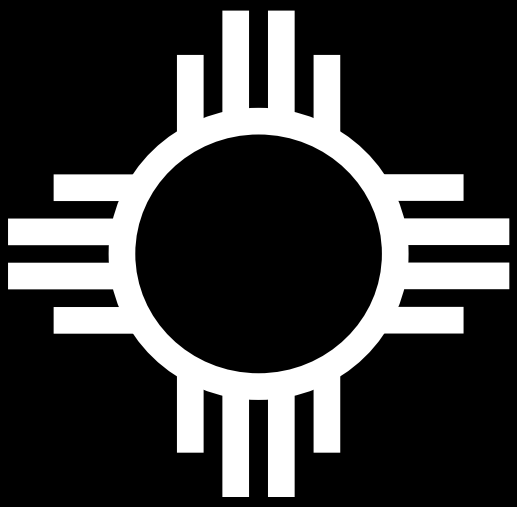
NEW MEXICO REGISTER



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December 31, 2009

New Mexico Register

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The official publication for all notices of rulemaking and filings of adopted, proposed and emergency rules in New Mexico

The Commission of Public Records
Administrative Law Division
Santa Fe, New Mexico
2009

New Mexico Register

Volume XX, Number 24
December 31, 2009

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Effective Date and Validity of Rule Filings

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

A=***Amended***, E=***Emergency***, N=***New***, R=***Repealed***, Rn=***Renumbered***

Other Material Related to Administrative Law

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Notices of Rulemaking and Proposed Rules

NEW MEXICO AGING AND LONG TERM SERVICES DEPARTMENT

NOTICE IS HEREBY GIVEN that the Secretary of the New Mexico Aging and Long-Term Services Department (ALTSD) is proposing the promulgation of regulations pursuant to her authority under the Aging and Long-Term Services Department Act, Sections 9-23-6.E and NMSA 1978, Section 28-4-6. ALTSD's Adult Protective Services Division (APS) will hold a Public Rule Hearing on February 24, 2010 at 10 a.m. in Hearing Room #1, Toney Anaya Building, 2550 Cerrillos Road, in Santa Fe, New Mexico, for the purpose of amending 8.11.3 NMAC, **ADULT PROTECTIVE SERVICES INVESTIGATIONS.** The proposed amendments to 8.11.3 NMAC, in summary, include, but are not limited to, the following: adding new definitions, clarifying other definitions, more clearly delineating process and procedures for investigations and the administrative review process.

Interested parties may access the proposed amendments on the Division's website at http://www.nmaging.state.nm.us/Adult_Protective_Services_Division.html. Copies may also be obtained by contacting APS at (505) 841-4537. Interested persons may testify at the hearing or submit written comments no later than 5:00 p.m. on February 22, 2010. Written comments regarding the proposed new rule and amendments to rules should be directed to Anthony Louderbough, Deputy Director, New Mexico Adult Protective Services Division, 625 Silver, SW Suite 400, Albuquerque, New Mexico 87102, or faxed to (505) 841-4520.

If you are an individual with a disability and/or require this information in an alternative format or request special accommodations to participate in the public hearing such as a reader, amplifier, qualified language interpreter or any other form of auxiliary aid or service to attend or participate in the upcoming hearing or meeting, please contact Tony Louderbough at the address and phone number listed above, at least one week prior to the hearing or as soon as possible.

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

New Mexico Environmental Improvement Board
Notice of Public Hearing to Consider the Proposed Adoption of New Regulations and to Amend Various Sections of 20.2.1, 20.2.2, 20.2.70 and 20.2.72 NMAC

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing beginning at 10:00 a.m. on March 1, 2010 to take public comment and May 3, 2010 to accept technical testimony, continuing thereafter as necessary to consider the adoption of proposed new regulations and the amendment of various other sections in 20.2.1, 20.2.2, 20.2.70 and 20.2.72 NMAC. The March 1, 2010 session will be held in the Rio Grande Room of the New Mexico Regulation and Licensing Department, Toney Anaya Building, 2550 Cerrillos Road, Santa Fe, New Mexico 87505.

New Energy Economy (NEE) is the proponent of the proposed regulation changes to New Mexico Environmental Improvement Board's air quality regulations. NEE's Petition seeks to regulate greenhouse gas emissions statewide as an air pollutant and public nuisance through the imposition of an emissions cap. NEE's Petition is limited to entities that emit more than 10,000 metric tons of greenhouse gas emissions per year. The New Mexico Environment Department would monitor and oversee the implementation of the greenhouse gas emission reduction regulations. A penalty for non-compliance would be imposed for violation of the regulations.

Please note that formatting and minor technical changes in the regulations, other than those proposed by New Energy Economy may occur. In addition, the Board may make other changes as necessary to accomplish the purpose of providing public health and safety in response to public comments and evidence presented at the hearing.

The proposed changes may be reviewed during business hours at the Environmental Improvement Board office, located in the Harold Runnels Building, 1190 St. Francis Drive, Room N2153, Santa Fe, New Mexico 87505.

Written comments regarding the proposals may be addressed to the Board Administrator, Ms. Joyce Medina, at the above address, and should reference docket number EIB 08-19 (R).

The hearing will be conducted in accordance with 20.1.1 NMAC (Rulemaking Procedures) Environmental Improvement Board, the Environmental Improvement Act, NMSA 1978, Section 74-1-1 (Environmental Improvement Act), and other applicable procedures. An Order on Hearing Procedures has been entered by the Hearing Officer on October 14, 2009 and is available from the Office of the Board Administrator.

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

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

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

New Energy Economy's Notice of Intent to Present Technical Testimony for the hearing must be received by the Office of the Environmental Improvement Board (EIB) not later than 5:00 p.m., January 18, 2010. All other parties' Notices of Intent to Present Technical Testimony must be received by the Office of the EIB not later than 5:00 p.m. February 22, 2010. Rebuttal testimony by all parties must be received by the Office of the EIB not later than 5:00 p.m. March 29, 2010. Notices of Intent to Present Technical Testimony and all subsequent documentation

should be submitted referencing the name of the regulation, the date of the hearing and the docket number EIB 08-19 (R) and should be submitted to:

Joyce Medina, Administrator
Environmental Improvement Board
Harold Runnels Bldg., Rm. N-2153
1190 St. Francis Drive
Santa Fe, New Mexico 87505
(505) 827-2425
(505) 827-0310 FAX

If you are an individual with a disability and you require assistance or an auxiliary aid, e.g., sign language interpreter, to participate in any aspect of this process, please contact Judy Bentley by February 12, 2010 at the NMED, Human Resources Bureau, P.O. Box 5469, Santa Fe, NM 87502, telephone 505-827-9872. TDD or TDY may access this number via the New Mexico Relay Network at 1-800-659-8331.

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

NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

NOTICE

The New Mexico Human Services Department (HSD) will hold two public hearings on January 11, 2010, in the ASD Conference Room of Plaza San Miguel, 729 St. Michael's Drive, Santa Fe, NM.

At 9:00 a.m. the subject is Billing for Medicaid Services and Medicaid Billing and Provider Hearings. The Human Services Department, Medical Assistance Division, is proposing amendments to 8.302.2 NMAC, *Billing for Medicaid Services* and 8.353.2 NMAC, *Provider Hearing* rules to clarify regulatory language, assure accuracy of existing rules and update the rules to include a shorter claim timely filing process, limitations against providers billing recipients, and clarifications for the provider hearing process.

8.302.2 NMAC, *Billing for Medicaid Services*

* New language directing providers to follow the instructions of the appropriate coordinated service contractors and claims processing contractors;
* Reducing the timely filing limits from 120 days to 60 calendar days from the date of service;
* New language limiting and clarifying exceptions to filing limit requirements;
* New language limiting the conditions under which HSD may waive timely filing limits;
* New language limiting and clarifying the conditions under which a provider may seek reimbursement from a recipient; and
* Clarifying other billing and payment limitations.

8.353.2 NMAC, *Provider Hearings*

* Clarifying Scope and Limits on Provider Hearings;
* Adding an Informal Resolution Conference; and
* Clarifying pre-hearing activities to include: informal and pre-hearing conferences, scheduling and continuations, timeliness, unresolved issues, written summaries, pre-conference orders, points of law, summary of evidence, evidence from HSD and providers, and additional evidence submission.

At 10:00 a.m. the subject is Vision Care Services and General Noncovered Services. The Human Services Department, Medical Assistance Division, is proposing amendments to 8.310.6 NMAC, *Vision Care Services*, and 8.301.3 NMAC, *Noncovered Services*, rules to clarify regulatory language, to maintain accuracy with existing rules and to identify which adult benefits have been reduced.

Specifically for both rules -

* Replacing outdated word usage, such as Medicaid with MAD
* Providing information on the eligibility of providers and their responsibilities
* Directing providers to enroll and follow a coordinated care contractor's instructions for billing and authorization of services

Specifically for Vision -

* Approving the combined refractive error of sphere and cylinder to equal 0.75 astigmatism as meeting the criteria for the dispensing of corrective lenses if the provider determines that the visual acuity will be significantly improved;
* Clarifying the conditions of coverage for polycarbonate lenses
* Clarifying the replacement criteria for eyeglasses and contact lenses
* Clarifying the provider types allowed to dispense contact lens
* Adult benefits are reduced to allow only one exam, one pair of lenses or pair contact lenses within a thirty-six (36) month period, unless specific criteria has been met

Specifically for Noncovered Services -

* Clarifying when a provider may or may not bill an eligible recipient when a service is not a covered benefit of MAD
* Update MAD's current instructions concerning durable medical equipment and medical supplies
* Clearer statement that MAD does not cover telephone consultations between an eligible recipient and their provider.
* Clarifying that MAD does not reimburse bariatric surgery services or procedures.

Interested persons may submit written comments no later than 5:00 p.m., January 11, 2010, to Kathryn Falls, Acting Secretary, Human Services Department, PO Box 2348, Santa Fe, New Mexico 87504-2348. All written and oral testimony will be considered prior to issuance of the final regulation.

If you are a person with a disability and you require this information in an alternative format or require a special accommodation to participate in any HSD public hearing, program or services, please contact the NM Human Services Department toll-free at 1-888-997-2583, in Santa Fe at 827-3156, or through the department TDD system, 1-800-609-4833, in Santa Fe call 827-3184. The Department requests at least 10 days advance notice to provide requested alternative formats and special accommodations.

Copies of the Human Services Register are available for review on our Website at www.hsd.state.nm.us/mad/registers by sending a self-addressed stamped envelope to Medical Assistance Division, Program Oversight & Support Bureau, PO Box 2348, Santa Fe, NM. 87504-2348.

NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

NOTICE

The New Mexico Human Services Department (HSD) will hold a public hearing on January 11, 2010, in the Rio Grande Room of the Toney Anaya Bldg., 2550 Cerrillos Road, Santa Fe, NM.

At 11:00 a.m. The subject is Personal Care Option (PCO) Program. Beginning in August 2008, individuals 21 years of age and older who were receiving Medicaid State Plan PCO services were gradually included in the Coordination of Long Term

Services (CoLTS) program. Since CoLTS manages PCO service delivery, the Medical Assistance Division needs to amend the PCO rules to reflect these changes and to clarify the role and responsibilities of the third-party assessor (TPA) and the CoLTS managed care contractors.

Interested persons may submit written comments no later than 5:00 p.m., January 11, 2010, to Kathryn Falls, Acting Secretary, Human Services Department, PO Box 2348, Santa Fe, New Mexico 87504-2348. All written and oral testimony will be considered prior to issuance of the final regulation.

If you are a person with a disability and you require this information in an alternative format or require a special accommodation to participate in any HSD public hearing, program or services, please contact the NM Human Services Department toll-free at 1-888-997-2583, in Santa Fe at 827-3156, or through the department TDD system, 1-800-609-4833, in Santa Fe call 827-3184. The Department requests at least 10 days advance notice to provide requested alternative formats and special accommodations.

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NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

NOTICE

The New Mexico Human Services Department (HSD) will hold a public hearing on January 12, 2010, in the HSD Law Library of Pollon Plaza, 2009 S. Pacheco St., Santa Fe, NM.

At 11:00 a.m. the subject is Emergency Response Services - CoLTS and Mi Via. In an effort to control costs, the Medical Assistance Division (MAD) will no longer cover the cost of installing emergency response devices for individuals receiving services through the Mi Via or CoLTS waivers. MAD will continue to cover the cost of testing and maintenance of emergency response equipment, training participants, caregivers and first responders on the use of the equipment, 24 hour monitoring for alarms, checking systems monthly or more frequently, if warranted by electrical outages, severe weather, etc, and reporting participant emergencies and changes in the participant's condition that may affect service delivery.

Interested persons may submit written comments no later than 5:00 p.m., January 12, 2010, to Kathryn Falls, Acting Secretary, Human Services Department, PO Box 2348, Santa Fe, New Mexico 87504-2348. All written and oral testimony will be considered prior to issuance of the final regulation.

If you are a person with a disability and you require this information in an alternative format or require a special accommodation to participate in any HSD public hearing, program or services, please contact the NM Human Services Department toll-free at 1-888-997-2583, in Santa Fe at 827-3156, or through the department TDD system, 1-800-609-4833, in Santa Fe call 827-3184. The Department requests at least 10 days advance notice to provide requested alternative formats and special accommodations.

Copies of the Human Services Register are available for review on our Website at www.hsd.state.nm.us/mad/registers by sending a self-addressed stamped envelope to Medical Assistance Division, Program Oversight & Support Bureau, PO Box 2348, Santa Fe, NM. 87504-2348.

NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

NOTICE

The New Mexico Human Services Department (HSD) will hold a public hearing on January 13, 2010, in the ASD Conference Room. 729 St. Michael's Drive. Santa Fe, NM.

At 9:00 a.m. the subject is Nursing Facility Reserve Bed Days. In an effort to control costs, the Medical Assistance Division (MAD) will no longer continue to hold or reserve a bed for a resident in a nursing facility for any other reason other than for hospitalization. These proposed rules also contain some changes due to the implementation of CoLTS as well as a new third-party assessor (TPA).

Interested persons may submit written comments no later than 5:00 p.m., January 13, 2010, to Kathryn Falls, Acting Secretary, Human Services Department, PO Box 2348, Santa Fe, New Mexico 87504-2348. All written and oral testimony will be considered prior to issuance of the final regulation.

If you are a person with a disability and you require this information in an alternative format or require a special accommodation to participate in any HSD public hearing, program or services, please contact the NM Human Services Department toll-free at 1-888-997-2583, in Santa Fe at 827-3156, or through the department TDD system, 1-800-609-4833, in Santa Fe call 827-3184. The Department requests at least 10 days advance notice to provide requested alternative formats and special accommodations.

Copies of the Human Services Register are available for review on our Website at www.hsd.state.nm.us/mad/registers by sending a self-addressed stamped envelope to Medical Assistance Division, Program Oversight & Support Bureau, PO Box 2348, Santa Fe, NM. 87504-2348.

NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

NOTICE

The New Mexico Human Services Department (HSD) will hold three public hearings on January 14, 2010, in the HSD Law Library, Pollon Plaza, 2009 S. Pacheco St., Santa Fe, NM.

At 9:00 a.m. the subject is Transfer of Assets for Home and Community Based Services Waivers. The Human Services Department is proposing to clarify eligibility for Home and Community Based Services Waiver programs when there has been a transfer of assets for less than fair market value during the five year look back period.

At 10:00 a.m. the subject is Newborn Eligibility. The Human Services Department is proposing changes to Newborn Medicaid (Category 031) program policy. The Children's Health Insurance Program Reauthorization Act of 2009 eliminates the Medicaid requirement that to receive coverage the newborn has to live with the mother. Additionally, because of Newborn Medicaid (category 031) status documentation of citizenship and identity are considered met at the first and all subsequent re-certifications.

At 11:00 a.m. the subject is Respite Services. In an effort to control costs, the Medical Assistance Division (MAD) is reducing by 50 percent the maximum number of respite services per ISP year under the Disabled and Elderly Home and Community Based Services Waiver.

Interested persons may submit written comments no later than 5:00 p.m., January 14, 2010, to Kathryn Falls, Acting Secretary, Human Services Department, PO Box 2348, Santa Fe, New Mexico 87504-2348. All written and oral testimony will be considered

prior to issuance of the final regulation.

If you are a person with a disability and you require this information in an alternative format or require a special accommodation to participate in any HSD public hearing, program or services, please contact the NM Human Services Department toll-free at 1-888-997-2583, in Santa Fe at 827-3156, or through the department TDD system, 1-800-609-4833, in Santa Fe call 827-3184. The Department requests at least 10 days advance notice to provide requested alternative formats and special accommodations.

Copies of the Human Services Register are available for review on our Website at www.hsd.state.nm.us/mad/registers by sending a self-addressed stamped envelope to Medical Assistance Division, Program Oversight & Support Bureau, PO Box 2348, Santa Fe, NM. 87504-2348.

NEW MEXICO BOARD OF NURSING

Public Rules Hearing

The New Mexico Board of Nursing will hold a Rules Hearing on Friday, February 12, 2010. The Rules Hearing will begin at 9:00 a.m. The rules hearing will be held at the New Mexico Board of Nursing Conference Room, 6301 Indian School Rd NE, Suite 710, Albuquerque NM 87110.

The purpose of the rules hearing is to hear public testimony and comments regarding the proposed amendments to the Board's rules and regulations: 16.12 NMAC: Part 1 General Provisions.

Persons desiring to present their views on the proposed amendments to the rules may write to request draft copies of the rules from the Board office at 6301 Indian School Rd NE, Suite 710, Albuquerque, NM, 87110, call (505) 841-8340 or download them from www.bon.state.nm.us . In order for the Board members to review the comments prior to the hearing, persons wishing to submit written comments regarding the proposed rules should submit them to the Board office in writing no later than January 26, 2010. Persons wishing to present written comments at the hearing are asked to provide (10) copies of any comments or proposed changes for distribution to the Board and staff. In addition, persons may present their comments orally at the hearing.

Notice: Any person presenting testimony, who is representing a client, employer or group, must be registered as a lobbyist through the Secretary of State's Office 9505) 827-3600 or do so within 10 days of the Public Hearing.

If you have questions, or if you are an individual with a disability who wishes to attend the hearing or meeting, please call the Board office at (505) 841-8340 at least two weeks prior to the hearing or as soon as possible.

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

NOTICE OF PROPOSED RULEMAKING

The Public Education Department ("Department") hereby gives notice that the Department will conduct a public hearing in the Jerry Apodaca Building, Mabry Hall 300 Don Gaspar, Santa Fe, New Mexico 87501-2786, on Wednesday, March 3, 2010 from 2:00 p.m. to 4:00 p.m. The purpose of the public hearing will be to obtain input on the following rule:

Rule Number	Rule Name	Proposed Action
6.29.12 NMAC	Library, Media and Information Literacy	Adopt New Rule

Interested individuals may testify either at the public hearing or submit written comments regarding the proposed rulemaking to Ms. Carolann Gutierrez, Bureau Chief, Humanities Bureau, Public Education Department, Jerry Apodaca Education Building, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786 (Carolann.gutierrez@state.nm.us) (505)-827-6596 or by fax (505) 476-0329. Written comments must be received no later than 5:00 p.m. on March 3, 2010. However, submission of written comments as soon as possible is encouraged.

Copies of the proposed rule may be accessed on the Department's website (http://ped.state.nm.us) or obtained from Carolann Gutierrez, Bureau Chief, Humanities Bureau, Public Education Department, Jerry Apodaca Education Building, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786 (Carolann.gutierrez@state.nm.us) (505)827-6596 telefax (505) 476-0329. The proposed rule will be made available at least thirty days prior to the hearings.

Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in this meeting are asked to contact Ms. Carolann Gutierrez as soon as possible. The Department requests at least ten (10) days advance notice to provide requested special accommodations.

Adopted Rules

NEW MEXICO EDUCATIONAL RETIREMENT BOARD

This is an amendment to 2.82.4 NMAC, Section 9, effective December 31, 2009.

2.82.4.9 ALLOWED SERVICE CREDIT:

A. For purposes of granting allowed service credit pursuant to Section 22-11-34A(2) NMSA 1978, a member engaged in military service that interrupted the member's employment under a state system in New Mexico shall return to employment within eighteen months following honorable discharge.

(1) In order to claim such service credit the member shall furnish documentary evidence of: (a) the member's entry into and honorable discharge from military service; (b) the dates of service to an affiliated public employer prior to entry into military service.

(2) The director shall review the members' request for allowed service credit based upon the documentary evidence presented, and, in the director's discretion, shall request additional documentation to verify the member's eligibility for such allowed service credit.

[~~B. The director shall use the salary information on file with the board in determining "average annual salary" under Section 22-11-34, Paragraph A (3). If there have been years of service performed by the member for which there are no salaries recorded with the board, the applicant for military service credit shall be required to furnish reasonable evidence, if such is available, satisfactory to the director of the salaries earned during such years. If reasonable evidence of the salaries earned is not available, the director shall set amounts to be used which, in his opinion, are representative of reasonable annual salaries for periods of time involved for the position held by the applicant at that time.~~

~~C. When the actual cost of purchase of military service credit is calculated under Section 22-11-34, Paragraph A (3), the member's last full quarter earned salary and length of service through the last calendar quarter prior to the date on which he makes payment, shall be the last salary annualized and included in determining the overall "average annual salary".~~

~~D. Members who were not employed on the effective date of Section 22-11-34, Paragraph A (3), but who have earned service credit and military service, shall have three years after the date of their re-employment in which to consummate purchase of the service credit provided under that section.~~

~~E. Members who were employed on the effective date of Section 22-11-34, Paragraph A (3), having no previous military service and who later terminate employment and subsequently serve in the military service and are then re-employed, have three years from the date of such re-employment in which to consummate purchase of the service credit provided under that section.~~

~~F. No retirement service credit shall be allowed for military service except for regular active duty in the armed forces of the United States.~~

~~G. Purchase of allowed service credit as provided in Section 22-11-34, Paragraph A (3), may be carried out only while the member is currently employed by an administrative unit.~~]

B. For purposes of granting allowed service credit pursuant to Section 22-11-34A(3) NMSA 1978, a member engaged in United States military service, shall:

(1) be honorably discharged from such service;

(2) have five or more years of contributory employment at the time of the application for allowed service credit, in order to be eligible to purchase allowed service credit pursuant to Section 22-11-34A(3) NMSA 1978;

(3) contribute to the fund, for each year of service credit the member elects to purchase, a sum equal to the member's average annual actual salary for the five years of contributory employment preceding the date of the contribution multiplied by the sum of the member's contribution rate and the employer contribution rate in effect at the time of the member's written election to purchase, subject to the federal Uniformed Services Employment and Reemployment Rights Act of 1994;

(4) full payment shall be made in a single lump sum within sixty days of the date that the member is informed of the amount of the payment;

(5) the portion of the purchase cost derived from the employer's contribution rate shall be credited to the fund and, in the event that a member requests a refund of contributions pursuant to Section 22-11-15 NMSA 1978, the member shall not be entitled to a refund of that portion of the purchase cost derived from the employer contribution rate;

(6) the director shall use the salary information on file with the board in determining "average annual actual salary" under Section 22-11-34A(3) NMSA 1978; if reasonable evidence of the salaries earned is not available, the director shall set amounts to be used which, in his opinion, are representative of reasonable annual salaries for the periods of contributory employment for the position held by the applicant at that time;

(7) when the actual cost of purchase of allowed service credit for periods of military service is calculated under Section 22-11-34A(3) NMSA 1978, the "average annual actual salary" shall be based upon the member's most recent twenty calendar quarters of contributory employment prior to the date on which he makes payment;

(8) no allowed service credit shall be granted for service not performed by the member by reason of service in the uniformed services of the United States, nor for periods of service in the military reserves or national guard for short term training during which the member was not activated pursuant to a federal call to duty, deployment or peacekeeping mission or other declared national emergency;

(9) purchase of allowed service credit as provided in Section 22-11-34A(3) NMSA 1978, may be carried out only while the member is currently employed by an administrative unit;

(10) the provisions of 2.82.10.8 NMAC shall apply to purchase of allowed service credit under this paragraph;

(11) a member who has forfeited service credit may reinstate such service credit in order to establish the minimum period of contributory employment required by this subsection by repayment of withdrawn member contributions in the manner required by Section 22-11-33C NMSA 1978; such repayment shall be made at the same time as the lump sum payment for allowed service credit as specified in Section 22-11-34A(3) NMSA 1978.

[~~H.~~] C. Notwithstanding the provisions of Subsection A of 2.82.3.8 NMAC the "annual actual salary" to be used in calculating the cost of allowed service credit described in Section 22-11-34A(3) and (4) shall be an annualized salary. For the purpose of this rule, employment shall be viewed as either full-time or part-time employment, and an annualized salary shall be defined as follows.

(1) For full-time employees: The annual salary as defined in Subsection A of 2.82.3.8 NMAC.

(2) For part-time employees: [~~The total remuneration for the part-time employment divided by the full-time equivalency.~~] The total remuneration for the part-time employment divided by the full-time equivalency, as defined by the director at the time of the contribution. In no event shall allowed service credit contributions be granted for any calendar quarter in which the member did not work more than .25 of the full-time equivalency for the applicable

position as determined pursuant to rules enacted by the board or the director.

(3) For employees on sabbatical leave: The amount that would have been earned during the entire year had the member been on regular assignment. In determining the full-time equivalency of an employee, the director may refer to the administrative unit's approved budget for the fiscal year under consideration.

[~~A.~~] D. For the purpose of granting allowed service credit, pursuant to Section 22-11-34A(4) NMSA 1978, a "public school or public institution of higher learning" in another state, territory, or possession of the United States shall be taken to mean one that is open to the public without regard to race, creed, or color, and such school or institution need not be tax supported. The out-of-state public school shall be accredited by the state in which it is located or another accrediting organization which is recognized by the state. Service credit purchasable pursuant to Section 22-11-34A(4)(a) NMSA 1978 shall not include employment as a graduate assistant, teaching assistant or teaching fellow or in any position of a similar nature while the member was enrolled as a student in that institution.

[~~I.~~] E. Prior to the purchase of allowed service credit under Section 22-11-34[~~, Paragraph~~] 4(d), NMSA, 1978, a member must provide satisfactory evidence that the private school was accredited by the state board of education at the time of the member's employment.

[~~J.~~] F. The board may accept rollover and employer pickup payroll deduction contributions for the purchase of allowed service credit if the following conditions are met.

(1) The payments must be all or a portion of the member's interest qualified under Section 401(a) of the Internal Revenue Code.

(2) The payments shall contain only tax-deferred contributions and earnings on the contributions. The member and employer must submit satisfactory documentation, releases or indemnifications to the board against any and all liabilities that may be connected with the transfer, verifying that the proposed transfer is a qualifying contribution under the Internal Revenue Code.

(3) Payroll deductions and employer pickups are authorized by the governing body of the ERA employer.

(4) The board may not accept rollover or employer pickup payroll deduction contributions in excess of the amount required to purchase the allowed service credit.

[~~K.~~] G. For payments to purchase allowed service credit which commence on and after January 1, 2002, the board may accept rollover and transfers if the following conditions are met.

(1) Rollovers must be eligible rollover distributions that are not includible in the income of the member by reason of Internal Revenue Code sections 402(c), 403(b)(8), 408(d) or 457 (e)(16).

(2) Transfers must be direct trustee-to-trustee transfers from a qualified plan described in Internal Revenue Code section 401(a) or 403(a), an annuity contract described in Internal Revenue Code section 403(b) to the extent permitted by Internal Revenue Code section 403(b)(13), or an eligible plan under Internal Revenue Code section 457(b) to the extent permitted by Internal Revenue Code section 457(e)(13).

(3) The rollovers and transfers shall contain only pre-tax deferred contributions and earnings on the contributions. The member and employer must submit satisfactory documentation, releases, or indemnification to the board against any and all liabilities that may be connected with the rollover or transfer verifying that the proposed rollover or transfer is permissible under the Internal Revenue Code.

(4) Payroll deduction contributions shall no longer be allowed for the purchase of allowed service credit if the contributions would commence on or after July 1, 2002.

(5) The board may not accept rollovers or transfers in excess of the amount required to purchase the allowed service credit.

[6-30-99; 2.82.4.9 NMAC - Rn, 2 NMAC 82.4.9, 11-30-2001; A, 4-15-2002; A, 10-31-2002; A, 12-31-2009]

NEW MEXICO LIVESTOCK BOARD

This is an amendment to 21.35.4 Sections 7, 9, 11 and 12, effective 12/07/2009.

21.35.4.7 DEFINITIONS:

A. "Board" means the New Mexico livestock board.

B. "Director" means the executive director of the New Mexico livestock board.

C. "Inspector" means any duly authorized or commissioned officer of the livestock board.

D. "Livestock" means cattle, sheep, swine, bison, goats, horses, mules, asses, poultry, ratites, camelids and farmed cervidae.

E. Livestock market owner means any person, persons, corporation or organization operating for business or charity a facility for the purpose of consignment sales of livestock.

F. Livestock market means any facility in the state of New Mexico, which is used for the purpose of holding consignment sales of livestock.

G. "New Mexico livestock" means any livestock raised or pastured or fed within the state of New Mexico.

H. "Official Identification" means an electronic or visual ear tag with a 15-digit number beginning with "840", a USDA silver metal identification tag, a USDA orange metal calfhood brucellosis vaccination tag, a breed registry tattoo with proof of registration, or other identification as approved by the New Mexico state veterinarian.

