections for criteria to use in evaluating the count ability of the resource.

**D. Settlement exclusions:**

**(1)** Agent orange settlement payments made to veterans or their survivors are excluded from consideration as resources.

**(2)** Payments made under the Radiation Exposure Compensation Act are excluded from consideration as resources.

**(3)** Payments by the remembrance, responsibility and the future foundation to individual survivors forced into slave labor by the Nazis are excluded as resources.

**(4)** 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.

**E. Exclusions for real property and home:** A home is any shelter used by an applicant/recipient or his/her spouse as the principal place of residence. The home includes any buildings and contiguous land used in the operation of the home. A home is not considered a countable resource while in use by the applicant/recipient as his/her principal place of residence. The home continues to be excluded during periods when the applicant/recipient resides in an acute care or long term care medical facility if the applicant/recipient, or his/her representative, states that the applicant/recipient intends to return to the home. If the applicant/recipient or his/her representative states the applicant/recipient does not intend to return to the home but the home is the residence of the applicant/recipient's spouse or dependent relative, the home is an excluded resource. If the applicant/recipient or his/her representative puts the home up for sale and it is *not* the primary residence of the applicant/recipient's spouse or a dependent relative, the home is considered a countable resource.

**F. 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 ($6,000) and an annual rate of return of at least six percent of the equity value. See Subparagraph (b) of Paragraph (1) of Subsection F of Section 8.215.500.14 NMAC, *determination of rate of return*, below if the equity value exceeds six thousand dollars ($6,000) but the rate of return is at least six percent annually. The six thousand dollars ($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/recipient as an employee which is essential to the applicant/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 ($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 exceeds six thousand dollars ($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 of 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 six percent within 18 months of the end of the year in which the adverse circumstances occurred; the ISD worker records in the case narrative the plan of action which is expected to increase the rate of return.

**(d)** The ISD worker notifies the applicant/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 worker 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/recipient must provide a statement from his/her employer to establish that tools or equipment are required for continued employment; if the applicant/recipient is self-employed, only those tools normally required to perform the job adequately are excluded; the applicant/recipient must obtain a statement from someone in the same line of self-employment to establish what is excludable.

**G. 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 regardless of value if it is used for transportation for the individual or a member of the individual's household. Any other automobiles are considered to be Non-liquid resources. Equity in the other automobiles is counted as a resource.

**H. 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/recipient does not exceed one thousand five hundred dollars ($1,500). A policy is considered to be "owned" by the applicant/recipient if the applicant/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/recipient exceeds one thousand five hundred dollars ($1,500), the ISD worker:

**(a)** verifies the total cash surrender value of all policies and considers the total amount a countable resource; and

**(b)** informs the applicant/recipient that the insurance policies can be converted to term insurance or ordinary life insurance of lower face value at his/her option, if the cash surrender value, alone or in combination with other countable resources, exceeds the resource standard.

**I. Produce for home consumption exclusion:** The value of produce for home consumption is totally excluded.

**J. Exclusion of settlement payments from the 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/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.

**K. 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 Paragraph (4) of Subsection A of Section 8.215.500.16 NMAC, *treatment of SSI or social security lump sum payments*, for policy regarding SSI and social security lump sums which are placed into the ownership of a medicaid qualifying trust. Social security lump sum payments are considered infrequent income.

**L. Home replacement exclusion:** 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/recipient's home as described in Subsection E of Section 8.215.500.14 NMAC, *exclusion for real property and home*, and following subsections;

**(2)** within three months of receipt (execution) of the note, the applicant/recipient purchases a replacement home which meets the definition of a home in Subsection E of Section 8.215.500.14 NMAC, *exclusion for real property and home*, and following subsections; and

**(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/recipient does not purchase another home which can be excluded under the provisions of Subsection E of Section 8.215.500.14 NMAC, *exclusions for real property and home*, and following subsections within three months, the value of the promissory note or similar installment 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/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 individual, which was not timely reinvested; and

**(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 Paragraph (3) of Subsection C of Section 8.215.500.20 NMAC, *interest on promissory note or sales contract*.

**(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.

**M. Household goods and personal effects exclusion:** Household goods and personal effects are excluded if they meet one of the following four criteria. They are:

**(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 individual; 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 individual; 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 individual; or items required because of an individual's impairment.

**N. ABLE act exclusions:**

**(1)** For most federal means-tested programs:

**(a)** ABLE account balances are excluded.

**(b)** Limitation is the maximum amount that can be contributed under a state plan.

**(2)** For the SSI program:

**(a)** ABLE account balances are excluded up to one hundred thousand dollars ($100,000).

**(b)** Amounts over one hundred thousand dollars ($100,000) count toward the two thousand dollars ($2,000) SSI resource limit.

**(c)** If an ABLE account balance exceeds one hundred thousand dollars ($100,000) by an amount that causes the recipient to exceed the SSI resource limit the recipient is ineligible for SSI.

**O.** Indian per capita: Public Law 97-458 (section 4) Amended Public Law 93-134, the Judgement Award Authorization Act, to require the exclusion of per capita payments under the Indian Judgement Fund Act of two thousand dollars ($2,000) or less. Initial purchases made with exempt payments distributed between January 1, 1982 and January 12, 1983, are excluded from resources to the extent that excluded funds were used.
[8.215.500.14 NMAC - Rp, 8.215.500.14 NMAC, 3/1/2018]

**8.215.500.15 ASSET TRANSFERS:**

**A. Transfers of assets for less than fair market value** by SSI applicants/recipients are considered only if/when an applicant/ recipient becomes institutionalized. For medicaid categories using SSI resource determination methodology, transfers by non-institutionalized applicants/recipients are not considered a factor of eligibility.

**B. Transfer of resources by an SSI recipient:** An institutionalized SSI applicant/ recipient who transfers resources without fair return may become ineligible for medicaid coverage of nursing home care for a specified period of time. See Section 8.281.500.14 NMAC and following subsections for information on resource transfer policies and penalties applicable to institutionalized applicants/recipients.
[8.215.500.15 NMAC - Rp, 8.215.500.15 NMAC, 3/1/2018]

**8.215.500.16 TRUSTS:** In some instances, an applicant/recipient with a trust can be eligible for SSI cash benefits but not be automatically eligible for medicaid. If the social security administration (SSA) determines that an SSI recipient has a trust, SSI notifies the human services department (HSD) of the existence of the trust. The recipient is then notified that the trust document must be submitted to and reviewed by HSD before medicaid eligibility is determined.

**A. Medicaid qualifying trusts:** A "medicaid-qualifying trust" (MQT) is a trust or similar legal device established prior to August 11, 1993, other than by will, by an applicant/recipient or spouse, under which the applicant/ recipient may be the beneficiary of all or part of the payments from the trust. The distribution of trust payments is determined by one or more trustees who are permitted to exercise discretion with respect to the distribution of payments to the applicant/recipient. When the use of an attorney is solicited to establish a trust, the beneficiary of that trust is not exempt from the requirements of MQT provisions. Legal instruments such as trusts are almost always drafted by an attorney. It is the grantor him/herself who actually establishes of creates the trust when he/she signs or executes it.

**(1) Amount deemed available from an MQT:** The amount from an MQT that is deemed available to an applicant/ recipient is the maximum amount that could be distributed to the applicant/ recipient, or for the care of the applicant/ recipient, regardless of restrictions imposed by the trust on the allowable use of the funds. If, for example, the trustee can make payments to a health care provider for medical services, the applicant/ recipient beneficiary is considered to be receiving benefits from the trust even though these benefits are not paid directly to the beneficiary. This provision applies regardless of whether the MQT was set up for the purpose of qualifying for medicaid or whether the trust is irrevocable.

**(2) Revocable trusts:** Revocable trusts that limit access to the assets held in trust must be dissolved and the assets spent down before eligibility can be established.

**(3) Beneficiary of trust lives in an ICF-MR:** If the beneficiary of a trust is an applicant/recipient who is mentally retarded and resides in an intermediate care facility for the mentally retarded (ICF-MR), that applicant/recipient's trust is not considered an MQT if the trust or trust decree was established prior to April 7, 1986, and is solely for the benefit of that applicant/recipient.

**(4) Treatment of SSI or social security lump sum payments:** SSI or social security lump sum payments for retroactive periods which are placed into an MQT do not qualify for the nine month exclusion from countable resources.

**B. Trusts creating medicaid eligibility: [RESERVED]**
[8.215.500.16 NMAC - Rp, 8.215.500.16 NMAC, 3/1/2018]

**8.215.500.17 DEEMING RESOURCES:**

**A. Deeming resources when an applicant/recipient lives with an ineligible spouse:** If an eligible noninstitutionalized applicant/ recipient lives in the same household with an ineligible spouse, the resources of the ineligible spouse are considered to belong to the applicant/

recipient. The resource standard for a couple applies.

**B. Deeming resources for minor applicant living with ineligible parent(s):** If an applicant/recipient is a minor under 18 years of age, the resources of the parent(s) are deemed to the applicant/recipient if the parent(s) live in the same household.

**(1)** **Computing deemed resources:** To determine the amount of resources deemed to an applicant/recipient who is a minor, the following computation is made:

**(a)** determine the parent(s) resources;

**(b)** allow the parent(s) all the resource exclusions that an applicant/recipient receives; and

**(c)** remaining resources in excess of two thousand dollars ($2,000) for one parent or three thousand dollars ($2,000) for two parents are deemed to the eligible minor.

**(2)** **Computing countable resources:** The deemed resources are added to the applicant/recipient's own countable resources. The minor applicant/recipient is eligible if countable resources do not exceed resource standards.

[8.215.500.17 NMAC - Rp, 8.215.500.17 NMAC, 3/1/2018]

**8.215.500.18 INCOME:**

**A.** An applicant/recipient's gross countable monthly income must be less than the maximum allowable monthly standard for the applicable medicaid category. Income may be in the form of cash, checks, 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. Income is counted in the month received. Income is considered available throughout the month, regardless of when in the month it is received. The ISD worker verifies and documents all income.

**B. Types of income:** Countable income is the sum of unearned income or earned income, less disregards or exclusions, plus deemed income.

**(1) Earned income:** Earned income consists of the total gross income received by an individual for services performed as an employee or as a result of self-employment.

**(a)** Royalties earned in connection with the publication of the applicant/recipient's work and any honorarium/fees received for services rendered are considered earned income.

**(b)** The self-employed applicant/recipient must provide an estimate of his/her 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.

**(i)** Consideration is given to the applicant/recipient's explanation as to why he/she believes the estimated net earnings for the current year vary substantially from the information shown on his/her tax return for past years.

**(ii)** 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.

**(2) 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.

**(3) Deemed income:** Deemed income is income which must be considered available to the assistance unit and counted in determining eligibility whether or not the income is actually made available. For household member(s) who are not members of the assistance unit but who have a support obligation to the assistance unit, income can only be deemed from a parent to his/her minor child(ren) who live in the same household and from one spouse to the other when both live in the same household.

**C. Contributions to the able account:**

**(1)** Contributions from any source to an ABLE account are not considered income to an SSI recipient.

**(2)** However:

**(a)** An SSI recipient's earnings contributed to an ABLE account are still considered wages and counted (even if payroll deduction).

**(b)** Gifts to an SSI recipient to be deposited into an ABLE account are considered as income.

**(c)** Gifts made directly into an ABLE account are not income.

[8.215.500.18 NMAC - Rp, 8.215.500.18 NMAC, 3/1/2018]

**8.215.500.19 INCOME STANDARDS:** See 8.200.520 NMAC and following subsections for income standards applicable to the SSI-related medicaid categories.

**A. Income exclusions:** Income exclusions are applied before income disregards. Exclusions are applied in determining eligibility whether the income belongs to the applicant/recipient or to an individual from whom income is deemed.

**B. Infrequent or irregular income:** Exclude the first thirty dollars ($30) per calendar quarter of earned income; and the first sixty dollars ($60) per calendar quarter of unearned income. The following definitions apply.

**(1)** "Irregular income" is income received on an unscheduled or unpredictable basis.

**(2)** "Infrequent income" is income received only once during a calendar quarter from a single source and includes:

**(a)** proceeds of life insurance policies;

**(b)** prizes and awards;

**(c)** gifts;

**(d)** support and alimony;

**(e)** inheritances;

**(f)** interest per account, and royalties;

**(g)** one-time lump sum payments, such as social security or retroactive SSI.

**(3)** "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.

**C. Foster care:** Foster care payments are totally excluded if:

**(1)** the foster child is not eligible for SSI; and

**(2)** the child was placed in the applicant/recipient's home by a public or private nonprofit child placement or child care agency.

**D. 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:

**(1)** volunteers in service to America (VISTA);

**(2)** university year for action (UYA);

**(3)** special demonstration and volunteer programs;

**(4)** retired senior volunteer program (RSVP);

**(5)** foster grandparent program;

**(6)** senior companion program.

**E. Census bureau employment:** Wages paid by the census bureau for temporary employment related to the census are excluded from consideration as income in the eligibility determination process.

[8.215.500.19 NMAC - Rp, 8.215.500.19 NMAC, 3/1/2018]

**8.215.500.20 UNEARNED INCOME:**

**A.** Unearned income includes all income not earned in the course of employment or self-employment.

**B.** Income paid to one spouse is considered the income of that spouse. One-half the total income paid to a couple is considered available to each member of the couple.

**(1)** If payment is made in the name of either or both spouses and another party, only the applicant/recipient's proportionate share is considered available to him/her.

**(2)** 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.

**C. 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.

**(2) Rental income:** If an applicant/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 8.215.500.14 NMAC, *home replacement exclusion*.

**D. 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/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 expense, such as food, clothing or shelter, is not excluded.

**(4) Veterans payments:** Veterans aid and attendance (A&A) payments are excluded from unearned income for determination of eligibility.

**(a)** If an applicant/recipient receives an augmented VA payment as a veteran or veteran's widow or widower, the payment amount may include an increment for a dependent. If so, the VA must be contacted to provide documentation of the portion of the payment which represents the dependent's increment. When verified, this amount of the VA payment is considered the dependent's income.

**(b)** The portion of a veterans administration improved pension (VAIP) benefit intended for

unreimbursed medical expenses is excluded for purposes of eligibility determination.

**(5) Payments by a third party:** Third party payments are excluded as income if made directly to the applicant/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 individual, 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.

**(c)** This provision does not apply if the signature of the creditor and the individual must both be present in order to negotiate the check (two-party check).

**(6) Indian tribe per capita payments:** Certain per capita payments are excluded from income and resources.

**(a)** Up to two thousand dollars two thousand dollars ($2,000) of per capita distributions of judgment funds to members of the confederated tribes of the Warm Springs Reservation are excluded except for funds held by Alaska native regional and village corporations (ANRVC) that are not held in trust by the secretary of the interior. ANRVC dividend distributions are not excluded from countable income under this exclusion (per Public Law 97-436 section 4, 98-64, and 100-580).

**(b)** All distributions to heirs of certain deceased Indians under the Old Age Assistance Claims Settlement Act except for per capita shares in excess of two thousand dollars ($2,000) (per Public Law 98-500 section 8).

**(c)** Up to two thousand dollars ($2,000) per year received by Indians that is derived from individual interests in trust or restricted lands (per Public Law 103-66 section 13736, 92-203, and 100-241).

**(d)** Up to two thousand dollars ($2,000) per year received by Indians that is derived from individual interests in trust or restricted lands (per Public Law 111-291).

**(e)** Amounts received by an individual as a lump sum or a periodic payment via the Cobell settlement cannot be counted as income in the month received or as a resource for a one year period beginning with the date of receipt (per Public Law 111-291 section 101).

**(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/recipient under 65 years of age is excluded.

**(a)** For an applicant/recipient who is blind or disabled and over 65 years of age, this exclusion applies only if he/she received medicaid for the month preceding his/her 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; and

**(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 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) Remembrance, responsibility and the future foundation:** Payments to individual survivors forced into slave labor by the Nazis are excluded.

**(11) 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.

**(12) SSI lump sums for retroactive periods:** Supplemental security income (SSI) lump sum payments for retroactive periods are excluded from consideration as countable income in the month received.

**(13) 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 individual's last illness or burial up to one thousand five hundred dollars ($1,500). Any excess is counted as unearned income.

**(14) 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.

**(15) ABLE ACT distributions:** Distributions from an ABLE account are excluded as income of the designated beneficiary. Qualified disability expenses (QDEs) are expenses related to the blindness or disability of the designated beneficiary and for the benefit of the designated beneficiary. The following (QDEs) are excluded:

**(a) Housing related QDEs:** mortgages (including house insurance), real property taxes, rent, heating fuel, gas, electricity, water, sewer, and garbage removal.

**(b) Non-housing related QDEs:** education, transportation, employment training and support, assistive technology and related services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for ABLE account oversight and monitoring, funeral and burial, and basic living expenses.

**(c) Non-qualified expenses.**

**(d) QDEs for non-housing:** Distributions for other non-housing expenses are excluded if retained beyond the month received in their current ABLE account if the distribution is identifiable and is intended to eventually be expended for non-housing costs.

**(e) Non-qualified expenses:** Not excluded under the ABLE Act are housing-related or other QDEs if retained by the beneficiary for two months.

[8.215.500.20 NMAC - Rp, 8.215.500.20 NMAC, 3/1/2018]

**8.215.500.21 DEEMED INCOME:**

**A. Availability:** Deemed income is income which must be considered available to members of an assistance unit regardless of whether the income is actually made available.

**B. Situations in which deeming occurs:** For household member(s) who are not members of the assistance unit but who have a support obligation to the assistance unit member(s), income can only be deemed from a parent(s) to his/her minor child(ren) who live in the same household and from one spouse to the other when both live in the same household.

**C. Parent or spouse receiving benefits based on economic need:** In a deeming situation where one parent or the spouse is receiving a needs benefit, the benefit plus all of the income of the spouse/parent who receives the benefit is excluded from the deeming process. This exclusion applies only to the income of the individual who receives the benefit.

**(1) Needs benefit defined:** "Needs benefit" is any benefit or assistance which is paid by a governmental agency on the basis of economic need.

**(2) Consideration of household membership:** Even if the income of one parent is excluded from the deeming process, the parent is considered a member of the household for purposes of determining the parental allocation. This does not apply to benefits received under the temporary assistance to needy families (TANF) program. No income is allocated to a parent or child if that parent or child is receiving TANF assistance.

**D. Applicant living with ineligible spouse:**

**(1)** If an applicant/recipient is living in the same household with an ineligible spouse, income may be deemed from the ineligible spouse to the applicant/recipient.