I. "Person" means an individual, partnership, association or operation.

[3/1/99; 21.35.4.7 NMAC - Rn, 21 NMAC 35.4.7, 10/30/2008; A/E, 12/07/2009]

21.35.4.9 INSPECTION AND TESTS AT LIVESTOCK MARKETS:

A. All livestock received at a livestock market may be inspected for health by a veterinarian of the board, or its authorized agent.

B. In conducting such inspections of any livestock in the possession of the livestock market operator, such board veterinarian, or its agent, is authorized to make such tests and to require the administration of such preventative or curative treatment, as the veterinarian shall deem necessary to prevent the spread of livestock disease.

C. The tests and treatments [~~that~~] which are required as part of this section shall be accomplished at the [~~owners~~] owner's expense.

[3/1/99; 21.35.4.9 NMAC - Rn, 21 NMAC 35.4.9, 10/30/2008; A/E, 12/07/2009]

21.35.4.11 BRUCELLOSIS TESTS OF CATTLE AT LIVESTOCK MARKETS:

A. Test eligible cattle originating from any zone, area, county or state determined by the USDA or the New Mexico state veterinarian to be high-risk for bovine brucellosis and entering New Mexico through specifically approved livestock markets [~~must be~~] may be required to be tested for brucellosis.

B. Reactors to the presumptive brucellosis test shall be [~~sent to slaughter~~] quarantined at the market pending completion of confirmatory testing and final determination of brucellosis status.

C. Reactors as determined by confirmatory testing, shall either be B branded, or sealed by metal seal in the truck transporting them to slaughter and documented correctly on a USDA veterinary services form 127.

D. After the reactors are removed, the remaining cattle in the shipment may be returned to premises of

origin under quarantine, or be S branded and sent directly to an approved feedlot or slaughter.
[3/1/99; 21.35.4.11 NMAC - Rn, 21 NMAC 35.4.11, 10/30/2008; A/E, 12/07/2009]

21.35.4.12 INSPECTION OF CATTLE AND TAGGING AT LIVESTOCK MARKETS:

A. All livestock entering a livestock market shall be inspected by a livestock inspector or authorized agent of the board, for brands and ownership and that inspection shall be documented upon the certificate prescribed by the board.

B. The livestock board shall provide tags of identification to be applied [~~to the livestock sold through livestock markets~~] as directed by the New Mexico livestock board. The tag shall be placed on the upper section of the shoulder area of all cattle tagged at such markets. The tag number and the brand identification data for animals shall be properly entered on the certificate prescribed by the board. All sexually intact dairy cattle four months of age or older, sexually intact beef cattle 18 months of age or older and all Mexican-origin (M-branded) cattle shall be individually identified by official identification, with such identification recorded on the certificate.

C. For the inspections conducted at markets, the board shall charge the fees prescribed by law and board rules for inspection of livestock.
[3/1/99; 21.35.4.12 NMAC - Rn, 21 NMAC 35.4.12, 10/30/2008; A/E, 12/07/2009]

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

6 NMAC 8.4.1, Standards for Vocational and Technical Programs in All Public Schools, State Supported Educational Programs and Two-Year Post-Secondary Institutions, filed July 18, 1997 is repealed and replaced with 6.33.2 NMAC, Establishment of Academic and Technical Standards, effective December 31, 2009.

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

TITLE 6 PRIMARY AND SECONDARY EDUCATION
CHAPTER 30 EDUCATIONAL STANDARDS - GENERAL REQUIREMENTS
PART 11 ACADEMIC PROFICIENCY AND ATTENDANCE TIED TO INSTRUCTION PERMITS

6.30.11.1 ISSUING AGENCY: Public Education Department
[6.30.11.1 NMAC - N, 12-31-09]

6.30.11.2 SCOPE: This rule shall apply to all minors in the state seeking to apply for instruction permits from the motor vehicle division.
[6.30.11.2 NMAC - N, 12-31-09]

6.30.11.3 STATUTORY AUTHORITY: Sections 22-2-1 and 22-2-2, NMSA 1978.
[6.30.11.3 NMAC - N, 12-31-09]

6.30.11.4 DURATION: Permanent.
[6.30.11.4 NMAC - N, 12-31-09]

6.30.11.5 EFFECTIVE DATE: December 31, 2009, unless a later date is cited at the end of a section.
[6.30.11.5 NMAC - N, 12-31-09]

6.30.11.6 OBJECTIVE: The underlying objective of this rule is to motivate minors to attend school and succeed in their studies, regardless of whether they are enrolled in a public school, non-public school or home school, by establishing uniform requirements and procedures for determining whether they have demonstrated a certain level of academic proficiency or school attendance, the demonstration of which can be used in determining the issuance or rejection of an instruction permit by the motor vehicle division.
[6.30.11.6 NMAC - N, 12-31-09]

6.30.11.7 DEFINITIONS:

A. "Alternative test" means a test other than the New Mexico standards based assessment, that is administered in a non-public school, an out of state school, department of defense school or by a home school operator, or one that is provided by the department.

B. "Home school" means the operation by the parent or legal guardian of a school-age person of a home study program of instruction that provides a basic academic educational program, including reading, language arts, mathematics, social studies and science.

C. "Motor vehicle division" means a division of the New Mexico taxation and revenue department ("MVD") that is responsible for administering the New Mexico Motor Vehicle Code which includes the issuance of instruction permits and drivers' licenses to those submitting an application.

D. "Nearing academic proficiency" means attaining a minimum score in reading and mathematics during a student's eighth grade as established by the laws, rules or procedures of the PED governing the New Mexico standards based assessment.

E. "New Mexico standards based assessment" ("SBA") means a system for testing students in various grades for their proficiency in the subject areas of mathematics, reading and language arts, writing, science and social studies, pursuant to the Assessment and Accountability Act (22-2C-1 to 22-2C-11 NMSA 1978). The SBA is administered annually to students in different grades in public schools and voluntarily to other students attending certain non-public schools and educational institutions in the state.

F. "Non-public school" means a school, other than a home school, that offers on-site programs of instruction and is not under the control, supervision or management of a local school board or the department and includes schools operated by or under a grant or contract from the bureau of Indian education of the United States department of the interior.

G. "Secretary" means the secretary of the public education department.
[6.30.11.7 NMAC - N, 12-31-09]

6.30.11.8 GENERAL CONSIDERATIONS:

A. This rule must be read in conjunction with 18.19.5.118 NMAC which was adopted by the tax and revenue department and requires minor applicants for an instruction permit to provide proof of identity, attendance in or completion of a driver education course, 90% school attendance in the ninth grade, and demonstrated achievement of nearing academic proficiency in the eighth grade in reading and mathematics.

B. Despite the effective date of this rule, it shall first apply only to those minors submitting applications to the MVD on or after September 1, 2011.

C. The PED alternative tests will be administered by the PED at least annually on dates and at locations throughout the state established by the PED and shall be available only to students who have not taken the New Mexico SBA because they were enrolled in a non-public school, were home schooled or came from another state or department of defense school.

D. A minor transferring from an out of state school may claim use of scores achieved in any eighth grade standards based assessment in reading and mathematics. Local school administrators or out of state issuing entities shall verify that the student achieved a minimum score in reading and mathematics comparable to "nearing academic proficiency".

E. A minor transferring from a department of defense operated school may claim use of scores achieved in any eighth grade academic standards based assessment in reading and mathematics. If no such assessment was taken, the minor may take the alternative test offered by the PED. Local school administrators or department

of defense officials shall verify that the student who took an eighth grade academic standards based assessment in reading and mathematics at a department of defense operated school achieved a minimum score in reading and mathematics comparable to "nearing academic proficiency".
[6.30.11.8 NMAC - N, 12-31-09]

6.30.11.9 DEMONSTRATING ACADEMIC PROFICIENCY: In order to demonstrate academic proficiency that satisfies a condition for the issuance of an instruction permit:

A. a minor enrolled in a public school must take the New Mexico standards based assessment in the eighth grade and attain scores of "nearing academic proficiency" in both reading and mathematics;

B. a minor enrolled in a non-public school who has not taken the New Mexico standards based assessment in the eighth grade and attained scores of "nearing academic proficiency" in both reading and mathematics, may demonstrate academic proficiency by attaining a passing score in reading and mathematics as determined by the assessment used and administered by the non-public school in the eighth grade; a written certification from a non-public school of that minor having attained a passing score shall satisfy the requirement of demonstrating academic proficiency;

C. a minor attending a home school established pursuant to state law who has not taken the New Mexico standards based assessment in the eighth grade and attained scores of "nearing academic proficiency" in both reading and mathematics, may demonstrate academic proficiency by demonstrating grade-level proficiency in reading and mathematics as determined by the assessment used and administered by the home school operator; a written certification from a home school operator of that minor having attained a passing score shall satisfy the requirement of demonstrating academic proficiency;

D. a minor transferring from an out of state school or from a department of defense school who has not taken the New Mexico standards based assessment in the eighth grade and attained scores of "nearing academic proficiency" in both reading and mathematics, may demonstrate academic proficiency by attaining a passing score in reading and mathematics as determined by the assessment used and administered by the out of state or department of defense school administered in the eighth grade; a written certification from a local school administrators or out of state issuing entity of that minor having attained a passing score shall satisfy the requirement of demonstrating academic proficiency.
[6.30.11.9 NMAC - N, 12-31-09]

6.30.11.10 DEMONSTRATING 90% SCHOOL ATTENDANCE: In order to demonstrate 90% school attendance that satisfies a condition for the issuance of an instruction permit:

A. minors enrolled in a public school must obtain a certification of attaining 90% attendance in the ninth grade from the school in which they are enrolled;

B. minors enrolled in a non-public school must obtain a certification from the school in which they are enrolled that they have met 90% attendance during their ninth grade at school;

C. minors attending a home school established pursuant to state law must obtain a certification from their parent or guardian that they have met 90% attendance during their ninth grade in their home schooling;

D. a minor transferring from an out of state or a department of defense school must obtain a certification from a local school administrator or out of state issuing entity of the school from which they transferred that they have met 90% attendance during their ninth grade at that school.
[6.30.11.10 NMAC - N, 12-31-09]

6.30.11.11 REVIEW OF ADVERSE DETERMINATIONS:

A. Any person aggrieved by a written decision or determination made by the PED under this rule related to a PED-administered alternative test result, may, pursuant to the procedures set forth in this section, seek administrative review by the secretary or the secretary's designee. Neither test results on an alternative test not administered by the PED nor denial of an MVD application for an instruction permit may be reviewed under this section.

B. A person aggrieved by the written decision or determination made by a public school under this rule to not-certify that the student has satisfied the ninth grade attendance or eighth grade reading and mathematics proficiency requirements, may, pursuant to the procedures set forth in this section, seek administrative review by the secretary or the secretary's designee.

C. All requests for review:

(1) shall be requested within fourteen (14) calendar days of issuance of a written decision or determination, signed by and contain the address and telephone number of the parent or legal guardian of the minor seeking review;

(2) shall describe in fewer than six (6) double-spaced pages why any decision or determination complained of was erroneous; and

(3) shall be accompanied by any supporting documents the requester believes will assist the secretary in rendering a final decision but in no event shall exceed a total of fifteen (15) pages of supporting documents.

D. The secretary or the secretary's designee shall:

(1) issue a written decision within thirty (30) calendar days of receiving a request unless, for good cause stated, the secretary or designee extends that period;

(2) after a review of the documents submitted by the students and their parents or legal guardians, determine if the decision or determination complained of was arbitrary, capricious, not supported by the facts or applicable law, or based upon fraud;

(3) rule on any requests to exceed the filing of the number of documents permitted or on filing a request for review late based upon good cause shown demonstrated by the parent or legal guardian seeking the exception; and

(4) not consider those documents submitted by the students and their parents or legal guardians that exceed the number of pages permitted.

E. A decision of the secretary or the secretary's designee issued under this section shall be final.

F. Any decision issued under this section that determines that a minor has satisfactorily demonstrated attendance or academic proficiency shall be notarized and issued in the form of a verified decision.
[6.30.11.11 NMAC - N, 12-31-09]

HISTORY OF 6.30.11 NMAC: [Reserved]

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

TITLE 6 PRIMARY AND SECONDARY EDUCATION
CHAPTER 33 EDUCATIONAL STANDARDS - VOCATIONAL EDUCATION
PART 2 ESTABLISHMENT OF ACADEMIC AND TECHNICAL STANDARDS

6.33.2.1 ISSUING AGENCY: Public Education Department
[6.33.2.1 NMAC - Rp, 6 NMAC 8.4.1.1, 12/31/09]

6.33.2.2 SCOPE: Career and technical education in all public schools, including charter schools, eligible state educational institutions, and eligible state postsecondary institutions.
[6.33.2.2 NMAC - Rp, 6 NMAC 8.4.1.2, 12/31/09]

6.33.2.3 STATUTORY AUTHORITY: Article 12, Section 6. New Mexico State Constitution; Section 21-13-2

NMSA 1978; Section 21-14-2 NMSA 1978; Section 21-16-7 NMSA 1978; Section 22-2-2(B) NMSA 1978; Section 22-13-1.1 NMSA 1978; Section 22-14-2 NMSA; 1978.
[6.33.2.3 NMAC - Rp, 6 NMAC 8.4.1.3, 12/31/09]

6.33.2.4 DURATION: Permanent
[6.33.2.4 NMAC - Rp, 6 NMAC 8.4.1.4, 12/31/09]

6.33.2.5 EFFECTIVE DATE: December 31, 2009, unless a later date is cited at the end of a section.
[6.33.2.5 NMAC - Rp, 6 NMAC 8.4.1.5, 12/31/09]

6.33.2.6 OBJECTIVE:

A. To establish challenging academic and technical standards with benchmarks and performance standards for students and to assist students in meeting such standards, including preparation for high skill, high wage or high demand occupations in current or emerging professions as defined in the scope of this regulation.

B. To establish the program requirements for career and technical education courses and programs at the elementary, secondary, and postsecondary levels.

C. To establish administrative requirements relating to career and technical education, instruction, programs, and services at the elementary, secondary, and postsecondary levels.

D. To establish a process for career and technical education program evaluation.

E. To assure accountability in the use of federal and state funds allocated for career and technical education programs.

F. To promote, strengthen, and assure the operation of quality career and technical education programs.

G. To promote provision of guidance and career counseling services.

H. To promote and strengthen partnerships with local schools, businesses, industry, and the entire community.

I. To establish follow-up and technical assistance procedures which provide for continuous assessment and improvement of career and technical education programs and services.

J. To establish career and technical education programs that offer a progressive, planned program of study which prepares students for: entry into an associate degree or two-year certificate program at a postsecondary institution; entry into a baccalaureate program at a four-year postsecondary institution; or entry into full-time employment in a chosen field, with the option to continue education.