**(2)** The methodology described below does not apply to the qualified medicare beneficiaries (QMB) program. See Paragraph (1) of Subsection B of Section 8.240.500.15 NMAC for methodology applicable to the QMB program only.

**(a) Evaluation of applicant's income:** Determine the amount of income available to the applicant using only the applicant's own income and allow the twenty dollars ($20) disregard. If the applicant/recipient has earned income, the first sixty five dollars ($65) plus one-half of the remainder is also disregarded.

**(i)** If an applicant/recipient's own income exceeds the income standard for an individual, the applicant/recipient is ineligible. No further calculation needs to be done.

**(ii)** If an applicant/recipient's countable income is less than the standard for an individual, determine the ineligible spouse's gross income.

**(b) Evaluation of ineligible spouse's gross income:** Determine the ineligible spouse's gross income (both earned and unearned). Subtract the twenty dollars ($20) general disregard plus the first sixty five dollars ($65) and one-half of the remainder from any earned income. If there are no children in the household, compare the ineligible spouse's countable income to one-half of the SSI federal benefit rate (FBR) for an individual not living in the household of others. If the ineligible spouse's countable income is less than one-half of the SSI FBR, no income is deemed from the ineligible spouse to the applicant/recipient. If the ineligible spouse's countable income equals or exceeds one-half of the SSI FBR, income is deemed from the ineligible spouse to the applicant.

**E. Applicant living with ineligible spouse and children:**

**(1)** A "child"

is under 18 years of age or under 21 years of age if a full-time student at an accredited institution of learning.

**(2)** If there are children in the household, subtract a living allowance for each ineligible child from the ineligible spouse's countable income. The living allowance is one-half of the monthly SSI FBR for an individual not living in a household with others less any income attributable to the child. If the remaining amount is less than one-half of the SSI FBR, no income is deemed from the ineligible spouse to the applicant/recipient. If the remaining amount equals or exceeds one-half of the SSI FBR, income is deemed from the ineligible spouse to the applicant/recipient.

**(3) Determination of countable income:** Add the total gross unearned income of the ineligible spouse to the total gross unearned income of the applicant/recipient. The twenty dollars ($20) disregard is deducted from the combined total of the couple's unearned income. If the total unearned income is less than twenty dollars ($20), the remainder is deducted from the combined total of the couple's earned income. The first sixty five dollars ($65) and half (1/2) of the remainder is subtracted from the combined total of the couple's earned income. After all applicable disregards have been subtracted, the remaining earned and unearned income amounts are combined to arrive at the total countable income. If the total countable income is less than the income standard for a couple, the applicant/recipient is eligible.

**F. Applicant child living with ineligible parents:** A "child" applicant/recipient is under 18 years of age. The ISD worker determines the total gross monthly amount of parental income, both unearned and earned. The ISD worker applies appropriate income disregards to calculate the countable deemed income. See Section 8.200.520.18 NMAC, *deemed income worksheet*. If the deemed income plus the child's separate income exceeds the income standard for an applicant/recipient, the child is not eligible for that month.

**G. Applicant/recipient parent and applicant/recipient child(ren):** If a household is composed of an applicant/recipient parent and an applicant/recipient child(ren), the income is deemed from the ineligible spouse to the applicant/recipient spouse if appropriate. See Subsection B of Section 8.215.500.21 NMAC, *deemed income*.

**(1)** If there is enough total income to make the applicant/recipient parent ineligible, the remainder of the income is carried over to be deemed to the child(ren). Deemed income is divided equally among the applicant/recipient children.

**(2)** If the total countable income of the child, including the deemed income, is more than the applicable income standard, the child is ineligible.

[8.215.500.21 NMAC - Rp, 8.215.500.21 NMAC, 3/1/2018]

**8.215.500.22 DISREGARDS:** Income disregards are allowed as described below when applicable.

**A. Child support payments:** One-third of the amount of child support payments made to a child applicant/recipient is disregarded. The remainder is considered unearned income, subject to the appropriate disregards.

**B. Twenty dollar disregard:** The first twenty dollars ($20) of unearned or earned income received in a month is disregarded. This disregard is applied first to unearned income, then to earned income if the unearned income is less than twenty dollars ($20). If there is no unearned income, the entire twenty dollars ($20) is applied to the gross earned income. This disregard is not applicable to payments made to an applicant/recipient through a state or other government assistance program, or by a private charitable organization, where such payments are based on the applicant/recipient's need.

**C. Additional earned income disregard:** After disregarding the first twenty dollars ($20) as specified in Subsection B of Section 8.215.500.22 NMAC above, if appropriate, earned income of sixty-five ($65) per month plus one-half of the remainder is disregarded.

**D. Work-related expenses of the blind or disabled:** Work-related expenses of an employed applicant/recipient or couple who is/are legally blind or disabled are disregarded. This disregard is for earned income only. The dollar amount of expenses which may be disregarded must be items or services directly related to enabling a person to work and which are necessarily incurred by that individual because of a physical or mental disability or blindness. Such costs incurred must be reasonable. Expenses are disregarded when paid and must be verified.

**(1)** This disregard does not apply to an applicant/recipient who is blind and is 65 years of age or older, unless he/she was receiving SSI payments due to blindness or disability in the month before turning 65 or received payments under a state aid to the blind or disabled 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 15 cents per mile for private automobile;

**(e)** lunches;

**(f)** child care costs, if not otherwise provided;

**(g)** uniforms, tools, and other necessary equipment;

**(h)** special vehicle modifications to enable transportation to and from work, but not the cost of the vehicle itself;

**(i)** attendants who may be hired for the purpose of taking applicant/recipient to and from work, and getting ready for work;

**(j)** durable medical equipment that is medically related and generally not useful in absence of the blindness or disability yet are necessary to attend and perform tasks in the work place;

**(k)** expenses for work related equipment which is impairment related and necessary for the individual to perform his/her tasks;

**(l)** prostheses necessary to perform work related tasks;

**(m)** design modifications related to blindness or disability that enable the applicant/recipient to leave home in order to attend work, or design modifications made to the work area of the home in the case where the applicant/recipient engages in a home based business; and

**(n)** special expenses necessary to enable an applicant/recipient who is blind or disabled to engage in employment, such as a seeing-eye dog, braille instructions, or instructions on using special equipment.

**(3)** If items or services above are purchased through an installment contract, the payments are disregarded. Should the item or service be a one time purchase, the purchase may be pro-rated over a 12 month period, or over the life of the contract.

**(4)** For items which are leased, the monthly payment would be disregarded.

**E. Student earned income:**

**(1)** 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.

**(2)** This disregard is available in addition to any exclusions applied to grants, scholarships or fellowships and in addition to any other allowable disregards.

**(3)** Up to one thousand two hundred dollars ($1,200) per quarter, or a maximum of one thousand six hundred twenty dollars ($1,620) per calendar year, of the earned income of certain students may be disregarded. To qualify for this disregard, the applicant/recipient must meet all of the following requirements:

**(a)** under 22 years of age;

**(b)** unmarried;

**(c)** not the head of a household; and

**(d)** in regular attendance at a college or university for at least 12 semester hours or a school or vocational or technical training course for at least 20 hours per week.

[8.215.500.22 NMAC - Rp, 8.215.500.22 NMAC, 3/1/2018]

**8.215.500.23 INCOME STANDARD:** When computing an applicant/recipient's eligibility, the applicable income standard is that of the SSI-related category being applied for/received. See Section 8.200.520 NMAC and following subsections.

[8.215.500.23 NMAC - Rp, 8.215.500.23 NMAC, 3/1/2018]

**HISTORY OF 8.215.500 NMAC:**

The material in this part was derived from that previously filed with the Commission of Public Records - State Records Center and Archives:

MAD Rule 860, SSI Methodology For Computation Of Countable Resources And Income, 3/17/1990.

MAD Rule 860, SSI Methodology For Computation Of Countable Resources And Income, 3/21/1990.

MAD Rule 860, SSI Methodology For Computation Of Countable Resources And Income, 4/24/1991.

MAD Rule 860, SSI Methodology For Computation Of Countable Resources And Income, 6/19/1992.

MAD Rule 861, Resources - SSI Methodology For Computation Of Countable Resources And Income, 3/18/1993.

MAD Rule 861, Resources - SSI Methodology For Computation Of Countable Resources And Income, 12/29/1994.

MAD Rule 862, Income - SSI Methodology For Computation Of Countable Resources And Income, 3/18/1993.

MAD Rule 864, Potential Income Or Resources - SSI Methodology For Computation Of Countable Resources And Income, 3/18/1993.

MAD Rule 866, Deeming Income, 11/16/1994.

**History of Repealed Material:**

8.215.500 NMAC, Medicaid Eligibility Supplemental Security Income (SSI) Methodology - Income And Resource Standards filed 2/15/2001) - Repealed effective 3/1/2018.

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## HUMAN SERVICES DEPARTMENT
### MEDICAL ASSISTANCE DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 314 LONG TERM CARE SERVICES - WAIVERS**
**PART 3 MEDICALLY FRAGILE HOME AND COMMUNITY-BASED SERVICES WAIVER SERVICES**

**8.314.3.1 ISSUING AGENCY:** New Mexico Human Services Department (HSD).

[8.314.3.1 NMAC - Rp, 8.314.3.1 NMAC 3/1/2018]

**8.314.3.2 SCOPE:** The rule applies to the general public.

[8.314.3.2 NMAC - Rp, 8.314.3.2 NMAC 3/1/2018]

**8.314.3.3 STATUTORY AUTHORITY:** The New Mexico medicaid program is administered pursuant to regulations promulgated by the federal department of health and human services under Title

XIX of the Social Security Act, as amended and by the state human services department pursuant to state statute. See Section 27-2-12, NMSA 1978.
[8.314.3.3 NMAC - Rp, 8.314.3.3 NMAC 3/1/2018]

**8.314.3.4 DURATION:** Permanent.
[8.314.3.4 NMAC - Rp, 8.314.3.4 NMAC 3/1/2018]

**8.314.3.5 EFFECTIVE DATE:** March 1, 2018 unless a later date is cited at the end of a section.
[8.314.3.5 NMAC - Rp, 8.314.3.5 NMAC 3/1/2018]

**8.314.3.6 OBJECTIVE:** The objective of this rule is to provide policies for the service portion of the New Mexico medical assistance program (MAP). These policies describe eligible providers, covered services, non-covered services, utilization review, and provider reimbursement.
[8.314.3.6 NMAC - Rp, 8.314.3.6 NMAC 3/1/2018]

**8.314.3.7 DEFINITIONS:**

**A. Activities of daily living (ADLs):** Those activities associated with an individual's daily functioning. The basic skills of everyday living such as toileting, bathing, dressing, grooming, and eating and the skills necessary to maintain the normal routines of the day, such as housekeeping, shopping and preparing meals. The term also includes exercising, personal, social and community skills.

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

**C. Authorized representative:** An individual designated by the eligible recipient or his or her guardian, if applicable, to represent the eligible recipient and act on his or her behalf. The authorized representative must provide formal documentation authorizing him or her to access the identified case information for this specific purpose. An authorized representative may be, but need not be, the eligible recipient's guardian or attorney.

**D. Category of eligibility (COE):** To qualify for medical assistance program (MAP) services, an applicant must meet financial criteria and belong to one of the groups that the New Mexico medical assistance division (MAD) has defined as eligible.

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

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

**G. Eligible recipient:** An applicant meeting the financial and medical level of care (LOC) criteria to receive MAD services through the medically fragile program.

**H. Home and community-based services (HCBS) waiver:** A set of MAD services that provides alternatives to long-term care services in institutional settings, such as the medically fragile waiver program. CMS waives certain statutory requirements of the Social Security Act to allow HSD to provide an array of home and community-based options through these waiver programs.

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

**J. Level of care (LOC):** The level of care an eligible recipient must meet to be eligible for the medically fragile program.

**K. Medically Fragile:** a chronic physical condition, which results in a prolonged dependency on medical care for which daily skilled (nursing) intervention is medically necessary and is characterized by one or more of the following: a life threatening condition characterized by reasonable frequent periods of acute exacerbation which require frequent medical supervision, or physician consultation and which in the absence of such supervision or consultation would require hospitalization; a condition requiring frequent, time consuming administration of specialized treatments which are medically necessary; or dependence on medical technology such that without the technology a reasonable level of health could not be maintained; examples include but are not limited to ventilators, dialysis machines, enteral or parenteral nutrition support and supplemental oxygen.

**L. Medically Fragile Waiver (MFW):** New Mexico's 1915 (c) HCBS program serving individuals diagnosed with a medically fragile condition prior to the age of 22 and a developmental disability or who are developmentally delayed or at risk for developmental delay and meet an ICF/IID level of care.

**M. Person centered planning:** A service planning process that is directed and led by the recipient, with assistance as needed or desired from a representative or other persons of the recipient's choosing. Person-centered planning is designed to identify the strengths, capacities, preferences, needs, and desired outcomes of the recipient. The person-centered process is an ongoing process that enables and assists the recipient to identify and access a personalized mix of paid and non-paid services and supports that assists him or her to achieve personally defined outcomes in the community.

**N. Recipient**: Individual receiving waiver services.

**O. Waiver:** A program in which the CMS has waived certain statutory requirements of the Social Security Act to allow states to provide an array of HCBS options

as an alternative to providing long-term care services in an institutional setting.
[8.314.3.7 NMAC - Rp, 8.314.3.7 NMAC 3/1/2018]

**8.314.3.8 MISSION STATEMENT: [RESERVED]**

**8.314.3.9 MEDICALLY FRAGILE HOME AND COMMUNITY-BASED SERVICES WAIVER:** The New Mexico MAP pays for medically necessary services furnished to eligible recipients. To help New Mexico recipients receive services in a cost-effective manner, the New Mexico medical assistance division (MAD) has obtained a waiver of certain federal regulations to provide home and community-based services (HCBS) waiver programs to recipients as an alternative to institutionalization. See 42 CFR 441.300. Section 8.314.3.9 NMAC describes the HCBS waiver program for the medically fragile population, including eligible providers, covered waiver services, service limitations, and general reimbursement methodology.
[8.314.3.9 NMAC - Rp, 8.314.3.9 NMAC 3/1/2018]

**8.314.3.10 ELIGIBLE PROVIDERS:**

**A.** Upon approval of New Mexico MAP provider participation agreements by MAD, providers who meet the following requirements are eligible to be reimbursed for furnishing waiver services to recipients:

**(1)** standards established by the HCBS waiver program; and

**(2)** provide services to recipients in the same scope, quality and manner as provided to the general public; see Section 8.302.1.14 NMAC.

**B.** Once enrolled, providers receive a packet of information, including medicaid program policies, billing instructions, utilization review instructions, and other pertinent material from MAD and the New Mexico DOH. Providers are responsible for ensuring that they have received these materials and for updating them as new materials are received from MAD.

**C. Qualifications of case management agency providers:** Agencies must meet the standards developed for this HCBS waiver program by the applicable division of the DOH. Case management agencies are required to have national accreditation. These accrediting organizations are the commission on accreditation of rehabilitation facilities (CARF), the joint commission or another nationally recognized accrediting authority. Case management assessment activities necessary to establish eligibility are considered administrative costs.

**D. Qualifications of case managers:** Case managers employed by case management agencies must have the skills and abilities necessary to perform case management services for recipients who are medically fragile, as defined by the DOH medically fragile waiver standards. Case managers must be registered nurses, as defined by the New Mexico state board of nursing and have a minimum of two years of supervised experience with the target population in one or more areas of pediatrics, critical care or public health.

**E. Qualifications of home health aide service providers:**

**(1)** Home health aide services must be provided by a licensed home health agency, a licensed rural health clinic or a licensed or certified federally qualified health center using only home health aides who have successfully completed a home health aide training program as described in 42 CFR 484.36(a) (1) and (2); or who have successfully completed a home health aide training program described in the New Mexico regulations governing home health agencies, Section 7.28.2.30 NMAC. Additionally, home health aides providing services must be deemed competent through a written examination and meet competency evaluation requirements specified in the 42 CFR 484.36(b) (1), (2) and (3); or meet the requirement for documentation of training or competency evaluation specified in the New Mexico regulations governing home health agencies, Section 7.28.2.30 NMAC.

**(2)** Supervision: Supervision must be performed by a registered nurse and shall be in accordance with the New Mexico Nursing Practice Act, Section 61-3-1, NMSA 1978. Supervision must occur at least once every 60 days in the recipient's home and be specific to the individual service plan (ISP). All supervisory visits must be documented in the recipient's file.

**(3)** The supervision of home health aides is an administrative expense to the provider and is not billable as a direct service.

**F. Qualifications of private duty nursing providers:**

**(1)** Private duty nursing services must be provided by a licensed home health agency, a licensed rural health clinic, or a licensed or certified federally qualified health center, using only registered nurses or licensed practical nurses holding a current New Mexico board of nursing license and having a minimum of one year of supervised nursing experience; nursing experience preferably with individuals with developmental disabilities or who are medically fragile.

**(2) Supervision:** Supervision must be performed by a registered nurse and shall be in accordance with the New Mexico Nursing Practice Act. Supervision must be specific to the ISP.

**(3)** The supervision of nurses is an administrative expense to the provider and not billable as a direct service.

**G. Qualifications of skilled therapy providers:** Skilled therapy services may be provided by a licensed group practice/home health agency that employs licensed occupational therapists, physical therapists, or speech therapists and certified occupational therapy assistants and certified physical

therapy assistants in accordance with the New Mexico regulation and licensing department. Physical therapy services must be provided by a physical therapist currently licensed by the state of New Mexico. Occupational therapy services must be provided by an occupational therapist currently licensed by the state of New Mexico, and registered with the American occupational therapy association or be a graduate of a program in occupational therapy approved by the council on medical education of the American occupational therapist association. Speech therapy services must be provided by a speech therapist currently licensed by the state of New Mexico and certified by the national association for speech and hearing. A physical therapy assistant working only under the direction and supervision of a licensed physical therapist, Section 16.20.6 NMAC, may provide physical therapy services. An occupational therapy assistant working only under the direction and supervision of a licensed occupational therapist, Section 16.15.3 NMAC, may provide occupational therapy services.

**H. Qualifications of behavior support consultation providers:**

**(1)** Behavior support consultation providers must possess one of the following licenses approved by a New Mexico licensing board: psychiatrist; clinical psychologist; independent social worker (LISW); professional clinical mental health counselor (LPCC); professional art therapist (LPAT); marriage and family therapist (LMFT); mental health counselor (LMHC); master social worker (LMSW); psychiatric nurse, or psychologist associate (PA).

**(2)** Behavior support consultation may be provided through a corporation, partnership or sole proprietor.

**(3)** Providers of behavior support consultation must have a minimum of one year of experience working with individuals with developmental disabilities or who are medically fragile. All behavior support consultants must maintain current New Mexico licensure with their professional field licensing body.

**I. Qualifications of respite care service providers:**

**(1)** Respite may be provided in the following locations: participant's home or private place of residence, the private residence of a respite care provider, or specialized foster care home. The participant and or the participant's authorized representative has the option and gives final approval of location of the respite services being provided. A specialized foster care home must be certified by the New Mexico children, youth and families department.

**(2)** Respite services are provided by a licensed home health care agency, a licensed or certified federally qualified health center, or a licensed rural health clinic. The registered nurses (RNs) and licensed practical nurses (LPNs) who work for the home health agency and provide respite services must be licensed by the New Mexico state board of nursing as an RN or LPN. See the New Mexico Nursing Practice Act, Section 61-3-1, NMSA 1978, and Section 16.12.2 NMAC. The home health aides who work for the home health agency and provide respite services, must have successfully completed a home health aide training program, as described in 42 CFR 484.36(a)(1) and (2); or have successfully completed a home health aide training program described in the New Mexico regulations governing home health agencies, Section 7.28.2 NMAC.

**J. Qualifications of nutritional counseling providers:** Nutritional counseling must be furnished by a licensed dietitian registered by the commission on dietetic registration of the American dietetic association, Nutrition and Dietetics Practice Act, Section 61-7A-1, NMSA 1978.

**K. Qualifications of specialized medical equipment and supplies providers:** Specialized medical equipment and supplies providers must have a business license for the locale they are in, a tax identification (ID) number for state and federal government, proof of fiscal solvency, proof of use of approved accounting principles, meet bonding required by the department of health (DOH), and comply with timeliness standards for this service. [8.314.3.10 NMAC - Rp, 8.314.3.10 NMAC 3/1/2018]

**8.314.3.11 PROVIDER RESPONSIBILITIES:**

**A.** A provider who furnishes services to an eligible recipient must comply with all federal and state laws, regulations, rules, and executive orders relevant to the provision of services as specified in the MAD provider participation agreement and the DOH provider agreement. A provider also must meet and adhere to all applicable NMAC rules and instructions as specified in the MAD provider rules manual and its appendices, MFW service standards, MFW service definitions, and program directions and billing instructions, as updated. A provider is also responsible for following coding manual guidelines and the centers for medicare and medicaid services (CMS) correct coding initiatives, including not improperly unbundling or upcoding services. Provider must maintain current knowledge and adherence to MFW requirements.

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

**C.** Providers must maintain records which are sufficient to fully disclose the extent and nature of the services provided to recipients. See Section 8.302.1 NMAC. [8.314.3.11 NMAC - Rp, 8.314.3.11 NMAC 3/1/2018]

**8.314.3.12 ELIGIBLE RECIPIENTS:**

**A.** Enrollment in the MFW program is contingent upon the applicant meeting the eligibility requirements as described in this

rule, the availability of funding as appropriated by the New Mexico legislature, and the number of federally authorized unduplicated eligible recipients. Once an allocation has been offered to the applicant, he or she must meet certain medical and financial criteria in order to qualify. This criteria is contained in Section 8.290.400 NMAC. The eligible recipient must meet the LOC required for admittance to an ICF/IID. After initial eligibility has been established for a recipient, on-going eligibility must be determined on an annual basis.

**B.** Eligibility is limited to individuals who in addition to a developmental disability, developmental delay, or are at risk of developmental delay, have a medically fragile condition, diagnosed before the age of 22, defined as a chronic physical condition, which results in a prolonged dependency on medical care for which daily skilled (nursing) intervention is medically necessary and is characterized by one or more of the following:

**(1)** a life threatening condition characterized by reasonably frequent periods of acute exacerbation which require frequent medical supervision, or physician consultation and which in the absence of such supervision or consultation, would require hospitalization;

**(2)** a condition requiring frequent, time consuming administration of specialized treatments which are medically necessary; or

**(3)** dependence on medical technology such that without the technology a reasonable level of health could not be maintained; examples include but are not limited to ventilators, dialysis machines, enteral or parenteral nutrition support and continuous oxygen.

[8.314.3.12 NMAC - Rp, 8.314.3.12 NMAC 3/1/2018]

**8.314.3.13 COVERED WAIVER SERVICES:** The services covered by the MFW program are intended to provide a home and community-based alternative to institutional care for an eligible recipient. In all services covered under the MFW the recipient has the right to privacy, dignity, and respect. The recipient further has the right to freedom from coercion and restraint. The MFW program covers the following services for a specified number of medically fragile recipients. The program is limited by the number of federally authorized unduplicated recipient (UDR) positions and program funding.

**A. Case management services:** Case management services assist recipients in gaining access to needed waiver and other state plan services, as well as medical, social, educational, and other services regardless of the funding source for the services. Case management services are offered in a manner that allows direct communication between the case manager, the recipient, and the family and appropriate service personnel. Case managers provide a link between recipients and care providers and coordinate the use of community resources needed for that care. At least every other month, the case manager conducts a face-to-face contact with the recipient, and on a monthly basis conducts a telephonic or electronic contact with the recipient. The scope of the case manager's duties includes the following:

**(1)** identifying medical, social, educational, family and community support resources;

**(2)** scheduling and coordinating timely interdisciplinary team (IDT) meetings to develop and modify the ISP annually and as needed by any team member;

**(3)** documenting contacts with the recipient and providers responsible for delivery of services to the recipient;

**(4)** verifying eligibility on an annual basis;

**(5)** ensuring the medically fragile long-term care assessment abstract (LTCAA) is completed and signed by the physician, physician assistant or clinical nurse practitioner (CNP);

**(6)** submitting the LOC packet including the LTCAA to the third-party assessor (TPA) contractor for prior authorization on a timely basis;

**(7)** ensuring the waiver review form (MAD 046) is submitted timely, both annually and as needed;

**(8)** initiating an ongoing monitoring process that provides for evaluation of delivery, effectiveness, appropriateness of services and support provided to the recipient as identified in the ISP;

**(9)** performing an annual recipient satisfaction survey; and

**(10)** coordinating services provided though the MFW program and other sources (state plan, family infant toddler (FIT), commercial insurance, educational and community).

**B. Home health aide:** Home health aide services are covered under the state plan as expanded early and periodic screening, diagnosis and treatment EPSDT benefits for waiver participants under the age of 21. Home health aide services are provided in the eligible recipient's own home or in the community. Home health aide services provide total care or assist a recipient in all activities of daily living. Total care is defined as: the provision of bathing (bed, sponge, tub, or shower), shampooing (sink, tub, or bed), care of nails and skin, oral hygiene, toileting and elimination, safe transfer techniques and ambulation, normal range of motion and positioning, adequate oral nutrition and fluid intake. The home health aide services assist the recipient in a manner that promotes an improved quality of life and a safe environment for the recipient. Home health aide services can be provided outside the recipient's home. Home health aides perform simple procedures such as an extension of therapy services, bowel and bladder care, ostomy site care, personal care, ambulation and exercise, household services essential

to health care at home, assistance with medications that are normally self-administered, reporting changes in patient conditions and needs, and completing appropriate records. Home health aides may provide basic non-invasive nursing assistant skills within the scope of their practice.

**C. Private duty nursing:** Private duty nursing services are covered under the state plan as expanded EPSDT benefits for waiver recipients under the age of 21. Private duty nursing services are provided in the eligible recipient's own home and in the community and include activities, procedures and treatment for a physical condition, physical illness, or chronic disability. Services may include medication management; administration and teaching; aspiration precautions; feeding management such as gastrostomy and jejunostomy; skin care; weight management; urinary catheter management; bowel and bladder care; wound care; health education; health screening; infection control; environmental management for safety; nutrition management; oxygen management; seizure management and precautions; anxiety reduction; staff supervision; and behavior and self-care assistance. DOH requires certain standards to be maintained by the private duty nursing care provider with which it contracts. In carrying out their role for DOH, private duty nursing care agencies must:

**(1)** employ only RNs and LPNs licensed in the state of New Mexico;

**(2)** assure that all nurses delivering services are culturally sensitive to the needs and preferences of the recipients and their families. Based upon the recipient's individual language needs or preferences, nurses may be requested to communicate in a language other than English;

**(3)** inform the case manager immediately of the agency's inability to staff according to the ISP;

**(4)** develop and implement an individual nursing plan in conjunction with the recipient's physician and case manager in a manner that identifies and fulfills the recipient's specific needs;

**(5)** document all assessments, observations, treatments and nursing interventions;

**(6)** document and report to the case manager any non-compliance with the ISP; and

**(7)** document any incidence of recipient harm, medication error, or other adverse event in accordance with the New Mexico Nursing Practice Act.

**D. Skilled therapy services for adults:** Skilled therapy services are covered under the state plan as expanded EPSDT benefits for waiver recipients under the age of 21. Adults access therapy services under the state plan for acute and temporary conditions that are expected to improve significantly in a reasonable and generally predictable period of time. Waiver services are provided when the limits of the state plan skilled therapy services are exhausted. The amount, duration, and goals of skilled therapy services must be included in an ISP. A therapy treatment plan must be developed with the initiation of therapy services and updated at least every six months. The therapy treatment plan includes the following: developmental status of the recipient in areas relevant to the service provided; treatment provided, including the frequency and duration; and recommendation for continuing services and documentation of results. Skilled maintenance therapy services specifically include the following:

**(1)** Physical therapy: Physical therapy services promote gross/fine motor skills, facilitate independent functioning or prevent progressive disabilities. Specific services may include: professional assessment(s), evaluation(s) and monitoring for therapeutic purposes; physical therapy treatments and interventions; training regarding physical therapy activities, use of equipment and technologies or any other aspect of the individual's physical therapy services; designing, modifying or monitoring use of related environmental modifications; designing, modifying, and monitoring use of related activities supportive to the ISP goals and objectives; and consulting or collaborating with other service providers or family members, as directed by the recipient.

**(2)** Occupational therapy: Occupational therapy services promote fine motor skills, coordination, sensory integration, or facilitate the use of adaptive equipment or other assistive technology. Specific services may include: teaching of daily living skills; development of perceptual motor skills and sensory integrative functioning; design, fabrication, or modification of assistive technology or adaptive devices; provision of assistive technology services; design, fabrication, or applying selected orthotic or prosthetic devices or selecting adaptive equipment; use of specifically designed crafts and exercise to enhance function; training regarding occupational therapy activities; and consulting or collaborating with other service providers or family members, as directed by the recipient.

**(3)** Speech language therapy: Speech language therapy services preserve abilities for independent function in communication; facilitate oral motor and swallowing function; facilitate use of assistive technology, or prevent progressive disabilities. Specific services may include: identification of communicative or oropharyngeal disorders and delays in the development of communication skills; prevention of communicative or oropharyngeal disorders and delays in the development of communication skills; development of eating or swallowing plans and monitoring their effectiveness; use of specifically designed equipment, tools, and exercises to enhance function; design, fabrication, or modification of assistive technology or adaptive devices; provision of assistive technology services; adaptation of the recipient's environment to meet his/her needs; training regarding speech

language therapy activities; and consulting or collaborating with other service providers or family members, as directed by the recipient.

**E. Behavior support consultation services:** This medicaid waiver provides services to assist the medically fragile recipient, his or her parents, family members or primary care givers. Behavior support consultation includes assessment, treatment, evaluation and follow-up services to assist the recipient, parents, family members or primary care givers with the development of coping skills which promote or maintain the recipient in a home environment. Behavior support consultation:

**(1)** informs and guides the recipient's providers with the services and supports as they relate to the recipient's behavior and his/her medically fragile condition;

**(2)** identifies support strategies to ameliorate contributing factors with the intention of enhancing functional capacities, adding to the provider's competency to predict, prevent and respond to interfering behavior and potentially reducing interfering behavior(s);

**(3)** supports effective implementation based on a functional assessment;

**(4)** collaborates with medical and ancillary therapies to promote coherent and coordinated services addressing behavioral issues and to limit the need for psychotherapeutic medications; and

**(5)** monitors and adapts support strategies based on the response of the recipient and his/her service and support providers. Based on the recipient's ISP, services are delivered in an integrated/natural setting or in a clinical setting.

**F. Respite care services:** The IDT is responsible for determining the need for respite care. Respite services are provided to recipients unable to care for themselves that are furnished on a short-term basis to allow the primary caregiver a limited leave of absence in order to reduce stress, accommodate caregiver illness, or meet a sudden family crisis or emergency. Respite care is provided in the eligible recipient's own home, in a private residence of a respite care provider, or in a specialized foster care home. The recipient or the recipient's authorized representative has the option and gives final approval of where the respite services will be provided. Respite services include: medical and non-medical health care; personal care bathing; showering; skin care; grooming; oral hygiene; bowel and bladder care; catheter and supra-pubic catheter care; preparing or assisting in preparation of meals and eating; as appropriate, administering enteral feedings; providing home management skills; changing linens; making beds; washing dishes; shopping; errands; calls for maintenance; assisting with enhancing self-help skills; promoting use of appropriate interpersonal communication skills and language; working independently without constant supervision/observation; providing body positioning, ambulation and transfer skills; arranging for transportation to medical or therapy services; assisting in arranging health care needs and follow-up as directed by the primary care giver, physician, and case manager; ensuring the health and safety of the recipient at all times. Respite services are limited to 14 days or 336 hours per budget year.

**G. Nutritional counseling:** Nutritional counseling is designed to meet the unique food and nutrition requirements of recipients with medical fragility and developmental disabilities. Examples of recipients who may require nutritional counseling are children or adults with specific illnesses such as failure to thrive, gastroesophageal reflux, dysmotility of the esophagus and stomach etc., or who require specialized formulas, or receive tube feedings or parenteral nutrition. This does not include oral-motor skill development such as that provided by a speech language pathologist. Nutritional counseling services include assessment of the recipient's nutritional needs, regimen development, or revisions of the recipient's nutritional plan, counseling and nutritional intervention and observation and technical assistance related to implementation of the nutritional plan. These services advise and help recipients obtain appropriate nutritional intake by integrating information from the nutritional assessment with information on food, other sources of nutrients, and meal preparation consistent with cultural backgrounds and socioeconomic status. These services can be delivered in the home.

**H. Specialized medical equipment and supplies:** This medicaid waiver provides specialized medical equipment and supplies which include:

**(1)** devices, controls or appliances specified in the plan of care that enable recipients to increase their ability to perform activities of daily living;

**(2)** devices, controls, or appliances that enable the recipient to perceive, control, or communicate with the environment in which they live;

**(3)** items necessary for life support or to address physical conditions along with ancillary supplies and equipment necessary to the proper functioning of such items;

**(4)** such other durable and non-durable medical equipment not available under the state plan that is necessary to address recipient functional limitations; and

**(5)** necessary medical supplies not available under the state plan. Items reimbursed with waiver funds are in addition to any medical equipment and supplies furnished under the state plan and exclude those items that are not of direct medical or remedial benefit to the recipient. The costs of maintenance and upkeep of equipment are included in the cost of equipment and supplies. All items must meet applicable standards of manufacture, design, and installation. Medical equipment and supplies that are furnished by the state plan are

not covered under this service. This service does not include nutritional or dietary supplements, disposable diapers, bed pads, or disposable wipes.
[8.314.3.13 NMAC - Rp, 8.314.3.13 NMAC 3/1/2018]

**8.314.3.14 NON-COVERED SERVICES:** Only services listed as covered waiver services are covered under the waiver program. Ancillary services can be available to waiver recipients through the MAP state plan services. These ancillary services are subject to the limitations and coverage restrictions which exist for other MAP services. See Section 8.301.3 NMAC for an overview of non-covered services.
[8.314.3.14 NMAC - Rp, 8.314.3.14 NMAC 3/1/2018]

**8.314.3.15 INDIVIDUALIZED SERVICE PLAN:** The CMS requires a person-centered individualized service plan (ISP) for each individual receiving services through a HCBS waiver program. The ISP is developed annually through an ongoing person-centered planning process.

**A.** The case manager assists the recipient in identifying his/her dreams, goals, preferences and outcomes for service. The case manager obtains information about the recipient's strengths, capacities, needs, preferences, desired outcomes, health status, and risk factors. This information is gained through a review of the LOC assessment; interviews between the case manager and recipient; and the person-centered planning process that takes place between the case manager and recipient to develop the ISP.

**B.** The ISP addresses: activities of daily living assistance needs, health care needs, equipment needs, relationships in the home and community, personal safety and provider responsibilities.

**C.** During the pre-planning process, the case manager provides the recipient with information about the MFW program. The case manager provides information about the range and scope of service choices and options, as well as the rights, risks, and responsibilities associated with the MFW program. The case manager is responsible for completing the CIA and obtaining other medical assessments needed for the ISP; completing the annual LOC redetermination process; and referring the recipient to the New Mexico human services department (HSD) income support division (ISD) for financial eligibility determination annually and as needed.

**D.** The case manager works with the recipient to identify service providers to participate in the IDT meeting. State approved providers are selected from a list provided by the case manager. The recipient sets the date and time of the IDT meeting. The case manager works with the recipient to plan the IDT meeting and encourages him/her to lead the IDT meeting to the extent possible.

**E.** The case manager assists the recipient in ensuring that the ISP addresses the recipient's goals, health, safety and risks along with addressing the information or concerns identified through the assessment process. The case manager writes up the ISP as identified in the IDT meeting. Each provider develops care activities and strategies for each outcome, goal, and objective identified at the IDT meeting. The case manager assures the ISP budget is within the capped dollar amount (CDA). Implementation of the ISP begins when provider service plans have been received by the case manager and recipient, and the plan and budget have been approved by the TPA contractor.