K. To establish career and technical education programs that include, but are not limited to, school-based learning, work-based learning, and connecting activities which may include apprenticeship programs, academies, school-based enterprises, entrepreneurship, school-to-work programs, in-plant training programs, cooperative education programs, as well as other models which provide a planned program of study to develop employability skills and prepare students for further employment
[6.33.2.6 NMAC - Rp, 6 NMAC 8.4.1.6, 12/31/09]

6.33.2.7 DEFINITIONS:

A. "Career and technical education" means organized programs offering a sequence of courses (including technical education and applied technology education) which are directly related to the preparation of individuals in for paid or unpaid employment in current or emerging occupations requiring an industry-recognized credential, certificate, or degree. This term is also referred to as vocational education in state statute 22-14-1 NMSA 1978. Such term also includes applied technology education.

B. "Career and technical education course" means a course with content that provides technical knowledge, and skills, and competency-based applied learning, and that aligns with the regulations for educational standards and student expectations for all New Mexico students who attend schools as defined in the scope of 6.29.1 NMAC.

C. "Career cluster" means a grouping of occupations in industry sectors based on recognized commonalities. Career clusters provide an organizing tool for developing instruction within the education system.

D. "Career pathways" means a sub-grouping of occupations/ career specialties used as an organizing tool for curriculum design and instruction of occupational career specialities that share a set of common knowledge and skills for career success.

E. "Cooperative education" means a method of education for individuals who, through written cooperative arrangements between a school and employers, receive instruction, including required rigorous and challenging academic courses and related career and technical education instruction, by alternation of study in school with a job in any occupational field, which alternation:

(1) shall be planned and supervised by the school and employer so that each contributes to the education and employability of the individual; and

(2) may include an arrangement in which work periods and school attendance may be on alternate half days, full days, weeks, or other periods of time in fulfilling the cooperative program.

F. "Educational plan for student success *(EPSS)*" means is the annual strategic long-range plan written by all schools districts and districts schools to improve student performance.

G. "Eligible postsecondary institution" means a postsecondary institution that grants a certificate or associate degree in a career and technical occupational area.

H. "Eligible state educational institution" means an identified institution school that is under the direction of a state agency other than the department or a separate board of regents.

I. "Postsecondary education tech prep student" means a student who:

(1) has completed the secondary education component of a tech prep program; and

(2) has enrolled in the postsecondary education component of a tech prep program at an institution of higher education.

J. "Program of study" is a progressive continuum of courses that may be offered across grades 9-14. A program of study is a means to provide technical training, training to prepare for employment and training to prepare for entry into postsecondary education.

K. "Secondary education tech prep student" means a secondary education student who has enrolled in two (2) courses in the secondary education component of a tech prep program.

L. "Tech prep program" means a program of study that combines a minimum of two (2) years of secondary education with a minimum of two (2) years of postsecondary education in a non-duplicative, sequential course of study.
[6.33.2.7 NMAC - Rp, 6 NMAC 8.4.1.7, 12/31/09]

6.33.2.8 IMPLEMENTATION:

A. Career and technical education program criteria - elementary and secondary levels. Career and technical education programs must:

(1) be in accordance with Section 22-14-1 through 30, NMSA 1978, and the Carl Perkins Act;

(2) provide exploratory and skill development program offerings linked to career pathways;

(3) provide school facilities and grounds which are:

(a) safe, healthy, orderly, clean, and in good repair;

(b) in compliance with the Americans with Disabilities Act, Part III and state fire marshal regulations, Sections 59A-

52-1 through 59A-52-25 NMSA 1978;

(c) safe for conducting experiments and school projects in all school laboratories and shops, as established in written school safety procedures which are reviewed annually; these procedures must include, but are not limited to:

(i) personal protective equipment;

(ii) adequate ventilation and electrical circuitry;

(iii) material safety data sheets;

(iv) body and eye washes; and

(v) training appropriate for each teaching situation;

(d) the maximum number of occupants in a laboratory or shop teaching space shall be based on the following:

(i) the building and fire safety codes;

(ii) the design of the laboratory or shop teaching facility;

(iii) appropriate supervision and the special needs of students; and

(iv) all applicable OSHA regulations;

(4) be embedded in the district EPSS and school EPSS and aligned with school improvement initiatives and programs and the appropriate career cluster;

(5) ensure student mastery of New Mexico's career and technical education content standards, including consideration of any results from a workplace readiness assessment, an interest inventory, a portfolio of standards-based indicators, and the student's Next Step Plan; and

(6) include competency-based applied learning which contributes to an individual's academic knowledge, high-order reasoning, and problem-solving skills, work attitudes, general employability skills, technical skills, and the occupational-specific skills necessary for economic independence as a productive and contributing member of society.

B. Career and technical education program criteria - postsecondary level.

(1) The program organization and delivery support the achievement of program objectives.

(a) Program descriptions include methods of learning, appropriate length of time for courses which comprise the career and technical education program, evidence that the program is coherent, and content that reflects a sequential course of study.

(b) Institutionally identified programs of study include academic and career and technical education skill development linked to the appropriate career cluster. Programs of study are of sufficient scope, quality and duration to ensure student competency and include course descriptions, student outcomes, and varied instructional methods.

(c) Licensure, regulations, or national industry skill standards are addressed through the institutionally identified program of study.

(d) Evaluation of student competencies required for each program incorporates consideration of any available results from a workplace readiness assessment, an interest inventory, a portfolio of standards-based indicators, or a certificate or degree plan at the postsecondary level;

(e) When appropriate, courses are available for dual credit, continuing education or job advancement.

(f) Institutionally identified programs of study are reviewed regularly and revised as necessary to meet the needs of business and industry and determine alignments with applicable public education department standards and benchmarks. This review and revision may also include accreditation standards of postsecondary institutions.

(2) Career and technical education curricula, materials, and resources provide quality instruction and promote student success through mastery of competencies.

(a) Instructional supplies and materials are relevant, current, and sufficient in supply.

(b) Programs involve business and industry through representation on advisory boards, contribution of resources, and provisions of job training placement opportunities for students.

(c) Programs do not discriminate on the basis of gender, marital or parental status, race, religion, sexual preference, age, national origin or disabilities.

(d) Required materials are available to the students.

(e) Recognized, related student organizations and professional development organizations are available and encouraged.

(3) Program outcomes meet stated objectives, including:

(a) program competencies in the areas of basic and advanced academic skills and general and specific occupational competencies;

(b) evaluation results which demonstrate the effectiveness of the program;

(c) labor market and job placement and wage information verifying the success of the program in preparing students for future employment;

(d) program participation completion rates and employment retention rates;

(e) program and student certification requirements are addressed.

(4) The facility and equipment meet the stated objectives of the program.

(a) Classroom and laboratory space accommodate student enrollment.

(b) Classroom and laboratory space are physically accessible for individuals with disabilities.

(c) Laboratory space meets program or industry standards and includes office and storage space.

(d) Facility and equipment maintenance and replacement schedules are followed.

(e) Equipment is up-to-date, operational, sufficient in quantity and quality, and systematically inventoried.

(f) Supplies are sufficient in quantity and systematically inventoried.

(5) The program is held within safe and healthy work environments for students.

(a) Up-to-date facilities are utilized.

(b) Equipment safety inspections are conducted and safety and environmental procedures are utilized by the program.

(c) The program provides instruction in occupational safety and health in alignment with industry standards.

(6) The program area has business/industry and community partnerships that support the program.

(a) The program offers cooperative education, internships, apprenticeship or some other form of work-based learning opportunity.

(b) Program advisory committee members assist in evaluating the program's progress to ensure that students demonstrate workplace competencies which meet employer requirements.

(c) Program advisory committee recommendations are recognized and may be incorporated into the program.

(d) Programs involve community and interagency coordination, supported through shared resources.

(e) The program may offer tech prep, articulation, dual or concurrent enrollment agreements.

(f) Programs are responsive to the community's employment needs and offer special training programs as necessary to address unemployment.

C. Career and technical education program administrative criteria - postsecondary level.

(1) Information about the program is made available to the general public.

(a) Program information is available in the college catalog, program brochures, and media campaigns.

(b) Outreach and recruitment activities promote student enrollment.

(2) The institution does not discriminate with regard to race, culture, ancestry, color, national origin, sex, age, religion, or disabilities, and does provide special services to assist these special

populations in meeting their educational objectives.

(a) Special population students are enrolled in the programs.

(b) Outreach and recruitment activities promote student enrollment that reflects the ethnic composition of the community.

(c) The program enrollment reflects non-traditional gender enrollments.

(d) Basic, remedial, and developmental supportive education services are made available to special populations and other students in need of such services.

(3) Students are provided with advisement, assessment, and counseling services and placement assistance.

(a) The institution maintains, coordinates, and facilitates articulation and recruitment with local high schools including tech prep activities.

(b) Career counseling, technical assessments, and counseling resources are available.

(c) Cooperative education, internships, apprenticeships, and job shadowing opportunities are available.

(d) Students are provided assistance with employability skills such as resume preparation, interview techniques, and job success information.

(e) Current local and national employment trends, occupational information, and career opportunities in the program area are provided to students as well as to instructors, counselors, admissions and placement personnel.

(f) Placement and follow-up data are collected on a continuing basis and are used in program planning and evaluation.

(4) The institution provides faculty and administrative support to meet the needs of the program.

(a) All program faculty have an appropriate credential or training background approved by the institution.

(b) The institution maintains a current professional development plan (PDP) for both full- and part-time career and technical education faculty.

(c) Funding is available for career and technical faculty/staff professional development.

(d) An adequate budget exists for program operation.

(5) The institution provides multimedia services such as library and computer services which support the educational objectives of the career and technical education program.

(a) An adequate level of services are available to support the career and technical education program.

(b) Services are provided for all ability levels.

(c) Services are available at times that are convenient to students and faculty.

(6) The institution maintains a planning strategy which aligns with the direction of industry in order to respond to the needs of the students, the community, business, and industry.

(a) The institution conducts program and institutional needs assessments.

(b) The institution has developed long- and short-range goals and objectives.

[6.33.2.8 NMAC - Rp, 6 NMAC 8.4.1.9, 12/31/09]

History of 6.33.2 NMAC:
History of Repealed Material:
6 NMAC 8.4.1, Standards for Vocational and Technical Programs in all Public Schools, State Supported Educational Programs, and Two-Year Post-Secondary Institutions, filed 7/18/97 - Repealed effective 12/31/09.

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

TITLE 11 LABOR AND WORKERS' COMPENSATION
CHAPTER 2 JOB TRAINING
PART 31 APPRENTICESHIP ASSISTANCE

11.2.31.1 ISSUING AGENCY: Public Education Department.
[11.2.31.1 NMAC - N, 12/31/09]

11.2.31.2 SCOPE: All New Mexico registered apprenticeship programs that develop skilled craftsmen in occupations recognized by the office of apprenticeship and the New Mexico state apprenticeship council.
[11.2.31.2 NMAC - N, 12/31/09]

11.2.31.3 STATUTORY AUTHORITY: 22-2-1, 22-2-2, 21-19A-6 NMSA 1978.
[11.2.31.3 NMAC - N, 12/31/09]

11.2.31.4 DURATION: Permanent.
[11.2.31.4 NMAC - N, 12/31/09]

11.2.31.5 EFFECTIVE DATE: December 31, 2009, unless a later date is cited at the end of a section.
[11.2.31.5 NMAC - N, 12/31/09]

11.2.31.6 OBJECTIVE: To set forth requirements and processes by which an apprenticeship program shall receive assistance through the public education department relating to 21-19A-2 et seq NMSA 1978.
[11.2.31.6 NMAC - N, 12/31/09]

11.2.31.7 DEFINITIONS:

A. "**Advisory committee**" means the apprenticeship and training advisory committee to the division.

B. "**Applicant**" means an entity desiring to file for Apprenticeship Assistance Act funding.

C. "**Apprentice**" means a person at least sixteen years old who is approved by the council and is covered by a written apprenticeship agreement with an employer, or with an association of employers or employees acting as agent for an employer, which apprentice agreement provides for reasonably continuous employment not less than two thousand hours required for any given trade for that person for his participation in an approved schedule of work experience through employment and for at least one hundred forty four hours per year of related supplemental instruction.

D. "**Apprenticeable trades**" means those on the United States department of labor (USDOL) list of officially recognized apprenticeable occupations that meet the standards of apprenticeship.

E. "**Apprenticeship**" means a formal educational method for training a person in a skilled trade that combines supervised employment with classroom study.

F. "**Apprenticeship agreement**" means a written agreement between an apprentice and either his employer, or an apprenticeship committee acting as agent for employer(s), which agreement contains the terms and conditions of the employment and training of the apprentice identified in 21-19A-5.C.

G. "**Apprenticeship committee**" means the sponsoring committee of each apprenticeable craft that is responsible for that particular apprenticeship program.

H. "**Apprenticeship standards**" means those standards that are registered and approved by the state apprenticeship council (SAC) per statutory duties in 50-7-4 NMSA 1978 or the office of apprenticeship.

I. "**Chair**" means "director of the New Mexico state apprenticeship council" who shall chair the apprenticeship training and advisory committee (ATAC) meetings.

J. "**Council**" means the New Mexico state apprenticeship council (SAC).

K. "**Director**" means the state director of apprenticeship of the PED.

L. "**Division**" means the public education department (PED), instructional support and vocational education division formally known as vocational education division of the state department of public education.

M. "**Journeyman**" means an individual who has documented sufficient skills and knowledge of a trade, craft or occupation, either through formal

apprenticeship or through practical on-the-job experience, and formal training. This individual is recognized by the state or his/her employer, as being fully qualified to perform the work of the trade, craft or occupation.

N. "**Preparatory instruction**" means the relevant academic classroom instruction that is needed by the apprentice prior to the start of related instruction.

O. "**Registered apprenticeship program**" for the purposes of eligibility for Apprenticeship Assistance Act funding, means a program registered by the New Mexico state apprenticeship council (SAC) or United States office of apprenticeship (OA).

P. "**Related instruction**" means the organized, off-the-job instruction in theoretical or technical subjects required for the completion of an apprenticeship for a particular apprenticeable trade.

Q. "**Reserved funds**" mean funds not obligated on March 1 through June 30 of the current fiscal year.

R. "**Slots**" means an allotment of approved training positions that are filled by individual apprentices, by which funding is calculated.

S. "**Supplementary instruction**" means new or upgraded skill training for those already employed as journeymen craftsmen.

[11.2.31.7 NMAC - N, 12/31/09]

11.2.31.8 ROLES AND RESPONSIBILITIES

A. The apprenticeship and training advisory committee shall follow guidance outlined in the Apprenticeship Assistance Act (21-19A-8) to include:

(1) review of a state fiscal year calendar during spring meeting;

(2) review of updated procedures manual annually;

(3) maintenance of a quorum that shall consist of no fewer than simple majority of voting members; and

(4) appointment of a standing committee of at least five members to solicit written testimony of participating apprenticeship training programs in the development of a position for the legislative process.

B. The public education department shall:

(1) administer apprenticeship assistance funds in accordance with legislative requirements and established policies and guidelines;

(2) assist apprenticeable crafts requesting training funds;

(3) provide oversight to ensure that contractual compliance and performance of the Apprenticeship Assistance Act are met;

(4) report to the ATAC any noncompliance identified by the evaluation and monitoring process; and

(5) provide reporting updates on a regular basis.