**F.** The case manager ensures for each recipient that:

**(1)** the plan addresses the recipient's needs and personal goals in medical supports needed at home for health and wellness;

**(2)** services selected address the recipient's needs as identified during the assessment process; needs not addressed in the ISP are addressed through resources outside the MF waiver program;

**(3)** the outcomes of the assessment process for assuring health and safety are considered in the plan;

**(4)** services do not duplicate or supplant those available to the recipient through the medicaid state plan or other public programs;

**(5)** services are not duplicated in more than one service code;

**(6)** the parties responsible for implementing the plan are identified and listed within the document;

**(7)** the back-up plans are complete; and

**(8)** the ISP is submitted to and reviewed by the TPA contractor in compliance with the MF waiver service standards.

**G.** The ISP is updated if personal goals, needs or life circumstances change that may or may not result in a change of the LOC. Revisions may be requested by the recipient. Each member of the IDT may request an IDT meeting to address changes or challenges. The case manager contacts the recipient to initiate revisions to the budget. The case manager initiates the scheduling of IDT meetings and assures the IDT meeting is in compliance with the MF waiver service standards.

**H.** The case manager is responsible for monitoring the ISP pre-planning and development process. The case management agency conducts internal quality improvement monitoring of service plans. The ISP is monitored monthly via phone, electronically, and face-to-face by the case manager.

**I.** After the initial ISP, the IDT reviews the ISP at least annually or more often as needed, in order to assess progress toward goal achievement and determine any needed revisions in care.
[8.314.3.15 NMAC - Rp, 8.314.3.15 NMAC 3/1/2018]

**8.314.3.16 UTILIZATION REVIEW:** All medicaid services,

including services covered under the MFW, are subject to utilization review for medical necessity and program compliance. Reviews can be performed before services are furnished, after services are furnished and before payment is made, or after payment is made. See Section 8.310.2.14 NMAC. Once enrolled, providers receive instructions and documentation forms necessary for prior approval and claims processing.

**A. Prior approval:** To be eligible for MFW program services, recipients must require an ICF/IID LOC and meet the eligibility requirements defined in Subsection B of Section 8.314.3.12 NMAC. LOC determinations are made by MAD or its designee. The ISP must specify the type, amount and duration of services. Certain procedures or services specified in the ISP can require prior approval from MAD or its designee. Services for which prior approval was obtained remain subject to utilization review at any point in the payment process.

**B. Eligibility determination:** Prior approval of services does not guarantee that individuals are eligible for MAP. Providers must verify that individuals are eligible for MAP at the time services are furnished and determine if recipients have other health insurance.

**C. Reconsideration:** Providers who disagree with prior approval request denials or other review decisions can request a re-review and reconsideration. See Section 8.350.2 NMAC.
[8.314.3.16 NMAC - Rp, 8.314.3.16 NMAC 3/1/2018]

**8.314.3.17 REIMBURSEMENT:** Waiver service providers must submit claims for reimbursement to MAD's fiscal contractor for processing. Claims must be filed per the billing instructions in the medicaid policy manual. Providers must follow all medicaid billing instructions. See Section 8.302.2 NMAC. Once enrolled, providers receive instructions on documentation, billing, and claims processing. Reimbursement to providers of medicaid waiver services is made at a predetermined reimbursement rate.
[8.314.3.17 NMAC - Rp, 8.314.3.17 NMAC 3/1/2018]

**8.314.3.18 RIGHT TO A HSD ADMINISTRATIVE HEARING:**

**A.** Pursuant to 42 CFR Section 431.220(a)(1) and (2), Section 27-3-3 NMSA 1978 an eligible recipient may request a HSD administrative hearing to appeal an adverse action or adverse decision. See Section 8.352.2 NMAC for a description of the HSD administrative hearing process. In addition to adverse actions defined in Section 8.352.2 the recipient may request an administrative hearing in the following circumstances:

**(1)** when an applicant has been determined not to meet the LOC requirement for medically fragile waiver program services; and

**(2)** when an applicant has not been given the choice of HCBS as an alternative to institutional care.

**B.** DOH and its counsel, if necessary, shall participate in any relevant HSD administrative hearing involving an eligible recipient. HSD's office of general counsel may elect to participate in the administrative hearing. See Section 8.352.2 NMAC for a complete description, instructions, and hearing process of a HSD administrative hearing for an eligible recipient.
[8.314.3.18 NMAC - N, 3/1/2018]

**8.314.3.19 CONTINUATION OF BENEFITS PURSUANT TO TIMELY APPEAL:**

**A.** Continuation of benefits may be provided to an eligible recipient who requests a HSD administrative hearing within the timeframe defined in Section 8.352.2 NMAC.

**B.** The continuation of a benefit is only available to an eligible recipient that is currently receiving the appealed benefit. The continuation of the benefit will be the same as the eligible recipient's current allocation, budget or LOC. See Section 8.352.2 NMAC for a complete description, instructions and process of a HSD administrative hearing and continuation of benefits process of a MAP eligible recipient.
[8.314.3.19 NMAC - N, 3/1/2018]

**8.314.3.20 GRIEVANCE SYSTEM:** An eligible recipient has the opportunity to register a grievance or complaint concerning the MFW program. An eligible recipient may register complaints with DOH via e-mail, mail or phone. Complaints will be referred to the appropriate DOH division or as appropriate referred to MAD for resolution. The filing of a complaint or grievance does not preclude an eligible recipient from pursuing a HSD administrative hearing. The eligible recipient is informed that filing a grievance or complaint is not a prerequisite or substitute for requesting a HSD administrative hearing.
[8.314.3.20 NMAC - N, 3/1/2018]

**HISTORY OF 8.314.3 NMAC:**
**Pre-NMAC History:** The material in this part was derived from that previously filed with the Commission of Public Records - State Records Center and Archives.
ISD-Rule 310.2300, Medically Fragile Individuals In-Home Care Program, (Services), 1/13/1986.

**History of Repealed Material:**
8.314.3 NMAC, Medically Fragile Home and Community-Based Services Waiver Services (filed 4/16/2002) - Repealed effective 3/1/2018.

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## HUMAN SERVICES DEPARTMENT
### MEDICAL ASSISTANCE DIVISION

**This is an amendment to 8.200.510 NMAC, Section 15 effective 3/1/2018.**

**8.200.510.15 EXCESS HOME EQUITY AMOUNT FOR LONG-TERM CARE SERVICES:**

**A.** Oct. 2017 $560,000.

**[~~A.~~] B.** Jan. 2017 $840,000.

**[~~B.~~] C.** Jan. 2016 $828,000.

**[~~C.~~] D.** Jan. 2015 $828,000.

[**~~D.~~**] **E.** Jan. 2014 $814,000.

[**~~E.~~**] **F.** Jan. 2013 $802,000.

**[~~F.~~] G.** Jan. 2012 $786,000.

[**~~G.~~**] **H.** Jan. 2011 $758,000.

[**~~H.~~**] **I.** Jan. 2010 $750,000.

[8.200.510.15 NMAC - Rp, 8.200.510.15 NMAC, 7/1/2015; A/E, 1/1/2016; A/E, 3/1/2017; A, 3/1/18]

## HUMAN SERVICES DEPARTMENT
### MEDICAL ASSISTANCE DIVISION

**This is an amendment to 8.240.500 NMAC, Section 14 effective 3/1/2018.**

**Explanatory statement: Statute citations throughout the rule were corrected to conform to correct legislative styles.**

**8.240.500.14 UNEARNED INCOME:** [**~~Unearned income exclusions:~~** ~~All social security and railroad retirement beneficiaries receive cost of living adjustments (COLAs) in January of each year. The ISD caseworker must disregard the COLA from January through March when (re)determining QMB eligibility. For redeterminations made in January, February and March and for new QMB applications registered in January, February or March, the ISD caseworker uses the December social security and railroad retirement benefit amounts. For QMB applications registered from April through December, total gross income including the new COLA figures are used to determine income and compared to the new April federal poverty levels. This exclusion does not apply to other types of income.~~]

**A. Unearned income exclusions:** All social security and railroad retirement beneficiaries receive cost of living adjustments (COLAs) in January of each year. The ISD caseworker must disregard the COLA from January through March when (re)determining QMB eligibility. For redeterminations made in January, February and March and for new QMB applications registered in January, February or March, the ISD caseworker uses the December social security and railroad retirement benefit amounts. For QMB applications registered from April through December, total gross income including the new COLA figures are used to determine income and compared to the new April federal poverty levels. This exclusion does not apply to other types of income.

**B. Evaluation of applicant/recipient's income:** The ISD caseworker determines the amount of income available to the applicant/recipient using only the applicant/recipient's own income. A standard $20 disregard is allowed in accordance with Section 8.215.500.22 NMAC. The federal poverty level standard disregard is only given if the applicant/recipient lives with an ineligible spouse. See 8.240.500.15 NMAC for deemed income.

[2/1/1995; 9/15/1995; 8.240.500.14 NMAC - Rn, 8 NMAC 4.QMB.523 & A, 7/15/2010; 8.240.500.14 NMAC - Rn, 8.240.500.13 NMAC, 10/1/12; A, 3/1/18]

## HUMAN SERVICES DEPARTMENT
### MEDICAL ASSISTANCE DIVISION

**This is an amendment to 8.281.400 NMAC, Section 10, and Section 11, effective 3/1/2018.**

**Explanatory statement: Statute citations throughout the rule were corrected to conform to correct legislative styles.**

**8.281.400.10 BASIS FOR DEFINING THE GROUP:** An applicant/recipient must require institutional care as certified by a physician licensed to practice medicine or osteopathy. The applicant/recipient must be institutionalized in a medicaid qualifying bed in a New Mexico medicaid-approved institution. "Institutions" are defined as acute care hospitals (ACHs), nursing facilities (NFs) and intermediate care facilities for [~~the mentally retarded (ICF-MRs)~~] individuals with intellectual disabilities (ICF/IID), swing beds and certified instate inpatient rehabilitation centers. Level of care (LOC) determinations for institutional care medicaid eligibility are made by the MAD UR contractor or a member's selected or assigned managed care organization (MCO). Documentation of these determinations is provided to the institution by the UR contractor or MCO. For applicants/recipients in a hospital awaiting placement in NFs, confirmation letters are furnished by the MAD UR contractor for use by hospital staff. A level of care (LOC) is not required for acute care hospitals. Documentation of acute care hospitalization must be provided by the hospital to determine the eligibility period.

[2/1/1995; 7/1/2000; 8.281.400.10 NMAC - Rn, 8 NMAC 4.ICM.402, 7/1/2003; A, 3/1/18]

**8.281.400.11 [~~GENERAL RECIPIENT REQUIREMENTS:~~] INTERVIEW REQUIREMENTS:**

**A. Purpose and scope of interview:** An interview is required at initial application for institutional care medicaid. The initial interview is an official and confidential discussion of household circumstances with the applicant. The interview is intended to provide the applicant with program information, and to supply the facts needed by the ISD caseworker to make a reasonable eligibility determination. The interview is not simply to review the information on the application, but also to explore and clarify any unclear

or incomplete information. The scope of the interview shall not extend beyond examination of the applicant's circumstances that are directly related to determining eligibility. The interview shall be held prior to disposition of the application.

**B. Individuals interviewed:** Applicants, including those who submit applications by mail, shall be interviewed via telephone with an ISD caseworker. When circumstances warrant or upon request of the applicant, the household may be interviewed in person at another place reasonably accessible and agreeable to both the applicant and the ISD caseworker. The applicant may bring any person he chooses to the interview.

**C. Scheduling interviews:** The interview on an initial application shall be scheduled within ten (10) working days, and, to the extent possible, at a time that is most convenient for the applicant.

**D. Missed interviews:** ISD shall notify a household that it missed its first interview appointment, and inform the household that it is responsible for rescheduling the missed interview. If the household contacts the caseworker within the 45-day application processing period, the caseworker shall schedule a second interview. When the applicant contacts ISD, either orally or in writing, the caseworker shall reschedule the interview as soon as possible thereafter within the 45 day processing period, without requiring the applicant to provide good cause for missing the initial interview. If the applicant does not contact ISD or does not appear for the rescheduled interview, the application shall be denied on the 45th day (or the next work day) after the application was filed.

[2/1/1995; 8.281.400.11 NMAC - Rn, 8 NMAC 4.ICM.410, 7/1/2003; A, 3/1/18]

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## HUMAN SERVICES DEPARTMENT
### MEDICAL ASSISTANCE DIVISION

**This is an amendment to 8.281.500 NMAC, Section 7 and Section 15 effective 3/1/2018.**

**Explanatory statement: Statute citations throughout the rule were corrected to conform to correct legislative styles.**

**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 his or her 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 his or her 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 his or her 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 he or she can use to meet his or her 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 [~~long-term care insurance partnership (QLTCPI)~~] 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 [~~QLTCP~~] 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 his or her 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.

[8.281.500.7 NMAC - Rp, 8.281.500.7 NMAC, 8/15/2015; A, 3/1/2018]

**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 separate property;

**(d)** the resulting figure must be less than $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 physician and supporting medical documentation; the institutionalized applicant or recipient is considered "likely to remain" even if he or she does not actually remain in an institution for 30 consecutive days if he or she 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 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 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 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 [~~QSLTCI~~] QSLTCIP 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 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 can request a HSD administrative hearing pursuant to 8.352.2 NMAC. Refer to 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 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 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]

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## HUMAN SERVICES DEPARTMENT
### MEDICAL ASSISTANCE DIVISION

**This is an amendment to 8.281.510 NMAC, Section 11 effective 3/1/2018.**

**Explanatory statement: Statute citations throughout the rule were corrected to conform to correct legislative styles.**

**8.281.510.11 RECOGNIZED MEDICAID TRUSTS:** The trust provisions set forth in 8.281.510.9 NMAC and 8.281.510.10 NMAC shall not apply to the following trusts so long as the trust document meets all the requirements set forth in this section.

**A.** The recognized medicaid trusts described in this section (special needs trusts and non-profit trusts for certain disabled individuals) are subject to the following.

**(1)** Only income and resources distributed directly to the applicant/recipient or to a third party on the applicant/recipient's behalf by the trustee are considered available to the applicant/recipient in determining medicaid eligibility if the applicant/recipient could use the payment for food or shelter for him/herself.

**(2)** The trusts are reversionary trusts meaning the trust must provide that, upon the death of the applicant/recipient, any funds remaining in the trust revert to the state medicaid agency, up to the amount paid in medicaid benefits on the applicant/recipient's behalf. If the applicant/recipient has resided in more than one state, the trust must provide that the funds remaining in the trust are distributed to each state in which the applicant/recipient received medicaid, based on the state's proportionate share of the total amount of medicaid benefits paid by all of the states on the applicant/recipient's behalf.

**(3)** All trusts submitted for review to the department must be in writing, signed, and fully executed. Trusts that are not signed and executed will not be considered as effective trusts until they are signed and executed. Trusts must also be funded as demonstrated by verifiable documentation prior to review by the department.

**(4)** Assets are not part of a trust and are considered outside of the trust until the date they are actually transferred into the trust, as demonstrated by verifiable documentation, regardless of the effective date of the trust. Assets outside of a trust will be evaluated according to the applicable regulations regarding the counting of resources.

**(5)** Since the department is a reversionary beneficiary for all of the trusts described in the rest of this section, any legal action concerning one of these trusts must name the department as an interested party and the department must be notified by service of process in accordance with the New Mexico Rules of Civil Procedure.

**(6)** The applicant/recipient may not be the trustee and may not have any ability, access, or authority to manage or control the trust account.

**(7)** Each trust document must identify the person or organization that drafted the trust document.

**(8)** If the department approves or previously approved a recognized medicaid trust, the trust and administration of the trust are subject to review by the department, at least annually, and more frequently upon the request of the department, to determine if the trust remains a valid trust for the purposes of meeting the requirements of a recognized medicaid trust.

**(9)** If the department determines that a trust is invalid under Paragraph (8) above, the department will evaluate the applicant/recipient's medicaid eligibility, applying the provisions of 8.281.500 NMAC to the corpus of any existing trust. If the corpus of the trust is not disclosed, or cannot be identified by the department due to a lack of documentation, the department will presume that the corpus of the trust is a countable resource in excess and will be counted toward the allowable resource limit in 8.281.500.11 NMAC, *applicable resource standards*.

**(10)** The trustee and any alternate trustees shall be specifically identified by name and address.

**(11)** The department shall not be charged any fees or costs for obtaining trust records or documents.

**(12)** The trust may not under any circumstances provide a loan to the beneficiary or any other individual or entity.

**(13)** The trust must be in compliance with all applicable criteria as set forth in 8.281.510.11 NMAC.

**(14)** All trusts under Subsection B below must terminate upon the death of the beneficiary and provision made to immediately disburse the remaining corpus in accordance with the terms of the trust.

**B. Special needs trusts:** A special needs trust is a trust containing the assets of a disabled applicant/recipient established and funded prior to the time the disabled applicant/recipient reaches the age of 65 and which is established for the sole benefit of the disabled applicant/recipient by a parent, grandparent, legal guardian of the disabled applicant/recipient, or a court. A trust established on or after December 13, 2016, by an individual (i.e. the trust beneficiary) with a disability under age 65 for his or her own benefit can qualify as a special needs trust, conferring the same benefits as a special needs trust set up by a parent,

grandparent, legal guardian, or court. To qualify as a special needs trust, the trust shall contain the following provisions.

**(1)** The trust shall be identified as an OBRA '93 trust established pursuant to 42 U.S.C. Section 1396p(d)(4)(A).

**(2)** The trust shall not contain any provisions to automatically alter the form of the trust from an individual trust to a "pooled trust" under 42 U.S.C. Section 1396p(d)(4)(C). The special needs trust should be properly dissolved and a pooled trust should be created in accordance with federal and state laws.

**(3)** The trust shall specifically state that the trust is for the sole benefit of the trust beneficiary. Only trusts which are intended for the sole benefit of the disabled applicant/recipient are special needs trusts. Any trust which provides benefits to other persons is not for the sole benefit of the trust beneficiary and shall not be considered a special needs trust. The trust may provide for reasonable compensation to a trustee and shall provide for the reimbursement to the department on the death of the trust beneficiary.

**(4)** The trust shall specifically state that its purpose is to permit the use of trust assets to supplement, and not to supplant, impair or diminish, any benefits or assistance of any federal, state or other governmental entity for which the beneficiary may otherwise be eligible or for which the beneficiary may be receiving.

**(5)** Parents shall not be relieved of their duty to support a minor child. A minor's funds in a trust shall not be expended on routine support that should be provided by the parents.

**(6)** The trust shall specifically state the age of the trust beneficiary, whether the trust beneficiary is disabled within the definition of 42 U.S.C. Section 1382c(a)(3), and whether the trust beneficiary is competent at the time the trust is established.

**(7)** If the trust beneficiary is a minor, the trustee shall execute a bond to protect the child's funds or shall get a court's written order exempting him/her from the bond requirement.

**(8)** If there is some question about the trust beneficiary's disability, independent proof may be required.

**(9)** If the trust beneficiary is a minor, the trust shall state whether the trust beneficiary is expected to be competent at his or her majority.

**(10)** The trust shall specifically identify, in an attached schedule, the source of the initial trust property and all assets of the trust. If the trust is being established with funds from the proceeds of a settlement or judgment subsequent to the bringing of a legal cause of action, medicaid's claim for its expenditures that are related to the cause of action shall be repaid immediately upon the receipt of such proceeds and prior to the establishment of the trust.

**(11)** Subsequent additions made to the trust corpus shall be reported to the ISD caseworker upon application and recertification. Subsequent additions to the trust (other than interest on the corpus) after the applicant/recipient reaches age 65 may be subject to transfer of asset provisions (unless an exception to transfer of asset provisions applies).

**(12)** If subsequent additions are to be made to the trust corpus with funds not belonging to the trust beneficiary, it shall be understood that those funds are a gift to the trust beneficiary and cannot be reclaimed by the donor.

**(13)** If the trust makes provisions which are intended to limit invasion by creditors or to insulate the trust from liens or encumbrances, the trust shall state that such provisions are not intended to limit the state's right to reimbursement or to recoup incorrectly paid benefits.

**(14)** The special needs trust shall identify the grantor by name, indicate his/her relationship to the primary beneficiary, and state that it is established by a parent, grandparent, or legal guardian of the trust beneficiary, or by a court. A court can be named as the grantor, if the trust is established pursuant to a settlement of a case before it, or if the court is otherwise involved in the creation of the trust.

**(15)** The trust may pay administration fees and legal bills incurred by the beneficiary related to the trust administration.

**(16)** The trust shall specifically state that it is irrevocable. Neither the grantor, nor the beneficiary, or any remainder beneficiaries shall have any right or power, whether alone or in conjunction with others, in whatever capacity, to revoke or terminate the trust or to designate the persons who shall possess or enjoy the trust estate during his/her lifetime. However, the trustee may seek an amendment for the limited purpose of ensuring that the trust complies with any changes to the laws governing the trust, per the agreement of all interested parties, to include the department. All such amendments shall be reviewed, consented to, and approved in writing by the department or its successor agency prior to finalizing the amendments. Any amendments not agreed to in writing by the department are void. Trust records shall be open at all reasonable times to inspection by the department and copies shall be provided, at no cost to the department, upon the request of an authorized representative of the department.

**(17)** The trustee shall be specifically identified by name and address. The trust shall state that the original trust beneficiary cannot be the trustee. The trust shall make provisions for naming a successor trustee in the event that any trustee is unable or unwilling to serve. The department as well as the trust beneficiary or guardian (if applicable), shall be given prior notice if there is a change in the trustee.

**(18)** The trust shall specifically state that the trustee shall fully comply with all state laws

and regulations, including prudent administration per Section 46A-8-804 NMSA 1978 (2003). The trust shall provide that the trustee cannot take any actions not authorized by, or without regard to, state laws and regulations.

**(19)** The trust shall specifically state that the trustee shall be compensated only as provided by law. The costs of administration must comply with Section 46A-8-805 NMSA 1978 (2003). If the trust identifies a guardian, the trust shall specifically identify him or her by name. A guardian shall be compensated only as provided by law. The parent of a minor child shall not be compensated from the trust as the child's guardian.

**(20)** The trust shall specifically name the department as a remainder beneficiary with priority over any other beneficiaries except the primary beneficiary for whom the trust was created. The trust shall specifically state that, upon the death of the primary beneficiary, the department will be immediately notified by the trustee in writing, and shall be paid all amounts remaining in the trust up to the total value of all medical assistance paid on behalf of the primary beneficiary. The trustee shall comply fully with this obligation to first repay the department, without requiring the department to take any action except to establish the amount to be repaid. Repayment shall be made by the trustee to the department or to any successor agency within 30 days after receiving written notification by the department of the amounts expended on behalf of the primary beneficiary.

**(a)** Allowable administrative expenses: The following types of administrative expenses may be paid from the trust prior to reimbursement to the department for medical assistance paid: taxes due from the trust to the state or federal government because of the death of the beneficiary, and reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust. Payment of such expenses must be fully documented and copies of the documentation provided to the department within seven calendar days of making such payments.

**(b)** Prohibited expenses and payments: Examples of some types of expenses that are not permitted prior to reimbursement to the department for medical assistance, include but are not limited to: taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate, inheritance taxes due for residual beneficiaries, payment of debts owed to third parties other than the department, funeral expenses, and payments to residual beneficiaries.

**(21)** If there is a provision for repayment of other assistance programs, the trust shall specifically state that the medicaid program shall be repaid prior to making repayment to any other assistance programs.

**(22)** The trust shall specifically state that if the beneficiary has received medicaid benefits in more than one state, each state that provided medicaid benefits shall be repaid. If there is an insufficient amount left to cover all benefits paid, then each state shall be paid its proportionate share of the amount left in the trust, based upon the amount of support provided by each state to the beneficiary.

**(23)** No provisions in the trust shall permit the trustee or the estate's representative to first repay other persons or creditors at the death of the beneficiary. Only what remains in the trust after the repayments specified in Paragraphs (20) through (22) above have been made shall be considered available for other expenses or beneficiaries of the estate.

**(24)** The trust shall specify that an accounting of all additions and expenditures made by or into the trust shall be submitted to the department on an annual basis, or more frequently upon the request of the department. The department shall not be charged any fees or costs for obtaining these records.

**(25)** The trust shall not create other trusts within it.

**(26)** If the trust is funded, in whole or in part, with an annuity or other periodic payment arrangement, the department must be named in the controlling documents as the primary remainder beneficiary up to the total amount of medical assistance paid on behalf of the individual.

**(27)** Distributions from the trust made to or for the benefit of a third party that are not for the sole primary benefit of the disabled individual are treated as a transfer of assets for less than fair market value and may create a period of ineligibility for certain medicaid services.

**C. Income diversion trusts:** An applicant/recipient whose income exceeds the income standard may be eligible to receive medicaid through the creation and funding of an income diversion trust. The trust terminates upon the death of the beneficiary. An income diversion trust must meet all of the following requirements.

**(1)** The trust is composed only of pension, social security, and other income to the applicant/recipient, including accumulated income in the trust.

**(2)** Only income distributed directly to the applicant/recipient or to a third party on the applicant/recipient's behalf by the trustee are considered available to the applicant/recipient in determining medicaid eligibility if the applicant/recipient could use the payment for food or shelter for him/herself.

**(3)** An income diversion trust is a reversionary trust meaning the trust must provide that, upon the death of the applicant/recipient, any funds remaining in the trust revert to the state medicaid agency, up to the amount paid in medicaid benefits on the applicant/recipient's behalf.

**(4)** If the applicant/recipient has resided in more than one state, the trust must

provide that the funds remaining in the trust are distributed to each state in which the applicant/recipient received medicaid, based on the state's proportionate share of the total amount of medicaid benefits paid by all the states on the applicant/recipient's behalf.

**(5)** The trustee may, upon the death of the beneficiary, pay the expenses of the beneficiary's burial or cremation up to the amount then authorized for burial expenses under federal and state medicaid law and regulations, to the extent other resources are not so designated.

**(6)** The trusts described in this section are also known in New Mexico as Maxwell v. Heim income diversion trusts; those trusts executed on or after August 11, 1993 no longer have to be court ordered or approved.

**D. Non-profit trusts for certain disabled individuals:** Trusts containing the assets of applicants/recipients who meet the social security administration's definition of disability.

**(1)** The trust must meet all the following criteria to be considered a non-profit trust for certain disabled individuals:

**(a)** the trust is established and managed by a non-profit association;

**(b)** a separate account is maintained for each beneficiary of the trust but, for purposes of investment and management of funds, the trust pools these accounts;

**(c)** accounts in the trust are established solely for the benefit of applicants/recipients who meet the social security administration's definition of disability and are established by the parent, grandparent, or legal guardian of such applicants/recipients, by such applicants/recipients themselves, or by a court;

**(d)** to the extent that any amounts remaining in the applicant/recipient's trust account upon his/her death are not retained by the trust, the trust pays to the department an amount equal to the total amount of medicaid benefits paid on behalf of the applicant/recipient;

**(i)** allowable administrative expenses: the following types of administrative expenses may be paid from the trust prior to reimbursement to the department for medical assistance paid: taxes due from the trust to the state or federal government because of the death of the beneficiary, and reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust; payment of such expenses must be fully documented and copies of the documentation provided to the department within seven calendar days of making such payments;

**(ii)** prohibited expenses and payments: examples of some types of expenses that are not permitted prior to reimbursement to the department for medical assistance, include but are not limited to: taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate, inheritance taxes due for residual beneficiaries, payment of debts owed to third parties, funeral expenses, and payments to residual beneficiaries; and

**(iii)** any income or resources added to the trust after the applicant/recipient reaches 65 years of age may subject him or her to a transfer of assets penalty.

**(2)** A trustee of a non-profit trust, in order to fulfill his or her fiduciary obligations with respect to the state's remainder interest in the trust, must:

**(a)** notify the department, in writing, of the creation or funding of the trust for the benefit of an applicant/recipient; and

**(b)** notify the department, in writing, of the death of the beneficiary of the trust; and

**(c)** notify the department, in writing, in advance of any transactions involving transfers from the trust principal for less than fair market value.

**(3)** Trust records shall be open at all reasonable times to inspection by the department and copies shall be provided, at no cost to the department, upon the request of an authorized representative of the department.

[8.281.510.11 NMAC - Rp, 8.281.500.15 NMAC, 10/1/2012; A, 3/1/2018]

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## HUMAN SERVICES DEPARTMENT
### MEDICAL ASSISTANCE DIVISION

**This is an amendment to 8.290.400 NMAC, Section 11, effective 3/1/2018.**

**Explanatory statement: Statute citations throughout the rule were corrected to conform to correct legislative styles.**

**8.290.400.11 GENERAL RECIPIENT REQUIREMENTS:** Eligibility for the waiver programs is always prospective. Applicants/recipients must meet, or expect to meet, all non-financial eligibility criteria in the month for which determination of eligibility is made. The application process begins once the letter of allocation, level of care, and the application for medical assistance is received by the income support division worker. After the individual service plan (ISP) has been in effect for 30 days or if it can be reasonably anticipated that services will be in effect for 30 days, the application is approved effective the first day of the month of the start date of the individualized service plan, unless income/resources deemed to a minor child from his parents results in the child's ineligibility for the initial month. The eligibility start date is based on the date of application or the start date of the ISP, whichever is later.

**A. Enumeration:** An applicant/recipient must furnish his social security number. Medicaid eligibility is denied or terminated for an applicant/recipient who fails to furnish social security number.

**B. Citizenship:** Refer to medical assistance Eligibility Manual Section 11 of 8.200.410 NMAC.

**C. Residence:** To be eligible for medicaid, an applicant/recipient must be physically present in New Mexico on the date of application or final determination of eligibility and must have declared an intent to remain in the state. If the applicant/recipient does not have the present mental capacity to declare intent, the applicant's/recipient's representative may assume responsibility for the declaration of intent. If the applicant/recipient does not have the mental capacity to declare intent and there is no representative to assume this responsibility, the state where the applicant/recipient is living will be recognized as the state of residence. If waiver services are suspended because the recipient is temporarily absent from the state but is expected to return within 60 consecutive days at which time waiver services will resume, the medicaid case remains open. If waiver services are suspended for any other reason for 60 consecutive days, the medicaid case is closed after appropriate notice is provided to the recipient.

**D. Non-concurrent receipt of assistance:** Home and community-based services waiver (HCBSW) services furnish medicaid benefits to an applicant/recipient who qualifies both financially and medically for institutional care but who, with provision of waiver services, can receive the care he needs in the community at less cost to the medicaid program than the appropriate level of institutional care. Individuals receiving services under a HCBSW may not receive concurrent services under nursing facility (NF), ICF-MR, personal care or any other HCBSW.

**(1) SSI recipients:** Applicants receiving supplemental security income (SSI) benefits are categorically eligible for waiver services. No further verification of income, resources, citizenship, age, disability, or blindness is required. The applicant must, however, meet the level of care requirement. (An SSI recipient must meet the assignment of rights and TPL requirements and not be ineligible because of a trust.)

**(2) Married SSI couples:** All married SSI couples where neither member is institutionalized in a medicaid-certified facility are treated as separate individuals for purposes of determining eligibility and benefit amounts beginning the month after the month they began living apart. See Section 8012 of the Omnibus Budget Reconciliation Act of 1989. In the case of an initial application, or reinstatement following a period of ineligibility, when members of a married couple are not living together on the date of application or date of request for reinstatement, each member of the couple is considered separately as of the date of application or request, regardless of how recently the separation occurred.

**E. Interview requirements:** An interview is required at initial application for all home and community-based waiver medical assistance programs in accordance with all of the requirements set forth at Section 8.281.400.11 NMAC.

[2/1/1995, 4/30/98; 8.290.400.11 NMAC - Rn, 8 NMAC 4.WAV.410, 411, 412, 413, 414 & A, 5/1/2002; A, 11/1/2007; A, 3/1/2018]

## HUMAN SERVICES DEPARTMENT
### MEDICAL ASSISTANCE DIVISION

**This is an amendment to 8.290.600 NMAC, Section 10, and Section 12 effective 3/1/2018.**

**8.290.600.10 BENEFIT DETERMINATION:** Application for the waiver programs is made using the [~~"application/redetermination of eligibility for medical assistance of aged, blind, and disabled individuals" (form MAD 381).~~] HSD 100 application. Upon notification by the appropriate program manager that an unduplicated recipient (UDR) is available for waiver services, applicants are registered on the income support division eligibility system. Applications must be acted upon and notice of approval, denial, or delay sent out within 45 calendar days from the date of application, or within 90 calendar days if a disability determination is required from the DDSU. The eligible recipients must assist in completing the application, may complete the form themselves, or may receive help from a relative, friend, guardian, or other designated representative. [~~To avoid a conflict of interest, a case manager or any other MAD provider may not complete the application or be a designated representative.~~]

**A. Representatives applying on behalf of individuals:** If a representative makes application on behalf of the eligible recipient, that representative will continue to be relied upon for information regarding the eligible recipient's circumstances. The ISD caseworker will send all notices to the eligible recipient in care of the representative.

**B. Additional forms:** The following forms are also required as part of the application process:

**(1)** the eligible recipient or representative must complete and sign the primary freedom of choice of case management agency form at the time of allocation; and

**(2)** the eligible recipient or representative must sign the applicant's statement of understanding at the time waiver services are declined or terminated.

**C. Additional information furnished during application:** The ISD caseworker provides an explanation of the waiver programs, including, but not limited to, income and resource limits and possible alternatives,

such as institutionalization. The ISD caseworker refers potentially eligible recipients to the social security administration to apply for supplemental security income (SSI) benefits. If a disability decision by the DDSU is required, but has not been made, the ISD caseworker must follow established procedures to refer the case for evaluation.
[2/1/1995; 1/1/1997; 8.290.600.10 NMAC - Rn, 8 NMAC 4.WAV.620 & A, 5/1/2002; A, 11/1/2007; A, 11/1/2012; A, 3/1/2018]

**8.290.600.12 ONGOING BENEFITS:**

**A. Regular reviews:** A complete redetermination of eligibility must be performed annually by the ISD caseworker for each open case. The redetermination includes contact with the eligible recipient or his representative to review financial and non-financial eligibility.

**B. Additional reviews:** Additional reviews are scheduled by the ISD caseworker depending upon the likelihood that the eligible recipient's income, resources or medical condition will change. The following are examples of frequently encountered changes which affect eligibility:

**(1)** social security cost-of-living increases;

**(2)** VA cost-of-living increases;

**(3)** rental income may be sporadic and require review every three months; and

**(4)** level of care review.

**C. 90 day reconsideration period**: HSD will reconsider in a timely manner the waiver eligibility of an individual who is terminated for failure to submit the renewal form or necessary information, if the individual subsequently submits the renewal form within 90 days after the date of termination without requiring a new application per 42 CFR 435.916(C)(iii).
[2/1/1995, 1/1/1997; 8.290.600.12 NMAC - Rn, 8 NMAC 4.WAV.624 & A, 5/1/2002; A, 11/1/2007; A, 11/1/2012; A, 3/1/2018]

## SUPERINTENDENT OF INSURANCE

By Final Order of the Superintendent of Insurance dated February 15, 2018, issued following a hearing held on November 16, 2017, the Office of Superintendent of Insurance, repeals and replaces its rule 13.4.7 NMAC - Licensing of Insurance Professionals - Continuing Education Requirements, effective on February 27, 2018.

## SUPERINTENDENT OF INSURANCE

**TITLE 13 INSURANCE**
**CHAPTER 4 LICENSING OF INSURANCE PROFESSIONALS**
**PART 7 CONTINUING EDUCATION REQUIREMENTS**

**13.4.7.1 ISSUING AGENCY:** Office of Superintendent of Insurance (OSI), Producer Licensing Bureau (PLB).
[13.4.7.1 NMAC - Rp, 13.4.7.1 NMAC, 2/27/2018]

**13.4.7.2 SCOPE:**

**A.** This rule applies to all licensed adjusters, insurance producers, limited surety agents, bail bond solicitors, property bondsmen, and nonresident insurance producers unless exempted by Subsection B of this section.