C. The apprenticeship training program funded through the Apprenticeship Assistance Act (21-19A-5) shall:

(1) maintain registered status as outlined in the Apprenticeship Assistance Act;

(2) submit program information by approved deadline dates as stated in the approved yearly calendar for management purposes;

(3) have representative attendance at all scheduled committee meetings as stated in the approved yearly calendar; and

(4) attend the designated annual meetings for purposes of completing an application; and notification of funding.

[11.2.31.8 NMAC - N, 12/31/09]

11.2.31.9 REQUIREMENTS

A. The applicant shall:

(1) comply with criteria for apprenticeship programs as outlined in the Apprenticeship Assistance Act (Section 21-19A-5);

(2) maintain a certificate of registration from New Mexico taxation and revenue department and be licensed to do business in New Mexico serving New Mexico residents;

(3) have a minimum of a one year registration with the NM council or USDOL office;

(4) calculate the program funding request using only those New Mexico apprentices registered and in training at the time of application; the number of approved apprentices being applied for must be equal to or lesser than the total number of apprentices registered and in training at the time of application;

(5) demonstrate the capacity to fund a training program that meets the requirement of the Apprenticeship Assistance Act;

(6) submit required documents within the identified timelines as stated in the approved yearly calendar;

(7) acknowledge that any application not received by the timeline as specified on the approved calendar shall not be considered for funding;

(8) have a minimum of five apprentices;

(9) have an administrative facility physically located in New Mexico;

(10) have a structured component for related instruction; a minimum of four hours of direct contact with an instructor per month is required;

(11) attend any mandatory request for application meeting as identified in the approved calendar to be considered for funding;

(12) attend any mandatory approval of application meeting as identified in the approved calendar to be considered for funding;

(13) submit additional information as requested within identified timelines for management purposes; and

(14) be entitled to a review pertaining to their application; a program request for review shall be submitted in writing to the public education department by the last business day in May.

B. Budget and accounting

(1) Applicant shall:

(a) submit original application for funding to PED state director of apprenticeship, and a copy of the completed application to department of workforce solutions (DWS) to the attention of director of the SAC by the deadline date as specified on the approved calendar; the application packet is comprised of the following forms:

(i) CTWEB/ATAC: A-01 - funding request;

(ii) CTWEB/ATAC: A-02 - funding survey;

(iii) CTWEB/ATAC: A-03 - acknowledgment of policies and procedures; and

(iv) Substitute W-9 - current taxpayer identification number verification;

(b) upon approval of an application at the May meeting, return to the director, located in the career-technical and workforce education bureau (CTWEB) of PED, a completed, signed grant agreement by the timeline as specified on the approved calendar; the approved grant agreement shall become effective July 1; failure to comply with this timeline shall result in forfeiture of any and all identified funds for that program; the form required is the CTWEB/ATAC: B-01 - grant agreement;

(c) set up the budget using PED reimbursement form CTWEB/ATAC: C-01-A;

(d) complete the reimbursement request form which identifies registered apprentices and training hours using the following forms;

(i) CTWEB/ATAC: C-01 - claim;

(ii) CTWEB/ATAC: C-02 - record of apprenticeship expenditure; and

(iii) CTWEB/ATAC: C-03 - record of journeyman expenditure;

(e) submit claims for reimbursement for the first through third fiscal quarters by the date as specified on the approved calendar, using forms CTWEB/ATAC: C-01 and CTWEB/ATAC: C-02;

(f) file the fourth quarter and final claim for reimbursement by June 30th or the last working day of that month, using forms

CTWEB/ATAC: C-01; CTWEB/ATAC: C-02; CTWEB/ATAC: C-03;

(g) submit a mid-year survey by the date(s) as specified on the approved calendar, or as specified by ATAC using form CTWEB/ATAC: B-02 - mid-year survey;

(h) complete budget adjustments using form CTWEB/ATAC: C-01-A;

(i) acknowledge that all slots as identified in 11.2.31.9 A (4) which are not used by January 10th of each year may result in the loss of funds for those slots through the mid-year survey using form CTWEB/ATAC: B-02;

(j) acknowledge that funds shall not be distributed to programs unable to maintain their registered status;

(k) acknowledge that no funds shall be distributed to an apprenticeship training program until the program has filed all reports required by the Apprenticeship Assistance Act and the division by the date as specified on the approved calendar; and

(l) receive funds based on the number of total related instruction contact hours multiplied by the approved hourly rate, not to exceed two hundred twenty hours per participant per year.

(2) The advisory committee shall:

(a) follow budget and accounting guidelines outlined in the Apprenticeship Act (21-19-A, 8 and 10);

(b) evaluate applications during open meeting and recommend funding slots; recommendations may include consideration of historical performance and potential to successfully expend available funds;

(c) evaluate allocated funds throughout the fiscal year; any and all funds identified by March 1 as potentially unexpended by the end of the fiscal year shall be combined with reserved funds and redistributed to all participating programs as provided in the act; and

(d) serve in an advisory capacity regarding the disbursement of funds pursuant to 21-19A-10.

(3) The public education department shall:

(a) review commentary provided by the ATAC for use in requesting appropriations of state funds as a budgetary line item for the registered apprenticeship system;

(b) follow budget and accounting guidelines as outlined in the Apprenticeship Assistance Act (21-19-A, 9);

(c) adopt forms, formulas, and administrative procedures upon recommendation of the ATAC for the distribution of available funds to registered apprenticeship training programs; distribution formulas shall be uniform in application to all programs;

(d) identify, annually in the month of March, the qualifications required and the procedures to be followed in the coming year, in applying for state funds for the following fiscal year; applications for funding shall be distributed at this meeting;

(e) formulate, for annual review in the month of May, allocation tables to be used in funding distribution;

(f) prepare grant agreements in accordance with the established rate for the approved applications;

(g) mail grant agreements to registered apprenticeship training programs by the deadline date as specified on the approved calendar;

(h) finalize the grant agreements granted by the state secretary of the public education department;

(i) review reimbursement claims for accuracy and submit to PED's fiscal office for vouchering;

(j) provide technical assistance to ensure contract specifications are met; and

(k) assist all applicants as requested.

[11.2.31.9 NMAC - N, 12/31/09]

11.2.31.10 CALENDAR: A calendar of events shall be published each year for inclusion in the annual procedures manual, with dates, timelines and items required for each event. If the due date for a claim or application falls on a weekend or a holiday, all submittals must be received by the Friday prior to the due date.

[11.2.31.10 NMAC - N, 12/31/09]

11.2.31.11 FORMS: To expedite the transmission of necessary information between the programs and the state agencies that administer the Apprenticeship Assistance Act, required forms will be developed by PED with input from the ATAC. The required forms are provided at the mandatory application meeting, reside at the PED website and are found in the annual procedures manual. Required forms are as follows:

A. The "CTWEB/ATAC A-01 - funding request" form is for the purpose of making application and includes but is not limited to, demographic and other information, such as the legal name of apprenticeship training program, contact information; the funding period; whether program is certified by SAC or OA; the SAC/OA identification number; the accounting data for sources of funding; in-kind services; state or federal assistance; whether or not the program uses any local education agency or other institution and the name of any such entity; a list of services and the amount the program pays for each service; if the program provides for correspondence classes; whether or not the correspondence apprentices meet with an instructor at least 4 hours per month; the length of apprenticeship program in years, the hours of related instruction for each year of training that are approved by OA or SAC; and a list of factors that make funding essential to the quality of the program with certifying official's name, signature and date.

B. The "CTWEB/ATAC A-02 - funding survey" form is for the purpose of surveying apprenticeship related instruction costs and shall include, but not be limited to, the program legal name and SAC/OA program number; facility costs; utility costs; instructor costs; equipment/supplies; administrative support; contract services; the hourly rate cost; and the name of the person completing this form with position, title, phone, fax, email and address.

C. The "CTWEB/ATAC A-03 - acknowledgment" form is for the purpose of acknowledgment of policy and procedures information provided and shall include, but not be limited to, the signature, title and phone number of the certifying official, and the name of the entity so certified.

D. The current W-9 "request for taxpayer identification number (TIN) verification substitute W-9 form from the New Mexico department of finance and administration (DFA)".

E. The "CTWEB/ATAC B-01 grant agreement" is for the purpose of clear terms of participation and shall be completed individually for each approved training program. The grant agreement includes the legal name and registered project number for the contractor to received fiscal year apprenticeship assistance act funds. The grant agreement may include, but not be limited to, the following information:

(1) program requirements;

(2) apprentice/journeyman qualifications;

(3) term;

(4) reimbursement:

(a) includes the annual rate and allocation;

(b) the formula is established on a composite of all approved training programs for funding;

(c) formula for the fiscal year is total apprentices approved in annual application for training, multiplied by total training hours, divided into legislative funding authorized for the program year;

(d) allocation may be adjusted by PED based on training hours and available funds;

(5) final signatures are acquired by the contractor and authorized PED officials; and

(6) attachments to the grant agreement include reimbursement forms.

F. The "CTWEB/ATAC B-02 - mid-year survey" form is for the purpose of fiscal management for adjustments and shall include, but not be limited to, the legal name; the number of apprentices to decrease, if applicable; and

a formula to determine the total decrease request.

G. The "CTWEB/ATAC C-01A – start here" reimbursement instructions form is for the purpose of "read only" information and includes the instructions to complete the claims for reimbursement, allocation with adjustments and the name and contact information for PED monitor.

H. The "CTWEB/ATAC C-01 - claim" form is for the purpose of processing reimbursement request and shall include, but not be limited to, the period covered with the date the claim was submitted; apprenticeship training program legal name, remittance address; quarterly claim request and balances; state apprenticeship council/office of apprenticeship verification signature; and the PED program manager's verification signature. Each claim for reimbursement must be certified by an authorized representative signature and date.

I. The "CTWEB/ATAC C-02 - record of apprentice" form is for the purpose of providing claim supporting documentation and shall include, but not be limited to, the project number; legal name; period covered; apprentice names and a numeric identification; the hours worked and unclaimed training hours, the rate per hour and amount claimed.

J. The "CTWEB/ATAC C-03 - record of journeyman" form is for the purpose of providing claim supporting documentation and shall include, but not be limited to, the program name, period covered, journeyman names, the hours worked multiplied by the rate per hour.

K. The "CTWEB/ATAC C-04 - apprentices" form is for the purpose of providing audit documentation and shall include, but not be limited to, the program number; name of each apprentice, hours in class; the class title/occupation; the dates and hours the class meets; the location of the class; the class dates; the instructor's name; the name and the signature and phone number of the training director or coordinator.

L. The "CTWEB/ATAC C-05 - journeyman" form is for the purpose of providing audit documentation and shall include, but not be limited to, the name of each journeyman and hours in supplemental training.

[11.2.31.11 NMAC - N, 12/31/09]

HISTORY OF 11.2.31 NMAC: [RESERVED]

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

This is an amendment to 6.31.2 NMAC, Sections 7, 9, 10, 11, 12 and 13, effective December 31, 2009.

6.31.2.7 DEFINITIONS:

A. Terms defined by federal laws and regulations. All terms defined in the following federal laws and regulations and any other federally defined terms that are incorporated there by reference are incorporated here for purposes of these rules.

(1) The Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 USC Secs. 1401 and following.

(2) The IDEA regulations at 34 CFR Part 300 (governing Part B programs for school-aged children with disabilities), 34 CFR Part 301 (governing programs for preschool children with disabilities).

(3) Pursuant to the paperwork reduction provisions of IDEA 20 USC Sec. 1408, all definitions, with the exception of those found in Subsection B of 6.31.2.7 below, contained in the IDEA Parts 300 and 301 at 34 CFR Secs. 300.1 through 300.45, will be adopted by reference.

B. The following terms shall have the following meanings for purposes of these rules.

(1) "CFR" means the code of federal regulations, including future amendments.

(2) "Child with a disability" means a child who meets all requirements of 34 CFR Sec. 300.8 and who:

(a) is aged 3 through 21 or will turn 3 at any time during the school year;

(b) has been evaluated in accordance with 34 CFR Secs. 300.304-300.311 and any additional requirements of these or other public education department rules and standards and as having one or more of the disabilities specified in 34 CFR Sec. 300.8 including mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, emotional disturbance, orthopedic impairment, autism, traumatic brain injury, and other health impairment, a specific learning disability, deaf-blindness, or being developmentally delayed as defined in paragraph (4) below; and who has not received a high school diploma; and

(c) at the discretion of each local educational agency and subject to the additional requirements of [~~Subsection 2 of Paragraph F~~] Paragraph (2) of Subsection F of 6.31.2.10 NMAC, the term "child with a disability" may include a child aged 3 through 9 who is evaluated as being developmentally delayed and who, because of that condition, needs special education and related services.

(3) "Department" means the public education department.

(4) "Developmentally delayed" means a child aged 3 through 9 or who will turn 3 at any time during the school year: with documented delays in development which are at least two standard deviations below the mean on a standardized test instrument or 30 per cent below chronological age; and who in the professional judgment of the IEP team and one or more qualified evaluators needs special education [~~or~~] and related services in at least one of the following five areas: [~~receptive or expressive language, cognitive abilities, gross or fine motor functioning, social or emotional development or self-help/adaptive functioning~~] communication development, cognitive development, physical development, social or emotional development or adaptive development. Use of the developmentally delayed option by individual local educational agencies is subject to the further requirements of Paragraph 2 of Subsection F of 6.31.2.10 NMAC. Local education agencies must use appropriate diagnostic instruments and procedures to ensure that the child qualifies as a child with a developmental delay in accordance with the definition in this paragraph.

(5) "Dual discrepancy" means the child does not achieve adequately for the child's age or to meet grade-level standards established in Standards for Excellence (Chapter 29 of Title 6 of the NMAC); and

(a) does not make sufficient progress to meet age or grade-level standards; or

(b) exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, grade level standards or intellectual development.

[~~**(5)**~~]**(6)** The **"educational jurisdiction"** of a public agency includes the geographic area, age range and all facilities including residential treatment centers, day treatment centers, hospitals, mental health institutions, juvenile justice facilities, state supported schools, or programs within which the agency is obligated under state laws, rules or regulations or by enforceable agreements including joint powers agreements (JPA) or memoranda of understanding (MOU) to provide educational services for children with disabilities. In situations such as transitions, transfers and special placements, the educational jurisdiction of two or more agencies may overlap and result in a shared obligation to ensure that a particular child receives all the services to which the child is entitled.

[~~**(6)**~~]**(7)** A **"free appropriate public education (FAPE)"** means special education and related services which meet all requirements of 34 CFR Sec. 300.17 and which, pursuant to Sec. 300.17(b), meet all applicable department rules and standards, including but not limited to these rules (6.31.2 NMAC), the Standards for Excellence ([~~6.30.2~~] 6.29.1 NMAC) and department rules governing school personnel preparation, licensure and performance (6.60 NMAC through 6.64 NMAC), student

rights and responsibilities (6.11.2 NMAC) and student transportation (6.41.3 and 6.41.4 NMAC).