**B.** The continuing education requirements of this rule shall not apply to:

**(1)** holders of limited licenses issued pursuant to Section 59A-12-18 NMSA 1978;

**(2)** licensees who have been continuously licensed by the superintendent for 25 years or more, without a lapse of more than 90 days;

**(3)** persons who maintain a license solely for the purpose of receiving renewal fee residuals and who do not otherwise transact the business of insurance;

**(4)** agents of fraternal benefit societies licensed pursuant to Section 59A-44-33 NMSA 1978; or

**(5)** nonresident insurance licensees who are licensed in another state or country that requires completion of continuing education courses.
[13.4.7.2 NMAC - Rp, 13.4.7.2 NMAC, 2/27/2018]

**13.4.7.3 STATUTORY AUTHORITY:** Sections 59A-2-9, 59A-6-1, 59A-11-10, 59A-11-23, 59A-12-16, 59A-12-26, 59A-13-12, 59A-44-33, 59A-51-4.1 NMSA 1978.
[13.4.7.3 NMAC - Rp, 13.4.7.3 NMAC, 2/27/2018]

**13.4.7.4 DURATION:** Permanent.
[13.4.7.4 NMAC - Rp, 13.4.7.4 NMAC, 2/27/2018]

**13.4.7.5 EFFECTIVE DATE:** February 27, 2018, unless a later date is cited at the end of a section.
[13.4.7.5 NMAC - Rp, 13.4.7.5 NMAC, 2/27/2018]

**13.4.7.6 OBJECTIVE:** The purpose of this rule is to set forth continuing education requirements for persons who are licensed by the superintendent to transact business in this state and for continuing education providers.
[13.4.7.6 NMAC - Rp, 13.4.7.6 NMAC, 2/27/2018]

**13.4.7.7 DEFINITIONS:** As used in this rule:

**A. "adjuster"** means a resident or non-resident public adjuster, staff adjuster or independent adjuster as defined in Section 59A-13-2 NMSA 1978;

**B. "approved course"** means a course of instruction approved by the committee as satisfying the continuing education requirements of this rule or that has been previously approved by another state with which New Mexico has reciprocal privileges and that has been submitted by the provider and approved by the committee;

**C. "bail bondsman"** has the same definition as in Subsection A of Section 59A-51-2 NMSA 1978;

**D. "biennially"** means every two years or during the 24 months next preceding expiration of the current license;

**E. "committee"** means OSI's continuing education committee;

**F. "compliance period"** means the time period between the issue date or last renewal date of the license to the expiration date of the license for purposes of satisfying the continuation requirements;

**G. "credit hour"** means 50 minutes of actual instruction or self-study time in an approved course;

**H. "ethics course"** means a course that deals with usage and customs among members of the insurance profession, involving moral and professional conduct and fiduciary obligations and duties toward one another, toward clients, toward insureds, and toward insurers and of responsible insurance agency management;

**I. "insurance producer"** means a person required to be licensed under the laws of the state of New Mexico to sell, solicit or negotiate insurance;

**J. "licensee"** means an adjuster, insurance producer, limited surety agent, bail bond solicitor, property bondsman or nonresident insurance producer within the scope of this rule;

**K. "limited surety agent"** has the same definition as in Subsection C of Section 59A-51-2 NMSA 1978;

**L. "nonresident licensee**" means a person licensed in this state pursuant to Section 59A-11-23 NMSA 1978;

**M. "property bondsman**" has the same definition as in Subsection D of Section 59A-51-2 NMSA 1978;

**N. "provider"** means a person who is authorized by the superintendent to provide approved continuing education courses for licensees and report licensee attendance for credit toward continuing education requirements;

**O. "roster"** is an official list of licensees who have successfully completed an offering of an approved course;

**P. "solicitor"** has the same definition as in Subsection E of Section 59A-51-2 NMSA 1978; and

**Q. "superintendent"** means the superintendent of insurance, the office of superintendent of insurance or employees of the office of superintendent of insurance acting within the scope of the superintendent's official duties and with the superintendent's authorization.

[13.4.7.7 NMAC - Rp, 13.4.7.7 NMAC, 2/27/2018]

**13.4.7.8 INSURANCE CONTINUING EDUCATION COMMITTEE:**

**A.** The superintendent shall appoint an insurance continuing education committee that shall serve at the superintendent's pleasure. The committee shall be a volunteer committee and shall not be entitled to per diem or other reimbursement or remuneration.

**B.** The committee shall approve individual courses of instruction for continuing education credit, notify the superintendent of approved courses as they are approved, make recommendations regarding continuing education courses and perform other tasks assigned by the superintendent.

**C.** The committee shall not approve any continuing education course that does not provide a method by which a provider can assure that a licensee has completed the course.

[13.4.7.8 NMAC - Rp, 13.4.7.8 NMAC, 2/27/2018]

**13.4.7.9 REQUIREMENTS FOR LICENSEES:**

**A. Hours required biennially.**

**(1)** All licensees must complete a minimum of three hours of credits in ethics during each compliance period. Ethics credit hours may be included toward the total credit hour requirement for each license type.

**(2)** Title insurance licensees shall complete ten credit hours of approved courses covering title insurance. At least three credit hours must specifically cover the proper handling of escrow funds. These three hours can also be used to satisfy the requirement for three credit hours in ethics.

**(3)** Limited surety agents, property bondsmen, solicitors and bail bond solicitors shall complete 14 hours of approved courses covering the Bail Bondsmen Licensing Law, Sections 59A-51-1 et seq. NMSA 1978 and related regulations during each two-year compliance period.

**(4)** All other licensees shall complete 24 credit hours of approved courses covering some or all of the kinds of insurance for which they are licensed during each compliance period. Licensees who transact insurance under multiple lines of authority are only required to satisfy a single 24 hour continuing education requirement for each compliance period.

**(5)** Adjusters who are licensed prior to July 1, 2017 must satisfy continuing education credits prior to renewal of licenses beginning with the first biennial renewal cycle occurring after April 30, 2018.

**(6)** Non-resident licensees are not required to complete New Mexico's continuing education requirements if the home state requires continuing education and the licensee has complied with the continuing education requirements of the home state, pursuant to the provisions of Section 59A-11-23 NMSA 1978. However, if a non-resident licensee fails to complete the required continuing education courses in the home state, the New Mexico nonresident license shall also be cancelled.

**B. No carryover.** No licensee may carry over credit hours earned in a compliance period to the

next compliance period.

**C. No duplicate credit.** No additional credit will be granted to a licensee for completion of the same approved course more than once in any compliance period.

**D. Course completion date**. Course credits are applied to licensing requirements based on the date that the course is taken, rather than on the date that the course credit is reported by the provider.

**E. Course approval.** Licensees shall receive course credit only for courses that have been approved by the committee prior to enrollment in the course.

**F. Extensions.** Licensees who meet the criteria of illness, medical disability, military deployment or circumstances beyond the control of the licensee may apply for an extension of time to complete their continuing education requirement or a waiver, in whole or in part, of the continuing education requirement.

**(1)** The superintendent shall establish the duration of the extension when it is granted.

**(2)** If the circumstances supporting the extension continue beyond the granted extension period, the licensee may reapply for an extension.

**(3)** The licensee must request the extension prior to the end of the compliance period for which it applies, using the form available on the OSI website.

**(4)** Licensees called to active military service in a combat theater, may apply for an exemption from or an extension of time for meeting the continuing education requirements or extending their license renewal. The licensee must request the extension or waiver prior to the end of the compliance period, using the form available on the OSI website.

**G. Reinstating a discontinued license**. A licensee whose license is discontinued shall complete all required continuing education credits before submitting an application for reinstatement. If the license is discontinued for longer than a single biennial compliance period, the licensee must complete 24 hours of continuing education credits in addition to all credits necessary to renew the license. Instead of completing the required continuing education courses, the licensee may choose to retake the qualifying examination.

[13.4.7.9 NMAC - Rp, 13.4.7.9 NMAC, 2/27/2018]

**13.4.7.10 COURSE CONTENT:**

**A. Course length**. Individual courses shall be a minimum of one credit hour in length.

**B. Ethics.** A single continuing education course may include both ethics and other insurance topics meeting the requirements of Subsection C of this section.

**C. Insurance subjects.**

**(1)** General instruction time shall be designed to refresh the licensee's understanding of basic insurance principles and coverages, applicable laws and regulations, and recent and prospective changes to them.

**(2)** Required hours for specialized training requirements must be completed prior to transacting the type of insurance and may also be counted toward the 24 credit hour general producer licensee requirement.

**(a)** Producers desiring to transact business relating to stop loss insurance shall complete at least eight credit hours relating specifically to stop loss insurance.

**(b)** Adjusters and producers desiring to transact business relating to flood insurance shall complete at least four credit hours relating specifically to flood insurance within one year of the effective date of this rule.

**(c)** Producers shall not transact business relating to long term care until they have completed at least eight hours of continuing education relating specifically to long term care, and shall complete at least four hours of continuing education relating specifically to long term care during each compliance period thereafter. The course must include topics relating to long term care partnership for producers who wish to transact long term care partnership business. Producers who transact long term care insurance as of the effective date of this rule shall have one year following the effective date of this rule to complete the eight-hour initial course requirement.

**(3)** Required training shall not focus specifically on training that is insurer- or company-product specific and may not include sales or marketing information.

**D. Approved learning formats.**

**(1)** A course may utilize any combination of classroom instruction, lectures, seminars, panel discussions, question-and-answer periods, correspondence courses, online web-based courses and recorded presentations, as long as the provider can assure that a licensee has completed the course.

**(2)** A minimum of three hours of continuing education course hours for each compliance period must be earned through participation in a formal classroom or in another learning format that permits the student to interact with a live instructor. Licensees are responsible for tracking this requirement and are subject to audit by the superintendent.

[13.4.7.10 NMAC - Rp, 13.4.7.10 NMAC, 2/27/2018]

**13.4.7.11 PROVIDER AND COURSE REQUIREMENTS:**

**A. Provider qualifications**. Prior to submitting proposed courses to the committee for approval, the provider must submit the following information and be approved as a provider:

**(1)** the name and contact information for the provider's primary contact person;

**(2)** the provider's physical and mailing address;

**(3)** the provider's website address;

**(4)** a link that will be provided for licensees to review course dates, location, and content;

**(5)** procedures that will be used to process online enrollment in courses, including payment via credit card; and

**(6)** experience and qualifications of the course instructors.

**B. Course content.** To obtain approval of a course, a provider shall assure that:

**(1)** the curriculum offered relates to insurance subjects, or subjects which relate to the individual licensee's transaction of insurance business;

**(2)** the course has significant intellectual or practical content and that its primary objective is to increase the participant's professional competence as a licensee; and

**(3)** pursuant to Subsection B of Section 59A-12-26 NMSA 1978, instruction shall be designed to refresh the licensee's understanding of:

**(a)** basic principles and coverages involved,

**(b)** applicable insurance laws and regulations,

**(c)** proper conduct of the licensee's business,

**(d)** duties and responsibilities of the licensee, and

**(e)** to address recent and prospective changes.

**C. Course approval.**

**(1)** The provider's course application to the committee shall include, at a minimum, the following information:

**(a)** a statement identifying the knowledge, skills, or abilities the licensee is expected to obtain through completion of the course;

**(b)** a detailed course content outline showing the approximate times for major topics;

**(c)** a detailed description of the course materials, including a course content word count, that demonstrates that the course supports the number of credit hours requested;

**(d)** the method of evaluation by which the provider measures how effectively the course meets its objectives and provides for student input;

**(e)** the total number of course hours requested for approval, including the method the applicant is using to determine the number of course hours and the number of hours included in the total number of course hours requested for approval that are ethics topics;

**(f)** the course application fee as specified in Section 59A-6-1 NMSA 1978; and

**(g)** for applicants determining self-study course hours by using the average of approved times in other states, a list of all course approved times and the states in which the course is approved;

**(2) Prior approval**. A provider must submit each course for review and receive approval of the course prior to making that course available for enrollment by licensees. If the committee determines that the course content is incomplete or inadequate, the provider will be notified and required to supplement or modify the course before receiving approval.

**(3) Renewals**. The original course application fee covers the period until the initial expiration of the course. Courses must be resubmitted for renewal, along with the renewal fee specified in Section 59A-6-1 NMSA 1978. Courses will not automatically be re-approved by the committee.

**(4) Electronic course submission**. Beginning July 1, 2017 any provider wishing to have a course approved by the committee, must submit each course for approval electronically. Instructions for electronic submission of courses may be found on the OSI website. Providers should allow up to 60 days for the committee to approve a new course.

**(5) Course expiration**. All continuing education courses already approved by the committee at the time of the adoption of the final version of this regulation by the superintendent, will expire on March 31, 2018. All courses approved by the committee thereafter will expire two years after the date the course is approved.

**(6) Voluntary cancellation**. Providers shall notify the superintendent when a course is discontinued or no longer active and when there is a change to the provider's information of record.

**(7) Non-voluntary course cancellation**. Approved courses shall be cancelled and the content updated, as necessary, to reflect changes in the law or regulations. Failure of the provider to update courses in a timely manner may result in cancelation of the course by the superintendent.

**D. Statement of approved courses**. Providers of approved courses shall include the following written statement in the course materials for each approved course: "This course has been approved by the Insurance Continuing Education Committee as New Mexico Insurance Continuing Education Course Number (insert number) for (insert number) hours of credit."

**E. Instructors**. A provider of an approved course shall assure that instructors for all courses are qualified by practical or academic experience to teach the subject to be covered. For purposes of this rule, practical or academic experience shall include, but is not limited to, actual experience related to the kind of insurance which is the subject of the course, undergraduate or graduate educational training, or professional insurance industry designations such as the *Chartered Property Casualty Underwriter* (CPCU), *Chartered Life Underwriter* (CLU), and *Fellow of the Life Management Institute* (FLMI) designations.

**F. Enrollment.** Providers shall make available a current list of scheduled courses including course content, applicable credits, course dates, instructor information

and course location as appropriate. Providers shall collect course fees at the time of registration.

**G. Minimum classroom requirements**.

**(1)** Courses must comply with the approved learning formats listed in Subsection D of 13.4.7.10 NMAC.

**(2)** A disinterested third party attendant, an instructor, or a disinterested third party using visual observation technology must visually monitor attendance either inside or at all exits of the course presentation area at all times during the course presentation.

**(3)** An instructor must be involved in each classroom presentation of the course, but in circumstances involving remote presentations, all students and the instructor do not need to be in the same location. Students may attend remotely via the internet or other real-time format. While presenting recorded or text materials, the instructor making the live course presentation does not have to be the same instructor included on the recorded presentation or who prepared the text materials.

**(4)** Question and answer discussion periods must be provided by either an instructor making a live presentation of the course to licensees in the same room, or via real-time live audio or audio-visual connection which shall allow for student inquiries and responses with the presenting instructor, or by an instructor who is present for the entire remote, recorded, or computer-based course presentation with the students in the same room.

**(5)** The course pace shall be set by the instructor and does not allow for independent completion of the course by students.

**(6)** Providers may not include time spent by students on the final examination and pre-tests in determining course credit hours.

**H. Course completion.** A provider shall assure that each licensee completes the course either by:

**(1)** monitoring the course to witness attendance and participation; or

**(2)** requiring submission of a test or other written work evidencing understanding of the course material.

**I. Reciprocal course**s. In order for a licensee to receive credit for a reciprocal course, the reciprocal course must be approved in the provider's home state and have been submitted by the provider in its entirety to the committee for prior approval. The committee may choose to deny approval of any course hours that are related to the home state's laws or regulations or may deny any material, based on the NAIC's guidance.

**J. Submission of roste**r. Within ten business days after the completion of the course of instruction by a licensee, the provider must electronically submit an attendance roster to the superintendent. Instructions for electronic submittal may be found on the OSI website.

**K. Records.** A provider shall maintain records of attendance and course completion for a minimum of three years and make such records available to the superintendent or the committee at any time upon request.

**L. Audits.** The OSI staff may conduct audits of any course or provider without prior notice to the provider. OSI staff or a designee may attend courses without identifying themselves as employees or representatives of OSI. If continuing education records are audited or reviewed and the validity or completeness of the records are questioned, the provider shall have 30 days from the date of notice to correct discrepancies or submit new documentation.

[13.4.7.11 NMAC - Rp, 13.4.7.11 NMAC, 2/27/2018]

**13.4.7.12 REPORTING REQUIREMENTS:**

**A. Reporting by providers.** Continuing education providers are required to report completion of continuing education courses to the superintendent. However, it is the responsibility of the individual resident licensee to ensure that the superintendent's records reflect the completion of the required number of continuing education courses on or before the continuing education due date. The licensee must correct any discrepancies in the record through the continuing education provider:

**B. Transition and reporting after July 1, 2017.**

**(1)** All continuing education courses must be completed and reported prior to renewal of the license. Licensees who fail to complete the required continuing education courses will not be permitted to renew the license, which will result in immediate termination of the license, pursuant to Section 59A-11-10 NMSA 1978.

**(2)** For individual licensees who were issued or who renewed a one-year agent, broker, or solicitor license prior to July 1, 2017, the license must be renewed for a biennial insurance producer or bail bondsmen's license by April 30, 2018. Prior to that renewal, the individual licensee must have completed 15 hours of continuing education courses, including at least one hour in ethics, as was required at the time the license was issued or renewed.

**(3)** For all biennial licenses issued after July 1, 2017, the licensee shall renew on the last day of the second birth month following issue of the license, such that the initial compliance period shall be no less than thirteen months and no more than twenty-four months in length. Prior to renewal, licensees shall complete the required number of continuing education courses, as set forth in Subsection A of 13.4.7.9 NMAC. The compliance period for completion of continuing education courses is the period between issue of the license and renewal on or before the last day of the licensees second birth month following issue.

**(4)** Thereafter, insurance producer licenses must be renewed biennially on or before the last day of the licensee's birth month. Required continuing education courses must be completed and reported during the compliance period, which is the twenty-four-month period immediately preceding renewal of the license. In order to allow time for the provider

to report course attendance prior to expiration of the license, students should plan accordingly in order to avoid payment of penalties.

**C. Fees.** A licensee shall submit all continuing education fees prescribed by Subsection E of Section 59A-12-26 NMSA 1978 to the provider. The provider will then submit the hourly course fee electronically to the superintendent on behalf of the licensee. Registration fees are nonrefundable for licensees who fail to attend or fail to successfully complete a course. Instructions for electronic submittal of fees may be found on each provider's website and on the OSI website.

**D. Records.**

**(1)** The licensee is responsible for confirming that all continuing education credits have been correctly recorded by the provider. The licensee may print a copy of the entire educational transcript for reference purposes. Instructions for reviewing and printing the transcript may be found on the OSI website.

**(2)** It is recommended that all licensees maintain copies of certificates of completion of approved courses and verified statements for a period of three years.

**(3)** Individual continuing education credit information can be reviewed by the licensee, by the public or by the superintendent. Instructions for viewing continuing education information may be found on the OSI website.

**(4)** The superintendent shall be notified electronically of any noncompliance with the continuing education requirements by licensees.

[13.4.7.12 NMAC - Rp, 13.4.7.12 NMAC, 2/27/2018]

**13.4.7.13 AUDITING PROCEDURES:**

**A.** All continuing education records submitted or maintained pursuant to this rule are subject to audit by the superintendent.

**B.** If the superintendent finds a licensee or provider has failed to timely report continuing education credits through the online system, the superintendent may impose a penalty.

**C.** A provider who fails to submit the roster to the superintendent within ten business days may be subject to removal from the list of approved continuing education providers in the state. Instructions for submitting the roster shall be provided to approved course providers.