[~~(7)~~](8) The **"general education curriculum"** pursuant to 34 CFR Sec. 300.320, means the same curriculum that a public agency offers for nondisabled children. For New Mexico public agencies whose non-special education programs are subject to department rules, the general curriculum includes the content standards, benchmarks and all other applicable requirements of the Standards for Excellence [~~(6.30.2 NMAC)~~] (Chapter 29 of Title 6 of the NMAC) and any other department rules defining curricular requirements.

[~~(8)~~](9) **"LEA"** means a local educational agency as defined in 34 CFR Sec. 300.28.

[~~(9)~~](10) **"Individualized education program"** or IEP means a written statement for a child with a disability that is developed, reviewed, and revised in accordance with 34 CFR Secs. 300.320 through 300.324;

[~~(10)~~](11) The **"IDEA"** means the federal Individuals with Disabilities Education Improvement Act of 2004, 20 USC Secs. 1401 and following, including future amendments.

[~~(11)~~](12) **"NMAC"** means the New Mexico administrative code, including future amendments.

[~~(12)~~](13) **"NMSA 1978"** means the 1978 Compilation of New Mexico Statutes Annotated, including future amendments.

[~~(13)~~](14) **"Parent"** includes, in addition to the persons specified in 34 CFR Sec. 300.30, a child with a disability who has reached age 18 and for whom there is no court-appointed general guardian, limited guardian or other court-appointed person who has legal custody or has otherwise been authorized by a court to make educational decisions on the child's behalf as provided in Subsection K of 6.31.2.13 NMAC. Pursuant to 34 CFR Sec. 300.519 and department policy, a foster parent of a child with a disability may act as a parent under Part B of the IDEA if: (i) the foster parent or the state children, youth and families department (CYFD) provides appropriate documentation to establish that CYFD has legal custody and has designated the person in question as the child's foster parent; and (ii) the foster parent is willing to make the educational decisions required of parents under the IDEA; and has no interest that would conflict with the interests of the child. A foster parent who does not qualify under the above requirements but who meets all requirements for a surrogate parent under 34 CFR Sec. 300.519 may be appointed as a surrogate if the public agency responsible for making the appointment deems such action appropriate. (See Subsection J of 6.31.2.13 NMAC.)

[~~(14)~~](15) **"Puente para los ninos fund"** in New Mexico means a risk pool fund to support high cost students with disabilities identified by LEAs pursuant to 34 CFR Sec. 300.704(c)(3)(i).

[~~(15)~~](16) **"SAT"** means the student assistance team, which is a school-based group of people whose purpose is to provide additional educational support to students who are experiencing difficulties that are preventing them from benefiting from general education.

[~~(16)~~](17) **"SEB"** means the special education bureau of the public education department.

(18) **"Special education"** means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education.

(a) As authorized by 34 CFR Sec. 300.8(a)(2)(ii) and 300.39(a)(2)(i), "special education" in New Mexico may include speech-language pathology services.

(b) Speech-language pathology services must meet the following standards to be considered special education:

(i) the service is provided to a child who has received appropriate tier I universal screening under Subsection D of 6.29.1.9 NMAC as it may be amended from time to time, before being properly evaluated under 34 CFR Secs. 300.301-300.306 and Subsection D of 6.31.2.10 NMAC;

(ii) the IEP team that makes the eligibility determination finds that the child has a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance; and

(iii) the speech language pathology service consists of specially designed instruction that is provided to enable the child to have access to the general curriculum and meet the educational standards of the public agency that apply to all children; and

(iv) the service is provided at no cost to the parents under a properly developed IEP that meets the requirements of Subsection B of 6.31.2.11 NMAC.

(c) If all of the above standards are met, the service will be considered as special education rather than a related service.

(d) Student/staff caseloads shall meet the requirements of Paragraphs (1) and (2) of Subsection H of 6.29.1.9 NMAC.

[~~(18)~~](19) A **"state-supported educational program"** means a publicly funded program that:

(a) provides special education and related services to children with disabilities who come within the program's educational jurisdiction;

(b) is operated by, or under contractual arrangements for, a state school, state educational institution or other state institution, state hospital or state agency; and

(c) is primarily funded through direct legislative appropriations or other direct state support to a public agency other than a local school district.

[~~(19)~~](20) **"USC"** means the United States code, including future amendments.

C. Definitions related to dispute resolution. The following terms are listed in the order that reflects a continuum of dispute resolution options and shall have the following meanings for the purposes of these rules.

(1) "Complaint assistance IEP (CAIEP) meeting" means an IEP meeting that is facilitated by the representative of the public agency who directs special education programs within the public agency, and who has decision-making authority on behalf of such agency.

(2) "Facilitated IEP (FIEP) meeting" means an IEP meeting that utilizes an independent, state-approved, state-funded, trained facilitator as an IEP facilitator to assist the IEP team to communicate openly and effectively, in order to resolve conflicts related to a student's IEP.

(3) "Mediation" means a meeting or series of meetings that utilizes an independent, state-approved, state-funded, trained mediator to assist parties to reconcile disputed matters related to a student's IEP or other educational, non-IEP-related issues.

D. The definitions in Subsection D apply only to Section 12 (*educational services for gifted children*).

(1) Gifted child defined. As used in 6.31.2.12 NMAC, "**gifted child**" means a school-age person as defined in Sec. 22-13-6(D) NMSA 1978 whose intellectual ability paired with subject matter aptitude/ achievement, creativity/divergent thinking, or problem-solving/critical thinking meets the eligibility criteria in 6.31.2.12 NMAC and for whom a properly constituted IEP team determines that special education services are required to meet the child's educational needs.

(2) Qualifying areas defined.

(a) "Intellectual ability" means a score two standard deviations above the mean as defined by the test author on a properly administered intelligence measure. The test administrator must also consider the standard error of measure (SEM) in the determination of whether or not criteria have been met in this area.

(b) "**Subject matter aptitude/ achievement**" means superior academic performance on a total subject area score on

a standardized measure, or as documented by information from other sources as specified in Paragraph (2) of Subsection C of 6.31.2.12 NMAC.

(c) "**Creativity/divergent thinking**" means outstanding performance on a test of creativity/ divergent thinking, or in creativity/divergent thinking as documented by information from other sources as specified in Paragraph (2) of Subsection C of 6.31.2.12 NMAC.

(d) "**Problem-solving/critical thinking**" means outstanding performance on a test of problem-solving/critical thinking, or in problem-solving/critical thinking as documented by information from other sources as specified in Subparagraph (b) of Paragraph (2) of Subsection B of 6.31.2.12 NMAC.

E. The definitions in Subsection E apply only to Section 13, Subsection I (*additional rights of parents, students, and public agencies - due process hearings*).

(1) "**Expedited hearing**" means a hearing that is available on request by a parent or a public agency under 34 CFR Secs. 300.532(c) and is subject to the requirements of 34 CFR Sec. 300.532(c).

(2) "**Gifted services**" means special education services to gifted children as defined in Subsection A of 6.31.2.12 NMAC.

(3) "**Summary due process hearing**" means a hearing designed to proceed more quickly and incur less expense than a standard due process hearing, as explained under Paragraph (15) of Subsection I of 6.31.2.13 NMAC.

(4) "**Transmit**" means to mail, send by electronic mail or telecopier (facsimile machine) or hand deliver a written notice or other document and obtain written proof of delivery by one of the following means:

(a) an electronic mail system's confirmation of a completed transmission to an e-mail address that is shown to be valid for the individual to whom the transmission was sent;

(b) a telecopier machine's confirmation of a completed transmission to a number which is shown to be valid for the individual to whom the transmission was sent;

(c) a receipt from a commercial or government carrier showing to whom the article was delivered and the date of delivery;

(d) a written receipt signed by the secretary of education or designee showing to whom the article was hand-delivered and the date delivered; or

(e) a final decision to any party not represented by counsel for a due process hearing by the U.S. postal service, certified mail, return receipt requested, showing to whom the articles was delivered and the date of delivery.

F. The definitions in Subsection F apply only to Section 9, Subsection B (*public agency funding and staffing*) and Section 11, Subsection L (*children in private schools or facilities*):

(1) "Qualified student" means, pursuant to Paragraph (1) of Subsection A of Section 22-13-8 NMSA 1978, a public school student who:

(a) has not graduated from high school;

(b) is regularly enrolled in one-half or more of the minimum course requirements approved by the department for public school students; and

(c) in terms of age:

(i) is at least five years of age prior to 12:01 a.m. on September 1 of the school year or will be five years of age prior to 12:01 a.m. on September 1 of the school year if the student is enrolled in a public school extended-year kindergarten program that begins prior to the start of the regular school year;

(ii) is at least three years of age at any time during the school year and is receiving special education pursuant to rules of the department; or

(iii) has not reached the student's twenty-second birthday on the first day of the school year and is receiving special education in accordance with federal law.

(2) "School-age person" means, pursuant to Paragraph (2) of Subsection A of Section 22-13-8 NMSA 1978, a person who is not a qualified student but who meets the federal requirements for special education and who:

(a) will be at least three years old at any time during the school year;

(b) is not more than twenty-one years of age; and

(c) has not received a high school diploma or its equivalent.

[6.31.2.7 NMAC - Rp, 6.31.2.7 NMAC, 6/29/07; A, 12/31/09]

6.31.2.9 PUBLIC AGENCY RESPONSIBILITIES:

A. Compliance with applicable laws and regulations. Each New Mexico public agency, within the scope of its authority, shall develop and implement appropriate policies, procedures, programs and services to ensure that all children with disabilities who reside within the agency's educational jurisdiction, including children who are enrolled in private schools or facilities such as residential treatment centers, day treatment centers, hospitals, mental health institutions, or are schooled at home, are identified and evaluated and have access to a free appropriate public education (FAPE) in compliance with all applicable requirements of state and federal laws and regulations. This obligation applies to all New Mexico public agencies that are responsible under laws, rules, regulations or written agreements for providing educational services for children with disabilities, regardless of whether that agency receives funds under the IDEA and regardless of whether it provides special education and related services directly, by contract, by referrals to private schools or facilities including residential treatment centers, day treatment centers, hospitals, mental health institutions or through other arrangements.

B. Public agency funding and staffing.

(1) Each public agency that provides special education or related services to children with disabilities shall allocate sufficient funds, staff, facilities and equipment to ensure that the requirements of the IDEA and all department rules and standards that apply to programs for children with disabilities are met.

(2) The public agency with primary responsibility for ensuring that FAPE is available to a child with a disability on the date set by the department for a child count or other report shall include that child in its report for that date. Public agencies with shared or successive responsibilities for serving a particular child during a single fiscal year are required to negotiate equitable arrangements through joint powers agreements or memorandums of understanding or interstate agreements for sharing the funding and other resources available for that child. Such agreements shall include provisions with regard to resolving disputes between the parties to the agreement.

(3) Placement of students in private [~~or public~~] residential treatment centers, or other out of home treatment or habilitation programs, by the IEP team or by a due process decision. [~~The sending school shall be responsible for the provision of special education and related services.~~] In no event shall a child with an IEP be allowed to remain in an out of home treatment or habilitation program for more than 10 days without receiving special education [~~or~~] and related services. The school district in which the qualified student or school-age person lives, whether in-state or out-of-state, is responsible for the educational, nonmedical care and room and board costs of that placement.

(a) Agreements between the resident school district of the qualified student or school-age person and a private residential treatment center must be on the form posted on the department's website or on a form otherwise approved by the department and must be reviewed and approved by the secretary of public education.

(b) Agreements must provide for:

(i) student evaluations and eligibility;

(ii) an educational program for each qualified student or school-age person that meets state standards for such programs, except that teachers employed by private schools are not required to be highly qualified;

(iii) the provision of special education and related services in conformance with an IEP that meets the requirements of federal and state law and applicable regulations and rules;

(iv) adequate classroom or other physical space that allows the school district to provide an appropriate education;

(v) a detailed description of the costs for the placement; and

(vi) an acknowledgement of the authority of the local school board and the department to conduct on-site evaluations of programs and student progress to ensure that state standards are met.

(4) Placement of students in public residential treatment centers, or other out of home treatment or habilitation programs, by the IEP team or by a due process decision. The sending school shall be responsible for the provision of special education and related services. In no event shall a child with an IEP be allowed to remain in an out of home treatment or habilitation program for more than 10 days without receiving special education and related services.

[(4)](5) Educational agencies may seek payment or reimbursement from noneducational agencies or public or private insurance for services or devices covered by those agencies that are necessary to ensure FAPE to children with disabilities. Claims for payment or reimbursement shall be subject to the procedures and limitations established in 34 CFR Secs. 300.154(b) and 300.154(d) through (g), Section 22-13-8 NMSA 1978 and any laws, regulations, executive orders, contractual arrangements or other requirements governing the noneducational payor's obligations.

[~~(5)~~]**(6)** Risk pool fund. (Puente para los ninos fund.)

(a) Local educational agency high cost fund.

(i) In compliance with 34 CFR Sec. 300.704(c) the department shall maintain a risk pool fund to support high cost children with disabilities identified by LEAs.

(ii) Funds distributed under this program will be on a reimbursable basis.

(b) Application [~~of~~] for funds. LEAs desiring to be reimbursed for the cost of children with disabilities with high needs shall file an application in accordance with the department's puente para los ninos fund as described on the department's website.

[~~(6)~~]**(7)** Pursuant to 34 CFR Sec. 300.154(d), a public agency may use the medicaid or other public benefits or insurance in which a child participates to provide or pay for services required under the IDEA Part B regulations, as permitted under the public insurance program, except as provided in (a) below.

(a) With regard to services required to provide FAPE to an eligible child, the public agency:

(i) may not require parents to sign up for or enroll in public insurance programs in order for their child to receive FAPE under Part B of the IDEA;

(ii) may not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to the IDEA Part B regulations, but pursuant to 34 CFR Sec. 300.154(f)(2), may pay the cost that the parent otherwise would be required to pay; and

(iii) may not use a child's benefits under a public benefits or insurance program if that use would: (A) decrease available lifetime coverage or any other insured benefit; (B) result in the family paying for services that would otherwise be covered by the public insurance program and that are required for the child outside of the time the child is in school; (C) increase premiums or lead to the discontinuation of benefits or insurance; or (D) risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures.

(b) Pursuant to 34 CFR Sec. [~~300.142(f)~~]300.154(e), an educational agency must obtain a parent's informed written consent for each proposed use of private insurance benefits and must inform parents that their refusal to permit the use of their private insurance will not relieve the educational agency of its responsibility to ensure that all required services are provided at no cost to the parents.

(c) Pursuant to 34 CFR Sec. 300.154(f):

(i) if a public agency is unable to obtain parental consent to use the parent's private insurance, or public benefits or insurance when the parent would incur a cost for a specified service required under the IDEA Part B regulations, to ensure FAPE the public agency may use its Part B funds to pay for the service; and

(ii) to avoid financial cost to parents who otherwise would consent to use private insurance, or public benefits or insurance if the parent would incur a cost, the public agency may use its Part B funds to pay the cost the parents otherwise would have to pay to use the parent's insurance (e.g., the deductible or co-pay amounts).

[~~(7)~~]**(8)** Each public agency is responsible for ensuring that personnel serving children with disabilities are qualified under state licensure requirements and are adequately prepared for their assigned responsibilities, pursuant to 34 CFR Sec. 300.156. Paraprofessionals and assistants who are appropriately trained and supervised in accordance with applicable department licensure rules or written department policy may be used to assist in the provision of special education and related services to children with disabilities under Part B of the IDEA.

C. IDEA applications and assurances. Each New Mexico public agency that desires to receive IDEA flow-through funds shall file an annual application with the department in the form prescribed by the department. Each application shall:

(1) provide all information requested by the department;

(2) demonstrate to the department's satisfaction that the agency is in compliance with all applicable requirements of 34 CFR Secs. 300.200-300.230 and these or other department rules and standards;

(3) include an agreement that the agency upon request will provide any further information the department requires to determine the agency's initial or continued compliance with all applicable requirements;

(4) include assurances satisfactory to the department that the public agency does and will continue to operate its programs in compliance with all applicable federal and state programmatic, fiscal and procedural requirements including the development of joint powers agreements, memoranda of understanding or other interagency agreements to address shared or successive responsibilities to meet the educational needs of a particular child during a single fiscal year; and

(5) pursuant to Subsection C of Section 22-8-11, NMSA 1978, the department shall not approve and certify an operating budget of any school district or state-chartered charter school that fails to demonstrate that parental involvement in the process was solicited.

D. Early intervening services set aside funds. Fifteen percent set aside.

(1) Pursuant to 34 CFR Secs. 300.208(a)(2) and 300.266, LEAs may use up to fifteen percent of the amount the LEA receives under Part B of IDEA to implement early intervening services for children with or without disabilities in kindergarten through grade 12 with particular emphasis on children in kindergarten through grade three.

(2) Prior to the implementation or use of these set aside funds, the LEA must have on record with the department an approved plan for use of these funds as

described by 34 CFR Sec. 300.226(b) and how such activities will be coordinated with regional education cooperatives as described in 34 CFR Sec. 300.226(e), if applicable.

(3) The LEA plan for use of set aside funds shall be submitted as an addendum to its annual application for Part B funding. If the LEA determines to implement a set aside plan after the initial application, a request for implementation of a set aside plan must be submitted for approval 60 days before the implementation of the plan.

(4) Each LEA that develops and maintains coordinated, early intervening services must report annually to the department as provided in 34 CFR Sec. 300.226(d).

E. Significant disproportionality.

(1) Pursuant to CFR 34 Sec. 300.646, LEAs must provide for the collection and examination of data to determine if significant disproportionality, based on race and ethnicity, is occurring with respect to:

(a) the identification of children as children with disabilities including the identification of children as children with disabilities in accordance with a particular impairment as defined by 34 CFR Sec. 300.8;

(b) the placement in particular educational settings of these children; and

(c) the incidence, duration and type of disciplinary actions, including suspensions and expulsions.

(2) Each public agency must reserve the fifteen percent early intervening funds if they are identified for having data that is significantly disproportionate in any one of the following categories:

(a) suspension of students with disabilities;

(b) over identification of students with disabilities;

(c) over identification of students in accordance with a particular impairment as defined by 34 CFR Sec. 300.8; and

(d) placement of students with disabilities in a particular setting.

(3) Review and revision of policies, practices and procedures. In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, or the placement in particular educational settings of these children, in accordance with Paragraph (1) of this subsection, the LEA must:

(a) provide for the review and, if appropriate, revision of the policies, procedures and practices used in the identification or placement to ensure that the policies, procedures and practices comply with the requirements of the IDEA; and

(b) require any LEA identified under Paragraph (1) of this subsection to reserve the maximum amount of funds under 34 CFR Sec. 300.226 to provide comprehensive coordinated early intervening services to serve children in the LEA, particularly, but not exclusively, children in those groups that were significantly over-identified under Paragraph (1) of this subsection; and

(c) require the LEA to publicly report on the revision of policies, practices and procedures described under Subparagraph (b) of this paragraph.

F. Annual determinations. Each local educational agency and other public agencies when applicable shall be assigned an annual determination. The determinations must be consistent with those provided in 34 CFR Sec. 300.603(b) based on the local educational agency's performance on the targets established in the department's state performance plan.

(1) For determinations of needs intervention and needs substantial intervention, the local educational agency may request an opportunity for an informal hearing. The request for hearing must be made in writing to the secretary of public education within 30 days of the date of the determination.

(2) The hearing will afford the local educational agency the opportunity to demonstrate why the department should not make the determination of needs intervention or needs substantial intervention. The hearing shall be conducted by the secretary or the secretary's designee. Formal rules of evidence shall not apply to the hearing.

[~~F.~~]**G.** Notification of public agency in case of ineligibility. Pursuant to 34 CFR Sec. 300.221, if the department determines that a public agency is not eligible under Part B of the act, the department shall notify the affected agency of that determination and provide the agency with reasonable notice and an opportunity for a hearing under 34 CFR Sec. 76.401(d).

[~~G.~~]**H.** Withholding of funds for noncompliance. Pursuant to 34 CFR Sec. 300.222, if the department, after reasonable notice and an opportunity for a hearing under 34 CFR Sec. 76.401(d), finds that a public agency that has previously been determined to be eligible is failing to comply with any requirement described in 34 CFR Secs. 300.201-300.213 and 34 CFR Sec. 300.608, the department must reduce or may not provide any further Part B payments to the public agency until the department is satisfied that the public agency is in compliance with that requirement.

[~~H.~~]**I.** Reallocation of funds. Pursuant to 34 CFR Sec. 300.705(c) if the department determines that a public agency is adequately providing FAPE to all children with disabilities residing in the area served by that public agency with state and local funds, the department may reallocate any portion of the funds under this part that are not needed by that public agency to provide FAPE to other LEAs in the state that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs or the department may also retain those funds for use at the state level as provided by 34 CFR Sec. 300.705(c).

[6.31.2.9 NMAC - Rp, 6.31.2.9 NMAC, 6/29/07; A, 12/31/09]

6.31.2.10 IDENTIFICATION, EVALUATIONS AND ELIGIBILITY DETERMINATIONS:

A. Child find. Each public agency shall adopt and implement policies and procedures to ensure that all children with disabilities who reside within the agency's educational jurisdiction, including children with disabilities attending private schools or facilities such as residential treatment centers, day treatment centers, hospitals, mental health institutions, detention and correctional facilities, children who are schooled at home, highly mobile children, children who reside on Indian reservations and children who are advancing from grade to grade, regardless of the severity of their disability, and who are in need of special education and related services, are located, evaluated and identified in compliance with all applicable requirements of 34 CFR Secs. 300.111, 300.131, 300.301-306 and these or other department rules and standards. For preschool children, child find screenings shall serve as interventions under Subsection B of 6.31.2.10 NMAC.

B. The public agency shall follow a three tier model of student intervention as a proactive system for early intervention for students who demonstrate a need for educational support for learning as set forth in Subsection D of 6.29.1.9 NMAC.

~~**[(1)** In tier I, the public agency must ensure that adequate universal screening in the areas of general health and well-being, language proficiency status, and academic levels of proficiency has been completed for each student enrolled. If universal screening a referral from a parent, a school staff member, or other information available to a public agency suggests that a particular student needs educational support for learning, then the student shall be referred to the student assistance team (SAT) for consideration of interventions at the tier II level.~~

~~**(2)** In tier II, a properly constituted SAT at each school, which includes the student's parents and student, as appropriate, must conduct the child study process and consider, implement and document the effectiveness of appropriate research-based interventions utilizing curriculum-based measures. In addition, the SAT must address~~

~~culture and acculturation, socioeconomic status, possible lack of appropriate instruction in reading or math, teaching and learning styles in order to rule out other possible causes of the student's educational difficulties. When it is determined that a student has an obvious disability or a serious and urgent problem, the SAT shall address the student's needs promptly on an individualized basis which may include a referral for a multidisciplinary evaluation to determine possible eligibility for special education and related services consistent with the requirements of 34 CFR Sec. 300.300.~~

~~(3) In tier III, a student has been identified as a student with a disability and deemed eligible for special education and related services, and an IEP is developed by a properly constituted IEP team pursuant to 34 CFR Sec. 300.321.~~]

C. Criteria for identifying children with perceived specific learning disabilities.

(1) Each public agency must use the three tiered model of student intervention for students suspected of having a perceived specific learning disability, consistent with the department rules, policies and standards for children who are being referred for evaluation due to a suspected disability under the specific learning disability category in compliance with 34 CFR Sec. 300.307.

(a) The public agency must, subject to Subparagraph (d) of this paragraph, require that the group established under 34 CFR Secs. 300.306(a)(1) and 300.308 for the purpose of determining eligibility of students suspected of having a specific learning disability, consider data obtained during implementation of tiers 1 and 2 in making an eligibility determination.

(b) To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation required in 34 CFR Secs. 300.304 through 300.306:

(i) data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and

(ii) data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.

(c) The documentation of the determination of eligibility, as required by 34 CFR Sec. 300.306(c)(1), must meet the requirements of 34 CFR Sec. 300.311, including:

(i) a statement of the basis for making the determination and an assurance that the determination has been made in accordance with 34 CFR Sec. 300.306(c)(1); and

(ii) a statement whether the child does not achieve adequately for the child's age or to meet state-approved grade-level standards consistent with 34 CFR Sec. 300.309(a)(1); and

(iii) a statement whether the child does not make sufficient progress to meet age or grade-level standards consistent with 34 CFR Sec. 300.309(a)(2)(i), or the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, grade level standards or intellectual development consistent with 34 CFR Sec. 300.309(a)(2)(ii); and

(iv) if the child has participated in a process that assesses the child's response to scientific, research-based intervention: a statement of the instructional strategies used and the student-centered data collected; documentation that the child's parents were notified about the state's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided; strategies for increasing the child's rate of learning; and the parents' right to request an evaluation.

(d) A parent may request an initial special education evaluation at any time during the public agency's implementation of tiers 1 and 2 of the three-tier model of student intervention. If the public agency agrees with the parent that the child may be a child who is eligible for special education services, the public agency must evaluate the child. If the public agency declines the parent's request for an evaluation, the public agency must issue prior written notice in accordance with 34 CFR Sec. 300.503. The parent can challenge this decision by requesting a due process hearing.

(2) Preschool children suspected of having a specific learning disability must be evaluated in accordance with Subparagraph (f) of Paragraph (5) of Subsection A of 6.31.2.11 NMAC and 34 CFR Secs. 300.300 through 300.305, which may include the severe discrepancy model.

[~~(2)~~](3) Public agencies must implement the dual discrepancy model in kindergarten through third grade utilizing the student assistance team and the three-tier model of student intervention as defined and described in the New Mexico Technical Evaluation and Assessment Manual (New Mexico T.E.A.M.). Data on initial evaluations for perceived learning disabilities in grades K-3 must be submitted to the department through the student teacher accountability reporting system (STARS).

[~~(1)~~](4) In identifying children with specific learning disabilities in grades 4 through 12, the public agency may use the dual discrepancy model as defined and described in the New Mexico Technical Evaluation and Assessment Manual (New Mexico T.E.A.M.) or the severe discrepancy model as defined and described in New Mexico T.E.A.M.

D. Evaluations and reevaluations.

(1) Initial evaluations.

(a) Each public agency must conduct a full and individual initial evaluation, at no cost to the parent, and in compliance with requirements of 34 CFR Secs. 300.305 and 300.306 and other department rules and standards before the initial provision of special education and related services to a child with a disability.

(b) Request for initial evaluation. Consistent with the consent requirement in 34 CFR Sec. 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

(c) Procedures for initial evaluation.

(i) The initial evaluation must be conducted within 60 calendar days of receiving parental consent for evaluation.

(ii) Each public agency must follow evaluation procedures in compliance with applicable requirements of 34 CFR Sec. 300.304 and other department rules and standards to determine: (1) if the child is a child with a disability under 34 CFR Sec. 300.8; and (2) if the child requires special education and related services to benefit from their education program.

(iii) Each public agency shall maintain a record of the receipt, processing and disposition of any referral for an individualized evaluation. All appropriate evaluation data, including complete SAT file documentation and summary reports from all individuals evaluating the child shall be reported in writing for presentation to the multi-disciplinary team or IEP team.

(d) Exception to the 60 day time frame. The requirements of this subsection do not apply:

(i) if the parent of a child repeatedly fails or refuses to produce the child for the evaluation; or

(ii) if the child enrolls in a school of another LEA after the 60 day time frame in this subsection has begun, and prior to a determination by the child's previous public agency as to whether the child is a child with a disability under 34 CFR Sec. 300.8.

(e) The exception to the 60 day time frame in Item (ii) of Subparagraph (d) of Paragraph (1) of Subsection D of 6.31.2.10 NMAC applies only if the subsequent public agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent public agency agree to a specific time when the evaluation will be completed.

(f) The multi-disciplinary team including the parent and child, if appropriate, must meet to determine if the child is a child with a disability and requires an IEP upon completion of the initial evaluation.

[~~**(g)** Each public agency must use the three tiered model for students suspected of having a specific learning disability, consistent with the department rules, policies and standards to ensure that lack of instruction in reading or math, is not the primary cause of learning difficulties for children who are being referred for evaluation due to a suspected disability under the specific learning disability category in compliance with 34 CFR Sec. 300.307.~~]

(2) Reevaluations.

(a) Each LEA must ensure that a reevaluation of each child is conducted at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary, and is in compliance with the requirements of 34 CFR Secs. 300.303-300.311, and any other applicable department rules and standards.

(b) Reevaluations may be conducted more often if:

(i) the LEA determines the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(ii) the child's parent or teacher requests a reevaluation.

(c) Reevaluations may not occur more than once a year, unless the parent and public agency agree otherwise.

(d) Procedures for conducting evaluations and reevaluations.

(i) The public agency must provide notice to the parents of a child with a disability that describes any evaluation procedures the agency proposes to conduct in compliance with 34 CFR Sec. 300.503.

(ii) The initial evaluation (if appropriate) and any reevaluations must begin with a review of existing information by a group that includes the parents, the other members of a child's IEP team and other qualified professionals, as appropriate, to determine what further evaluations and information are needed to address the question in 34 CFR Sec. 300.305(a)(2). Pursuant to 34 CFR Sec. 300.305(b), the group may conduct its review without a meeting.

(iii) If it is determined that a child requires an individualized evaluation or reevaluation the public agency is required to follow the procedures established by the department.

(iv) Each public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child, including information provided by the child's family that may assist in determining if the child is a child with a disability, the content of the child's IEP including information related to assisting the child to be involved and progress in the general education curriculum or for a preschool child to participate in appropriate activities.