[13.4.7.13 NMAC - Rp, 13.4.7.14 NMAC, 2/27/2018]

**13.4.7.14 [RESERVED]**

**13.4.7.15 [RESERVED]**

**HISTORY OF 13.4.7 NMAC:**

**Pre-NMAC history.** The material in this rule was previously filed with the State Records Center as:

SCC 85-2, In Re to Article II: Rules Regarding Continuing Education Requirements, on April 17, 1985;

SCC-85-11, Insurance Department Regulation 12 - Insurance Agents, Brokers and Solicitors, on October 10, 1985;

SCC-91-3-IN, Continuing Education Requirements of Insurance Agents, Brokers, and Solicitors, on January 31, 1992.

**NMAC history.**

Recompiled as 13 NMAC 4.7, Continuing Education Requirements, effective 7/1/1997.

13.4.7 NMAC, Continuing Education Requirements, effective 5/1/2002.

13.4.7 NMAC, Continuing Education Requirements, effective 5/1/2002 was Repealed and Replaced by 13.4.7 NMAC, effective 2/27/2018.

**History of repealed material.**

13 NMAC 4.7, Continuing Education Requirements, Repealed 5/1/2002

13.4.7 NMAC Continuing Education Requirements, filed 5/1/2002 – Repealed effective 2/27/2018.

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## WATER QUALITY CONTROL COMMISSION

The New Mexico Water Quality Control Commission approved at its January 9, 2018 hearing, to repeal its rule 20.1.6 NMAC, Rulemaking Procedures – Water Quality Control Commission (filed 05/01/2017) and replace it with 20.1.6 NMAC, Rulemaking Procedures – Water Quality Control Commission, (adopted on 01/22/2018) and effective 03/16/2017.

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## WATER QUALITY CONTROL COMMISSION

**TITLE 20 ENVIRONMENTAL PROTECTION**
**CHAPTER 1 ENVIRONMENTAL PROTECTION GENERAL**
**PART 6 RULEMAKING PROCEDURES - WATER QUALITY CONTROL COMMISSION**

**20.1.6.1 ISSUING AGENCY:** New Mexico Water Quality Control Commission.

[20.1.6.1 NMAC - Rp, 20.1.6.1 NMAC, 03/16/2018]

**20.1.6.2 SCOPE:** This part governs the procedures to be followed by the commission, and by participants before the commission, in connection with all rulemaking hearings before the commission, except to the extent this part may be inconsistent with specific procedures in governing law. In cases where this part is inconsistent with any rulemaking procedures specified in governing law, the procedures in governing law apply, rather than the procedures in this part.

[20.1.6.2 NMAC - Rp, 20.1.6.2 NMAC, 03/16/2018]

**20.1.6.3 STATUTORY AUTHORITY:** Subsection E of Section 74-6-4 NMSA 1978 directs the commission to adopt, promulgate and publish regulations. Section 74-6-6 NMSA 1978 requires a public hearing prior to the adoption, amendment or repeal of a regulation, and specifies requirements for such

a hearing. Sections 14-4-1 through 14-4-11 NMSA 1978 require specific public notice process and specifies filing requirements with the State Records Administrator.
[20.1.6.3 NMAC - Rp, 20.1.6.3 NMAC, 03/16/2018]

**20.1.6.4 DURATION:** Permanent.
[20.1.6.4 NMAC - Rp, 20.1.6.4 NMAC, 03/16/2018]

**20.1.6.5 EFFECTIVE DATE:** March 16, 2018, unless a later date is cited at the end of a section.
[20.1.6.5 NMAC - Rp, 20.1.6.5 NMAC, 03/16/2018]

**20.1.6.6 OBJECTIVE:** The objectives of this rule are:

**A.** to standardize the procedures used in rulemaking proceedings before the commission;

**B.** to encourage public participation in the hearings conducted by the commission for the promulgation of regulations;

**C.** to make possible the effective presentation of the evidence and points of view of parties and members of the general public;

**D.** to allow all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing; and

**E.** to assure that commission hearings are conducted in a fair and equitable manner.
[20.1.6.6 NMAC - Rp, 20.1.6.6 NMAC, 03/16/2018]

**20.1.6.7 DEFINITIONS:** As used in this part:

**A.** "Act" means the Water Quality Act, Sections 74-6-1 through 74-6-17 NMSA 1978.

**B.** "Commission administrator" means the department employee designated by the secretary of environment to provide staff support to the commission.

**C.** "Commission" means the water quality control commission.

**D.** "Constituent agency" means any or all agencies of the state defined as such under the act.

**E.** "Department" means the New Mexico environment department.

**F.** "Document" means any paper, exhibit, pleading, motion, response, memorandum, decision, order or other written or tangible item that is filed in a proceeding under this part, or brought to or before the commission for its consideration, but does not include a cover letter accompanying a document transmitted for filing.

**G.** "Exhibit" means any document or tangible item submitted for inclusion in the hearing record.

**H.** "General public" means any person attending a hearing who has not submitted a notice of intent to present technical testimony.

**I.** "Governing law" means the statute, including any applicable case law, which authorizes and governs the decision on the proposed regulatory change.

**J.** "Hearing officer" means the person designated by the commission to conduct a hearing under this part.

**K.** "Hearing record" means:

**(1)** the transcript of proceedings; and

**(2)** the record proper.

**L.** "Participant" means any person who participates in a rulemaking proceeding before the commission.

**M.** "Party" means the petitioner, any person filing a notice of intent to present technical testimony, and any person filing an entry of appearance.

**N.** "Person" means an individual or any entity, including federal, state and local governmental entities, however organized.

**O.** "Petitioner" means the person who petitioned the commission for the regulatory change that is the subject of the hearing.

**P.** "Provide to the public" means for the commission to distribute rulemaking information by:

**(1)** posting it on the commission's website;

**(2)** posting it on the New Mexico sunshine portal;

**(3)** making it available at the applicable constituent agency's district, field, and regional offices, if any;

**(4)** sending it by email to persons who have made a written request for notice of announcements addressing the subject of the rulemaking proceeding and who have provided an email address to the commission administrator;

**(5)** sending it by email to persons who have participated in the rulemaking and who have provided an email address to the commission administrator;

**(6)** sending written notice that includes, at a minimum, an internet and street address where the information may be found to persons who provide a postal address; and

**(7)** providing it to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees.

**Q**. "Record proper" means all documents related to the hearing and received or generated by the commission prior to the beginning, or after the conclusion, of the hearing, including, but not limited to:

**(1)** the petition for hearing and any response thereto;

**(2)** the minutes (or an appropriate extract of the minutes) of the meeting at which the petition for hearing was considered, and of any subsequent meeting at which the proposed regulatory change was discussed;

**(3)** the notice of hearing;

**(4)** affidavits of publication;

**(5)** a copy of all publications in the New Mexico register relating to the proposed rule;

**(6)** notices of intent to present technical testimony;

**(7)** a copy of any technical information that was relied upon in formulating the final

rule;

**(8)** all written pleadings, including motions and responsive pleadings, and orders;

**(9)** statements for the public record or other relevant materials received by the agency during the public comment period;

**(10)** the hearing officer's report, if any;

**(11)** a copy of the full text of the initial proposed rule, the full text of the final adopted rule, and the concise explanatory statement filed with the state records administrator;

**(12)** post-hearing submissions, if allowed;

**(13)** the audio recordings (or an appropriate extract of the recordings) of the meeting(s) at which the commission deliberated on the adoption of the proposed regulatory change;

**(14)** the commission's decision and the reasons therefore; and

**(15)** any corrections made by the state records administrator pursuant to Section 14-4-3 NMSA 1978.

**R.** "Regulation" means any rule, regulation or standard promulgated by the commission and affecting one or more persons, besides the commission and the department, except for any order or decision issued in connection with the disposition of any case involving a particular matter as applied to a specific set of facts.

**S.** "Regulatory change" means the adoption, amendment or repeal of a regulation.

**T.** "Service" means personally delivering a copy of the document, exhibit or pleading to the person required by this part to be served; mailing it to that person; or, if that person has agreed, sending it by electronic transmission; if a person is represented by an attorney, service of the document shall be made on the attorney; service by mail is complete upon mailing the document; service by electronic transmission is complete upon transmission of the document.

**U.** "Technical testimony" means scientific, engineering, economic or other specialized testimony, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing.

**V.** "Transcript of proceedings" means the verbatim record (audio recording or stenographic) of the proceedings, testimony and argument in the matter, together with all exhibits proffered at the hearing, whether or not admitted into evidence, including the record of any motion hearings or prehearing conferences.

[20.1.6.7 NMAC - Rp, 20.1.6.7 NMAC, 03/16/2018]

**20.1.6.8 LIBERAL CONSTRUCTION:** This part shall be liberally construed to carry out its purpose.

[20.1.6.8 NMAC - Rp, 20.1.6.8 NMAC, 03/16/2018]

**20.1.6.9 SEVERABILITY:** If any provision or application of this part is held invalid, the remainder of this part, or its application to other situations or persons, shall not be affected.

[20.1.6.9 NMAC - Rp, 20.1.6.9 NMAC, 03/16/2018]

**20.1.6.10 - 20.1.6.99 [RESERVED]**

**20.1.6.100 POWERS AND DUTIES OF THE COMMISSION AND HEARING OFFICER:**

**A.** Commission: The commission shall exercise all powers and duties prescribed under the act and this part not otherwise delegated to the hearing officer or the commission administrator.

(1) The commission may issue procedural orders that either impose additional procedural requirements or simplify the procedures provided in this part. In no event, may the commission eliminate any procedural requirements of the act.

(2) The appointment of a hearing officer does not preclude the commissioners from attending or participating in the proceeding.

**B.** Hearing officer: The commission shall designate a hearing officer for each hearing who shall exercise all powers and duties prescribed or delegated under this part. The hearing officer shall conduct a fair and equitable proceeding, assure that the facts are fully elicited, and avoid delay. The hearing officer shall have authority to take all measures necessary for the maintenance of order and for the efficient, fair and impartial consideration of issues arising in proceedings governed by this part, including, but not limited to:

**(1)** conducting hearings under this part;

**(2)** ruling on motions and procedural requests that do not seek final resolution of the proceeding, and issuing all necessary orders;

**(3)** administering oaths and affirmations, admitting or excluding evidence, examining witnesses and allowing post-hearing submissions;

**(4)** making such orders as may be necessary to preserve decorum and to protect the orderly hearing process;

**(5)** if requested by the commission, preparing and filing a report of the hearing, with recommendations for commission action;

**(6)** requesting parties to file original documents with the commission administrator; and

**(7)** requesting a party to submit a proposed statement of reasons in support of the commission's decision.

**C.** Qualifications: The hearing officer may be an independent contractor or a commissioner, shall be knowledgeable of the laws of the state and of administrative hearing procedures, and shall not be:

**(1)** an employee of the department, except for the commissioners themselves or their designees, or unless employed by the department as a hearing officer;

**(2)** a person who has a personal bias or prejudice concerning a party or a party's lawyer or consultant, or has personal knowledge of disputed facts concerning the proceeding, or is related to a party within the third degree of relationship, or has a financial interest in the proceeding.

**D.** Notice of hearing officer assignment: If a hearing officer other than a commissioner is assigned, the commission administrator shall notify the parties of the name and address of the hearing officer. The commission administrator shall also, at that time, forward to the hearing officer copies of all documents filed to date.

[20.1.6.100 NMAC - Rp, 20.1.6.100 NMAC, 03/16/2018]

**20.1.6.101 GENERAL PROVISIONS - COMPUTATION OF TIME:**

**A.** Computation of time: In computing any period of time prescribed or allowed by this part, except as otherwise specifically provided, the day of the event from which the designated period begins to run shall not be included. The last day of the computed period shall be included, unless it is a Saturday, Sunday, or legal state holiday, in which event the time is extended until the end of the next day, which is not a Saturday, Sunday, or legal state holiday. Whenever a party must act within a prescribed period after service upon them, and service is by mail, three days is added to the prescribed period.

**B.** Extension of time: The commission or hearing officer may grant an extension of time for the filing of any document upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties.

[20.1.6.101 NMAC - Rp, 20.1.6.101 NMAC, 03/16/2018]

**20.1.6.102 GENERAL PROVISIONS - RECUSAL:** No commission member shall participate in any action in which his or her impartiality of fairness may reasonably be questioned, and the member shall recuse himself or herself in any such action by giving notice to the commission and the general public by announcing this recusal on the record. In making a decision to recuse himself or herself, the commission member may rely upon the Governmental Conduct Act, Sections 10-16-1 through 10-16-18 NMSA 1978, the Financial Disclosures Act, Sections 10-16A-1 through 10-16A-8 NMSA 1978, or any other relevant authority.

[20.1.6.102 NMAC - Rp, 20.1.6.102 NMAC, 03/16/2018]

**20.1.6.103 GENERAL PROVISIONS - EX PARTE DISCUSSIONS:** At no time after the commission's determination to hold a public hearing on a petition and before the issuance of the commission's written decision under this part, shall the department, or any other party, interested participant or their representatives discuss *ex parte* the merits of the proceeding with any commission member or the hearing officer.

[20.1.6.103 NMAC - Rp, 20.1.6.103 NMAC, 03/16/2018]

**20.1.6.104 DOCUMENT REQUIREMENTS - FILING AND SERVICE OF DOCUMENTS:**

**A.** The filing of any document as required by this part shall be accomplished by delivering the document to the commission administrator.

**B.** Any person filing any document shall:

**(1)** provide the commission administrator with the original along with up to 15 copies of the document, provided that the commission administrator may waive the requirement to provide up to 15 copies if an electronic copy of the original is provided in a format acceptable for distribution to the commission members;

**(2)** serve a copy of the document on each other party. If a party is represented by an attorney, service of the document shall be made on the attorney; and

**(3)** include a certificate of service, as shown in Section 500 of this rule.

**C.** Whenever this part requires service of a document, service shall be made by delivering a copy to the person to be served by mailing it, or, if that person has agreed, by sending it by electronic transmission to that person. Agreement to be served by electronic transmission may be evidenced by placing the person's email address on a document filed pursuant to this part. Service by mail is complete upon mailing the document. Service by electronic transmission is complete upon transmission of the document.

**D.** Form of documents: Unless otherwise ordered by the hearing officer, all documents, except exhibits, shall be prepared on 8 ½ x 11-inch white paper, printed single-sided, and where appropriate, the first page of every document shall contain a heading and caption as shown in Section 500 of this rule.

**E.** Documents issued by commission or hearing officer: All documents issued by the commission or hearing officer shall be filed with the commission administrator, who shall promptly serve copies of the documents upon all parties.

[20.1.6.104 NMAC - Rp, 20.1.6.104 NMAC, 03/16/2018]

**20.1.6.105 EXAMINATION OF DOCUMENTS FILED:**

**A.** Examination allowed: Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during normal business hours, inspect and copy any document filed in any rulemaking proceeding before the commission. Such documents shall be made available by the commission administrator, as appropriate and shall also be made available on the New Mexico sunshine portal. If the commission administrator determines that any part of the rulemaking record cannot be practicably displayed or is inappropriate for public display on the New Mexico sunshine portal,

the commission administrator shall describe that part of the record, shall note on the New Mexico sunshine portal that the part of the record is not displayed, and shall provide instructions for accessing or inspecting that part of the record.

**B.** Cost of duplication: The cost of duplicating documents shall be borne by the person seeking copies of such documents, but the commission administrator shall not charge a fee for providing the notice of proposed rulemaking in electronic form.

[20.1.6.105 NMAC - Rp, 20.1.6.105 NMAC, 03/16/2018]

**20.1.6.106 - 20.1.1.199 [RESERVED]**

**20.1.6.200 PREHEARING PROCEDURES - PETITION FOR REGULATORY CHANGE:**

**A.** Any person may file a petition with the commission to adopt, amend, or repeal any regulation within the jurisdiction of the commission.

**B.** The petition shall be in writing and shall include a statement of the reasons for the regulatory change. The petition shall cite the relevant statutes that authorize the commission to adopt the proposed rules and shall estimate the time that will be needed to conduct the hearing. A copy of the entire rule, including the proposed regulatory change, indicating any language proposed to be added or deleted, shall be attached to the petition. The entire rule and its proposed changes shall be submitted to the commission in redline fashion, and shall include line numbers. Any document that does not include all the items required to be in a petition shall be returned to the petitioner along with a copy of these rules and a check-off list of required items, and the petitioner will be asked to resubmit their petition in the form required by these rules.

**C.** The commission shall determine, at a public meeting occurring no later than 90 days after receipt of the petition, whether or not to hold a public hearing on the proposal. Any person may respond to the petition either in writing prior to the public meeting or in person at the public meeting.

**D.** If the commission determines to hold a public hearing on the petition, it may issue such orders specifying procedures for conduct of the hearing, in addition to those provided by this part, as may be necessary and appropriate to fully inform the commission of the matters at issue in the hearing or control the conduct of the hearing. Such orders may include requirements for giving additional public notice, holding pre-hearing conferences, filing direct testimony in writing prior to the hearing, or limiting testimony or cross-examination.

[20.1.6.200 NMAC - Rp, 20.1.6.200 NMAC, 03/16/2018]

**20.1.6.201 NOTICE OF HEARINGS:**

**A.** Unless otherwise allowed by governing law and specified by the commission, the commission shall provide to the public notice of the proposed rulemaking at least 60 days prior to the hearing.

**B.** Public notice for proposed regulatory changes of general application to the state shall include publication in at least one newspaper of general circulation in the state, publication in the New Mexico register, and such other means of providing notice as the commission may direct or are required by law. Notice for proposed regulatory changes that are confined in effect to a specific geographic area shall also be published in a newspaper of general circulation in the area affected.

**C.** The notice of proposed rulemaking shall state:

**(1)** the subject of the proposed rule, including a summary of the full text of the proposed rule and a short explanation of the purpose of the proposed rule;

**(2)** a citation to the specific legal authority authorizing the proposed rule and the adoption of the rule;

**(3)** a citation to technical information, if any, that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained;

**(4)** the statutes, regulations, and procedural rules governing the conduct of the hearing;

**(5)** the manner in which persons may present their views or evidence to the commission including information on participating in the public hearing;

**(6)** the location where persons may secure copies of the proposed regulatory change;

**(7)** an internet link providing free access to the full text of the proposed rule; and

**(8)** if applicable, that the commission may make a decision on the proposed regulatory change at the conclusion of the hearing.

[20.1.6.201 NMAC - Rp, 20.1.6.201 NMAC, 03/16/2018]

**20.1.6.202 TECHNICAL TESTIMONY:**

**A.** Any person, including the petitioner, who intends to present technical testimony at the hearing shall, no later than 20 days prior to the hearing, file a notice of intent to present technical testimony. The notice shall:

**(1)** identify the person for whom the witness(es) will testify;

**(2)** identify each technical witness the person intends to present, and state the qualifications of that witness, including a description of their educational and work background;

**(3)** if the hearing will be conducted at multiple locations, indicate the location or locations at which the witnesses will be present;

**(4)** include a copy of the direct testimony of each technical witness in narrative form, and state the estimated duration of the direct oral testimony of that witness;

**(5)** include

the text of any recommended modifications to the proposed regulatory change; and

**(6)** list and attach all exhibits anticipated to be offered by that person at the hearing.

**B.** The hearing officer may enforce the provisions of this section through such action as the hearing officer deems appropriate, including, but not limited to, exclusion of the technical testimony of any witness for whom a notice of intent was not timely filed. If such testimony is admitted, the hearing officer may keep the record open after the hearing to allow responses to such testimony. The hearing officer may also require that written rebuttal testimony be submitted prior to hearing.

[20.1.6.202 NMAC - Rp, 20.1.6.202 NMAC, 03/16/2018]

**20.1.6.203 ENTRY OF APPEARANCE:** Any person may file an entry of appearance as a party. The entry of appearance shall be filed no later than 20 days before the date of the hearing on the petition. In the event of multiple entries of appearance by those affiliated with one interest group, the hearing officer may consolidate the entries, or divide the service list to avoid waste of resources.

[20.1.6.203 NMAC - Rp, 20.1.6.203 NMAC, 03/16/2018]

**20.1.6.204 PARTICIPATION BY GENERAL PUBLIC:**

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

**B.** A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing or submit it at the hearing. Written comment must be mailed or delivered to the commission administrator.

**C.** If the commission changes the date of the hearing or the deadline for submitting comments as stated in the notice of proposed rulemaking, the commission shall provide to the public notice of the change.

[20.1.6.204 NMAC - Rp, 20.1.6.204 NMAC, 03/16/2018]

**20.1.6.205 LOCATION OF HEARING:** Unless otherwise provided by governing law, the commission shall hold hearings on proposed regulatory changes of statewide application in Santa Fe, and at other places the commission may prescribe. The commission may hold hearings on proposed regulatory changes that are not of statewide application within the area substantially affected by the proposal.

[20.1.6.205 NMAC - Rp, 20.1.6.205 NMAC, 03/16/2018]

**20.1.6.206 PARTICIPATION BY CONFERENCE TELEPHONE OR OTHER SIMILAR DEVICE:**

**A.** A member of the commission may participate in a meeting or hearing of the commission by means of a conference telephone or other similar communications equipment when it is otherwise difficult or impossible for the member to attend the meeting or hearing in person, provided that each member participating by conference telephone can be identified when speaking, all participants are able to hear each other at the same time and members of the public attending the meeting or hearing are able to hear any member of the commission who speaks at the meeting or hearing. A commission member's participation by such means shall constitute presence in person at the meeting or hearing. A commission member who needs to participate in this manner must notify the commission administrator sufficiently in advance so as to permit the commission administrator to arrange for the appropriate communications equipment.

**B.** A witness may participate in a hearing of the commission by means of a conference telephone or other similar communications equipment when an emergency or circumstances make it impossible for the witness to attend the hearing in person. A witness who needs to participate in this manner must receive permission from the hearing officer sufficiently in advance of the hearing so as to permit the commission administrator to arrange for the appropriate communications equipment. Each witness participating in this manner must be identified when speaking, all participants must be able to hear each other at the same time, and members of the public attending the hearing must be able to hear any witness who speaks during the hearing.

[20.1.6.206 NMAC - Rp, 20.1.6.206 NMAC, 03/16/2018]

**20.1.6.207 MOTIONS:**

**A.** General: All motions, except those made orally during a hearing, shall be in writing, specify the grounds for the motion, and state the relief sought. Each motion shall be accompanied by an affidavit, certificate or other evidence relied upon and shall be served as provided by 20.1.6.104 NMAC.

**B.** Unopposed motions: An unopposed motion shall state that the concurrence of all other parties was obtained. The moving party shall submit a proposed order approved by all parties for the hearing officer's review.

**C.** Opposed motions: Any opposed motion shall state either that concurrence was sought and denied, or why concurrence was not sought. A memorandum brief in support of such motion may be filed with the motion.

**D.** Response to motions: Any party upon whom an opposed motion is served shall have 15 days after service of the motion to file a response. A non-moving party failing to file a timely response shall be deemed to have waived any objection to the granting of the motion.

**E.** Reply to response: The moving party may, but is not

required to, submit a reply to any response within 10 days after service of the response.

**F.** Decision: Non-dispositive motions may be decided by the hearing officer without a hearing. The hearing officer shall refer any motion that would effectively dispose of the matter to the commission for a decision, and may refer any other motion to the commission. A procedural motion may be ruled upon prior to the expiration of the time for response; any response received thereafter shall be treated as a request for reconsideration of the ruling. The hearing officer shall file all original documents with the commission administrator.

[20.1.6.207 NMAC - Rp, 20.1.6.207 NMAC, 03/16/2018]

**20.1.6.208 - 20.1.6.299 [RESERVED]**

**20.1.6.300 HEARING PROCEDURES - CONDUCT OF HEARINGS:**

**A.** The rules of civil procedure and the rules of evidence shall not apply.

**B.** The hearing officer shall conduct the hearing so as to provide a reasonable opportunity for all persons to be heard without making the hearing unreasonably lengthy or cumbersome, or burdening the record with unnecessary repetition. The hearing shall proceed as follows.

**(1)** The hearing shall begin with an opening statement from the hearing officer. The statement shall identify the nature and subject matter of the hearing and explain the procedures to be followed.

**(2)** The hearing officer may allow a brief opening statement by any party who wishes to make one.

**(3)** Unless otherwise ordered, the petitioner shall present its case first.

**(4)** The hearing officer shall establish an order for the testimony of other participants. The order may be based upon notices of intent to present technical testimony, sign-in sheets and the availability of witnesses who cannot be present for the entire hearing.

**(5)** If the hearing continues for more than one day, the hearing officer shall provide an opportunity each day for testimony from members of the general public. Members of the general public who wish to present testimony should indicate their intent on a sign-in sheet.

**(6)** The hearing officer may allow a brief closing argument by any person who wishes to make one.

**(7)** At the close of the hearing, the hearing officer shall determine whether to keep the record open for written submittals in accordance with 20.1.6.304 NMAC. If the record is kept open, the hearing officer shall determine and announce the subject(s) on which submittals will be allowed and the deadline for filing the submittals.

**C.** If the hearing is conducted at multiple locations, the hearing officer may require the petitioner's witnesses to summarize their testimony or be available for cross-examination at each location. Other participants are not required to testify at more than one location, and the hearing officer may prohibit a witness from testifying at more than one location.

[20.1.6.300 NMAC - Rp, 20.1.6.300 NMAC, 03/16/2018]

**20.1.6.301 TESTIMONY AND CROSS-EXAMINATION:**

**A.** All testimony will be taken under oath or affirmation which may be accomplished in mass or individually.

**B.** The hearing officer shall admit any relevant evidence, unless the hearing officer determines that the evidence is incompetent or unduly repetitious. The hearing officer shall require all oral testimony be limited to the position of the witness in favor of or against the proposed rule.

**C.** Any person who testifies at the hearing is subject to cross-examination on the subject matter of his or her direct testimony and matters affecting his or her credibility. Any person attending the hearing is entitled to conduct such cross-examination as may be required for a full and true disclosure of matters at issue in the hearing. The hearing officer may limit cross-examination to avoid harassment, intimidation, needless expenditure of time or undue repetition.

[20.1.6.301 NMAC - Rp, 20.1.6.301 NMAC, 03/16/2018]

**20.1.6.302 EXHIBITS:**

**A.** Any person offering an exhibit at hearing other than a document filed and served before the hearing shall provide at least an original and 15 copies for the commission, and a sufficient number of copies for every other party.

**B.** All exhibits offered at the hearing shall be marked with a designation identifying the person offering the exhibit and shall be numbered sequentially. If a person offers multiple exhibits, he shall identify each exhibit with an index tab or by other appropriate means.

**C.** Large charts and diagrams, models, and other bulky exhibits are discouraged. If visual aids are used, legible copies shall be submitted for inclusion in the record.

[20.1.6.302 NMAC - Rp, 20.1.6.302 NMAC, 03/16/2018]

**20.1.6.303 TRANSCRIPT OF PROCEEDINGS:**

**A.** Unless specified by the commission or the hearing officer, a verbatim transcript shall be made of the hearing, including any deliberations. The cost of the original transcript of the proceeding and of providing a copy for each commission member shall be borne by the petitioner.

**B.** Any person may obtain a copy of the transcript of a proceeding. It shall be obtained directly from the court reporter, and the cost of the transcript shall be paid directly to the source.

[20.1.6.303 NMAC - Rp, 20.1.6.303 NMAC, 03/16/2018]

**20.1.6.304 POST-HEARING SUBMISSIONS:** The hearing officer may allow the record to remain open for a reasonable period of time following the conclusion of the hearing for written submission of additional evidence, comments and arguments, revised proposed rule language, and proposed statements of reasons. The hearing officer's determination regarding post-hearing submissions shall be announced at the conclusion of the hearing. In considering whether the record will remain open, the hearing officer shall consider the reasons why the material was not presented during the hearing, the significance of the material to be submitted and the necessity for a prompt decision.
[20.1.6.304 NMAC - Rp, 20.1.6.304 NMAC, 03/16/2018]

**20.1.6.305 HEARING OFFICER'S REPORT:** If the commission directs, the hearing officer shall file a report of the hearing. The report shall identify the issues addressed at the hearing, identify the parties' final proposals, and the evidence supporting or opposing those proposals, including discussion or recommendations as requested by the commission, and shall be filed with the commission administrator within the time specified by the commission. The commission administrator shall promptly notify each party that the hearing officer's report has been filed and shall provide a copy of the report along with a notice of any deadline set for comments on that report.
[20.1.6.305 NMAC - Rp, 20.1.6.305 NMAC, 03/16/2018]

**20.1.6.306 DELIBERATION AND DECISION:**

**A.** If a quorum of the commission attended the hearing, and if the hearing notice indicated that a decision might be made at the conclusion of the hearing, the commission may immediately deliberate and make a decision on the proposed regulatory change.

**B.** If the commission does not reach a decision at the conclusion of the hearing, the commission administrator, following receipt of the transcript, will promptly furnish a copy of the transcript to each commission member that did not attend the hearing and, if necessary, to other commission members, commission counsel and the hearing officer. Exhibits provided to those persons at the time of the hearing need not be supplied again.

**C.** The commission shall reach its decision on the proposed regulatory change within 60 days following the close of the record or the date the hearing officer's report is filed, whichever is later.

**D.** If, during the course of its deliberations, the commission determines that additional testimony or documentary evidence is necessary for a proper decision on the proposed regulatory change, the commission may, consistent with the requirements of due process, reopen the hearing for such additional evidence only.

**E.** The commission shall issue its decision on the proposed regulatory change in a suitable format, which shall include its reasons for the action taken.

**F.** The commission's written decision is the official version of the commission's action, and the reasons for that action. Other written or oral statements by commission members are not recognized as part of the commission's official decision or reasons.

**G.** If the commission fails to act on a proposed rule within two years after the notice of proposed rulemaking is published in the New Mexico register, the rulemaking is automatically terminated unless the commission acts to extend the period for an additional two years by filing a statement of good cause for the extension in the rulemaking record. If the commission extends the rulemaking period, it shall provide for additional public participation, comments, and hearing prior to adopting the rule.

**H.** The commission may terminate a rulemaking at any time by publishing a notice of termination in the New Mexico register. If the commission terminates a rulemaking in this manner, it shall provide to the public notice of its action.
[20.1.6.306 NMAC - Rp, 20.1.6.306 NMAC, 03/16/2018]

**20.1.6.307 NOTICE OF COMMISSION ACTION:**

**A.** The commission administrator shall provide to the public notice of the commission's action and a concise explanatory statement.

**B.** The adopted rule shall not take effect unless within 15 days of adoption of the rule, the commission delivers the final rule to the state records administrator, accompanied by a concise explanatory statement that contains:

**(1)** the date that the commission adopted the rule;

**(2)** a reference to the specific statutory authority authorizing the rule; and

**(3)** any findings required by law for adoption of the rule.

**C.** Adoption of the final rule occurs upon signature of the written decision.

**D.** If the state records administrator notifies the commission of having made any minor, nonsubstantive corrections in spelling, grammar, and format in the filed rule, the commission administrator shall provide to the public notice of the correction within 30 days of receiving the state records administrator's record of correction.
[20.1.6.307 NMAC - Rp, 20.1.6.307 NMAC, 03/16/2018]

**20.1.6.308 - 20.1.6.399 [RESERVED]**

**20.1.6.400 APPEAL OF REGULATIONS:**

**A.** Appeal of any regulatory change by the commission shall be taken in accordance with governing law.

**B.** The appellant shall serve a copy of the notice of appeal on the commission and on each party.

**C.** The appellant

shall be responsible for preparation of a sufficient number of copies of the hearing record at the expense of appellant.

**D.** Unless otherwise provided by governing law, the filing of an appeal shall not act as a stay of the regulatory change being appealed.
[20.1.6.400 NMAC - Rp, 20.1.6.400 NMAC, 03/16/2018]

**20.1.6.401 STAY OF COMMISSION REGULATIONS:**

**A.** Any person who is or may be affected by a rule adopted by the commission may file a motion with the commission seeking a stay of that rule or regulatory change. The motion shall include the reason for, and the legal authority supporting, the granting of a stay. The movant shall file and serve the motion in accordance with the requirements of Section 104 of this part at least 30 days before the meeting at which the commission will consider the motion. The commission chair will decide at which meeting the motion will be heard.

**B.** Unless otherwise provided by governing law, the commission may grant a stay pending appeal of any regulatory change promulgated by the commission. The commission may only grant a stay if good cause is shown after a motion is filed and a hearing is held.

**C.** In determining whether good cause is present for the granting of a stay, the commission, upon at least a two-thirds vote of the members voting shall consider:

**(1)** the likelihood that the movant will prevail on the merits of the appeal;

**(2)** whether the moving party will suffer irreparable harm if a stay is not granted;

**(3)** whether substantial harm will result to other interested persons; and

**(4)** whether harm will ensue to the public interest.

**D.** If no action is taken within 60 days after filing of the motion, the commission shall be deemed to have denied the motion for stay.
[20.1.6.401 NMAC - Rp, 20.1.6.401 NMAC, 03/16/2018]

**20.1.6.402 - 20.1.6.499 [RESERVED]**

**20.1.6.500 PREFERRED FORMAT:**

**STATE OF NEW MEXICO**
**WATER QUALITY CONTROL COMMISSION**

**IN THE MATTER OF PROPOSED AMENDMENTS TO _____ NMAC**

**[Name of Petitioner],**
**Petitioner.**
**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing [name of document] was served by [hand-delivery] [first class mail] [email] to all parties on [date].
[20.1.6.500 NMAC - Rp, 20.1.6.500 NMAC, 03/16/2018]

**HISTORY OF 20.1.6 NMAC:**
**Pre-NMAC History:** The material in this part was derived from Guidelines for Water Quality Control Commission Regulation Hearings (Approved November 10, 1992; Amended June 8, 1993).

**History of Repealed Material:**
20.1.6 NMAC, filed 05/01/2017, repealed effective 03/16/2018

**Other History: [RESERVED]**

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## WATER QUALITY CONTROL COMMISSION

**This is an amendment to 20.6.4 NMAC, Section 804, effective 02-28-2018.**

**20.6.4.804 CLOSED BASINS: Perennial reaches of the Mimbres river upstream of the confluence with Allie canyon to Cooney canyon, and all perennial reaches of East Fork Mimbres (McKnight canyon) downstream of the fish barrier, and all perennial reaches thereto.**

**A. Designated uses:** Irrigation, domestic water supply, [~~high quality~~] coldwater aquatic life, livestock watering, wildlife habitat and primary contact.

**B. Criteria:** The use-specific numeric criteria set forth in 20.6.4.900 NMAC are applicable to the designated uses, except that the following segment-specific criteria apply: the monthly geometric mean of E. coli bacteria 126 cfu/100 mL or less, single sample 235 cfu/100 mL or less.
[20.6.4.804 NMAC - Rp 20 NMAC 6.1.2804, 10-12-2000; A, 05-23-2005; A, 12-01-2010; A, 03-02-2017; A, 02-28-2018]
[**NOTE:** The segment covered by this section was divided effective 03-02-2017. The standards for the additional segment are covered under 20.6.4.807 NMAC.]

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## End of Adopted Rules

## Other Material Related to Administrative Law

### ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
### ENERGY CONSERVATION AND MANAGEMENT DIVISION

**NOTICE OF MINOR, NON-SUBSTANTIVE CORRECTIONS**

Pursuant to the authority granted under State Rules Act, Subsection D of Section 14-4-5 NMSA, please note the following minor, non-substantive corrections to the formatting of each and every Title 19 Natural Resources and Wildlife, Chapter 14 Geothermal Power repealed rules (19.14.110 NMAC through 19.14.131 NMAC) filed on February 12, 2018, published and effective on February 27, 2018:

The filed date for every repealed rule has been corrected from 11/11/1983 to 11/1/1983.

A copy of this *Notification* will be filed with the official version of the above rule.

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## End of Other Material Related to Administrative Law

# 2018 New Mexico Register

## Submittal Deadlines and Publication Dates
## Volume XXIV, Issues 1-24

| Issue | Submittal Deadline | Publication Date |
|---|---|---|
| Issue 1 | January 4 | January 16 |
| Issue 2 | January 18 | January 30 |
| Issue 3 | February 1 | February 13 |
| Issue 4 | February 15 | February 27 |
| Issue 5 | March 1 | March 13 |
| Issue 6 | March 15 | March 27 |
| Issue 7 | March 29 | April 10 |
| Issue 8 | April 12 | April 24 |
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| Issue 21 | November 1 | November 13 |
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| Issue 23 | November 29 | December 11 |
| Issue 24 | December 13 | December 27 |

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