(e) Each public agency shall maintain a record of the receipt, processing, and disposition of any referral for an individualized reevaluation. Reevaluation shall be completed on or before the three year anniversary date. All appropriate reevaluation data and summary reports from all individuals evaluating the child shall be reported in writing for presentation to the multi-disciplinary team or IEP team.

(f) The parents of a child with a disability who disagree with an evaluation obtained by the public agency have the right to obtain an independent educational evaluation of the child at public expense pursuant to 34 CFR Sec. 300.502.

E. Procedural requirements for the assessment and evaluation of culturally and linguistically diverse children.

(1) Each public agency must ensure that tests and other evaluation materials used to assess children are selected, provided and administered so as not to be discriminatory on a racial or cultural basis and are provided and administered in the child's native language or other mode of communication, such as American sign language, and in the form most likely to yield accurate information, on what the child knows and can do academically, developmentally and functionally, unless it is clearly not feasible to select, provide or administer pursuant to 34 CFR Sec. 300.304(c)(1).

(2) Each public agency must ensure that selected assessments and measures are valid and reliable and are administered in accordance with instructions provided by the assessment producer and are administered by trained and knowledgeable personnel.

(3) Each public agency must consider information about a child's language proficiency in determining how to conduct the evaluation of the child to prevent misidentification. A child may not be determined to be a child with a disability if the determinant factor for that eligibility determination is limited English proficiency. Comparing academic achievement results with grade level peers in the public agency with similar cultural and linguistic backgrounds should guide this determination process and ensure that the child is exhibiting the characteristics of a disability and not merely language difference in accordance with 34 CFR Sec. 300.306(b)(1).

(4) Each public agency must ensure that the child is assessed in all areas related to the suspected disability.

(5) Policies for public agency selection of assessment instruments include:

(a) assessment and evaluation materials that are tailored to assess specific areas of educational need; and

(b) assessments that are selected ensure that results accurately reflect the child's aptitude or achievement level.

(6) Public agencies in New Mexico shall devote particular attention to the foregoing requirements in light of the state's cultural and linguistic diversity. Persons assessing culturally or linguistically diverse children shall consult appropriate professional standards to ensure that their evaluations are not discriminatory and should include appropriate references to such standards and concerns in their written reports.

F. Eligibility determinations.

(1) General rules regarding eligibility determinations

(a) Upon completing the administration of tests and other evaluation materials, a group of qualified professionals and the parent of the child must determine whether the child is a child with a disability, as defined in 34 CFR Sec. 300.8 and Paragraph (2) of Subsection B of 6.31.2.7 NMAC. The determination shall be made in compliance with all applicable requirements of 34 CFR Sec. 300.306 and these or other department rules and standards and, for a child suspected of having a specific learning disability, in compliance with the additional procedures of 34 CFR Secs. 300.307-300.311, and these or other department rules, policies and standards.

(b) The public agency must provide a copy of the evaluation report and the documentation of determination of eligibility to the parent.

(2) Optional use of developmentally delayed classification for children aged 3 through 9

(a) The developmentally delayed classification may be used at the option of individual local education agencies but may only be used for children who do not qualify for special education under any other disability category.

(b) Children who are classified as developmentally delayed must be reevaluated during the school year in which they turn 9 and will no longer be eligible in this category when they become 10. A student who does not qualify under any other available category at age 10 will no longer be eligible for special education and related services.

[6.31.2.10 NMAC - Rp, 6.31.2.10 NMAC, 6/29/07; A, 12/31/09]

6.31.2.11 EDUCATIONAL SERVICES FOR CHILDREN WITH DISABILITIES:

A. Preschool programs for children aged 2 through 5.

(1) Each public agency shall ensure that a free appropriate public education is available for each preschool child with a disability within its educational jurisdiction no later than the child's third birthday and that an individualized education program (IEP) under Part B or an individual family services plan (IFSP) under Part C of the IDEA is in effect by that date in compliance with 34 CFR Secs. 300.101, 300.124 and 300.323(b).

(2) A child who will turn three at any time during the school year who is determined eligible may enroll in a Part B preschool program at the beginning of the school year if the parent so chooses, whether or not the child has previously been receiving Part C services.

(3) To ensure effective transitioning from IDEA Part C programs to IDEA Part B programs, each public agency must conduct a full and individual evaluation, at no cost to the parent, and in compliance with requirements of 34 CFR Secs. 300.300, 300.301, 300.302, 300.304 and 300.305 and other department rules and standards before the initial provision of Part B special education and related services to a child with a disability.

[~~**(3)**~~]**(4)** Each public agency shall develop and implement appropriate policies and procedures to ensure a smooth and effective transition from Part C to Part B programs for preschool children with disabilities within the agency's educational jurisdiction, in compliance with 34 CFR Sec. 300.124. Each LEA and other public agencies as appropriate shall make reasonable efforts to establish productive working relations with local Part C programs and when given reasonable notice shall participate in the ninety day transition planning conferences arranged by local Part C providers.

[~~**(4)**~~]**(5)** In particular:

(a) Each LEA shall survey Part C programs within its educational jurisdiction in its child find efforts to identify children who will be eligible to enter the LEA's Part B preschool program in future years.

(b) Each LEA shall promote parent and family involvement in transition planning with Part C programs, community programs and related services providers at least six months before the child is eligible to enter the LEA's Part B preschool program.

(c) Each LEA shall establish and implement procedures to support successful transitions including parent training, professional development for special educators and general educators, and student and parent self-advocacy training and education.

(d) Each LEA shall assist parents in becoming their child's advocates as the child makes the transition through systems.

(e) Each LEA shall participate in transition planning conferences arranged by the designated Part C lead agency no less than 90 days prior to the anticipated transition or the child's third birthday, whichever occurs first, to facilitate informed choices for all families.

(f) Each LEA shall designate a team including parents and qualified professionals to review existing evaluation data for each child entering the LEA's preschool program in compliance with 34 CFR Sec. 300.305, and based on that review to identify what additional data, if any, are needed to determine the child's eligibility for Part B services or develop an appropriate program.

(g) Each LEA shall initiate a meeting to develop an eligible child's IFSP, IEP or IFSP-IEP, in accordance with 34 CFR Sec. 300.323, no later than 15 days prior to the first day of the school year of the LEA where the child is enrolled or no later than 15 days prior to the child's entry into Part B preschool services if the transition process is initiated after the start of the school year, whichever is later, to ensure uninterrupted services. This IFSP, IEP, or IFSP-IEP will be developed by a team constituted in compliance with 34 CFR Sec. 300.321 that includes parents and appropriate early intervention providers who are knowledgeable about the child.

(h) In compliance with 34 CFR Sec. 300.101(b)(2), if a child's birthday occurs during the summer, the child's IEP team shall determine the date when services under the IEP or IFSP will begin.

(i) Each public agency shall develop policies and procedures to ensure a successful transition from Part B preschool for children with disabilities who are eligible for continued services in pre-kindergarten and kindergarten.

B. Individualized education programs (IEPs).

(1) Except as provided in 34 CFR Secs. 300.130-300.144 for children enrolled by their parents in private schools, each public agency (1) shall develop, implement, review and revise an IEP in compliance with all applicable requirements of 34 CFR Secs. 300.320-300.328 and these or other department rules and standards for each child with a disability (within its educational jurisdiction); and (2) shall ensure that an IEP is developed, implemented, reviewed and revised in compliance with all applicable requirements of 34 CFR Sec. 300.320-300.328, and these or other department rules and standards for each child with a disability who is placed in or referred to a private school or facility by the public agency.

(2) Each IEP or amendment shall be developed at a properly convened IEP meeting for which the public agency has provided the parent and, as appropriate, the child, with proper advance notice pursuant to 34 CFR Sec. 300.322 and Paragraph (1) of Subsection D of 6.31.2.13 NMAC and at which the parent and, as appropriate, the child have been afforded the opportunity to participate as members of the IEP team pursuant to 34 CFR Secs. 300.321, 300.322 and 300.501(b) and (c) and Subsection C of 6.31.2.13 NMAC.

(3) Except as provided in 34 CFR Sec. 300.324(a)(4), each IEP shall include the signature and position of each member of the IEP team and other participants in the IEP meeting to document their attendance. Written notice of actions proposed or refused by the public agency shall also be provided in compliance with 34 CFR Sec. 300.503 and Paragraph (2) of Subsection D of 6.31.2.13 NMAC and shall be provided at the close of the IEP meeting. Informed written parental consent must also be obtained for actions for which consent is required under 34 CFR Sec. 300.300 and Subsection F of 6.31.2.13 NMAC. An amended IEP does not take the place of the annual IEP conducted pursuant to CFR Sec. 300.324(a)(4) which requires that members of a child's IEP team must be informed of any changes made to the IEP without a meeting.

(4) Agreement to modify IEP meeting requirement.

(a) In making changes to a child's IEP after the annual IEP team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP team meeting for the purposes of making those changes and instead may develop a written document to amend or modify the child's current IEP.

(b) If changes are made to the child's IEP in accordance with subparagraph (4)(a) of this paragraph, the public agency must ensure that the child's IEP team is informed of those changes.

C. Least restrictive environment.

(1) Except as provided in 34 CFR Sec. 300.324(d) and Subsection K of 6.31.2.11 NMAC for children with disabilities who are convicted as adults under state law and incarcerated in adult prisons, all educational placements and services for children with disabilities must be provided in the least restrictive environment that is appropriate to each child's needs in compliance with 34 CFR Secs. 300.114-300.120.

(2) In determining the least restrictive environment for each child's needs, public agencies and their IEP teams shall ensure that the following requirements are met.

(a) The requirements of 34 CFR Sec. 300.114(a)(2) for each public agency to ensure that to the maximum extent appropriate, children with disabilities, including children in public or private

institutions or other care facilities, are educated with children who are nondisabled, and that special classes, separate schooling or other removal of children with disabilities from the general educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(b) The required continuum of alternative placements as specified in 34 CFR Sec. 300.115.

(c) The requirement of 34 CFR Sec. 300.116(c) that each child with a disability be educated in the school that he or she would attend if nondisabled unless the child's IEP requires some other arrangement.

(d) The requirement of 34 CFR Sec. 300.116(e) that a child with a disability not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

(e) The requirements of 34 CFR Sec. 300.320(a)(4) that the IEP for each child with a disability include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child to be involved and progress in the general curriculum and to participate in extracurricular and other nonacademic activities with nondisabled children.

(f) The requirement of 34 CFR Sec. 300.324(a)(3) that the regular education teacher of a child with a disability, as a member of the IEP team, must assist in determining the supplementary aids and services, program modifications or supports for school personnel that will be provided for the child in compliance with Sec. 300.320(a)(4).

(g) The requirement of 34 CFR Sec. 300.320(a)(5) that the IEP include an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and the activities described in Sec. 300.320(a)(4) and 300.117.

(h) The requirements of 34 CFR Sec. 300.503 that a public agency give the parents written notice a reasonable time before the agency proposes or refuses to initiate or change the educational placement of the child or the provision of FAPE to the child and that the notice include a description of any other options considered and the reasons why those options were rejected.

(i) The requirement of 34 CFR Sec. 300.120 that the department carry out activities to ensure that Sec. 300.114 is implemented by each agency and that, if there is evidence that a public agency makes placements that are inconsistent with Sec. 300.114, the department must review the public agency's justification for its actions and assist in planning and implementing any necessary corrective action.

D. Performance goals and indicators. Pursuant to the requirements of 34 CFR Sec. 300.157(a), the content standards and benchmarks from the department's Standards for Excellence [~~(6.30.2 NMAC)~~] (Chapter 29 of Title 6 of the NMAC) for all children attending public schools and state-supported educational programs in New Mexico shall provide the basic performance goals and indicators for children with disabilities in the general education curriculum. The IEP academic goals must align with the New Mexico content standards and benchmarks, including the expanded performance standards for students with significant cognitive disabilities, however, functional goals do not have to align with the standards and benchmarks. Unless waivers or modifications covering individual public agencies' programs have been allowed by the department or the secretary of education, the general education curriculum and the content standards and benchmarks shall only be adapted to the extent necessary to meet the needs of individual children with disabilities as determined by IEP teams in individual cases.

E. Participation in statewide and district-wide assessments. Each local educational agency and other public agencies when applicable shall include all children with disabilities in all statewide and district-wide assessment programs. Each public agency shall collect and report performance results in compliance with the requirements of 34 CFR Sec. 300.157 and Sec. 1111(h) of the Elementary and Secondary Education Act, and any additional requirements established by the department. Students with disabilities may participate:

(1) in the appropriate general assessment in the same manner as their nondisabled peers; this may include the use of adaptations that are deemed appropriate for all students by the department; or

(2) in the appropriate general assessment with appropriate accommodations in administration if necessary; public agencies shall use the current guidance from the department about accommodations as specified in the student's IEP; or

(3) in alternate assessments for the small number of students for whom alternate assessments are appropriate under the department's established participation criteria; the IEP team must agree and document that the student is eligible for participation in an alternate assessment based on alternate achievement standards according to 34 CFR Sec. 300.320(a)(6).

F. Behavioral management and discipline.

(1) Behavioral planning in the IEP. Pursuant to 34 CFR Sec. 324(a)(2)(i), the IEP team for a child with a disability whose behavior impedes his or her learning or that of others shall consider, if appropriate, strategies to address that behavior, including the development of behavioral goals and objectives and the use of positive behavioral interventions, strategies and supports to be used in pursuit of those goals and objectives. Public agencies are strongly encouraged to conduct functional behavioral assessments (FBAs) and integrate behavioral intervention plans (BIPs) into the IEPs for students who exhibit problem behaviors well before the behaviors result in proposed disciplinary actions for which FBAs and BIPs are required under the federal regulations.

(2) Suspensions, expulsions and disciplinary changes of placement. Suspensions, expulsions and other disciplinary changes of placement for children with disabilities shall be carried out in compliance with all applicable requirements of 34 CFR Secs. 300.530-300.536, and these or other department rules and standards, including particularly 6.11.2.11 NMAC, governing interim disciplinary placements and long-term suspensions or expulsions of students with disabilities.

(3) FAPE for children removed from current placement for more than 10 school days in a school year. FAPE shall be provided in compliance with all applicable requirements of 34 CFR Sec. 300.530(d) and these or other department rules and standards for all children with disabilities who have been removed from their current educational placements for disciplinary reasons for more than 10 school days during a school year, as defined in 34 CFR Sec. 300.536.

(4) LEAs must keep an accurate accounting of suspension and expulsion rates for children with disabilities as compared to children without disabilities to ensure that children with disabilities are not being expelled or suspended at a significantly higher rate than children without disabilities.

G. Graduation planning and post-secondary transitions.

(1) The IEP for each child with a disability in grades 8 through 12 is developed, implemented and monitored in compliance with all applicable requirements of the department's Standards for Excellence, [~~6.30.2 NMAC~~] (Chapter 29 of Title 6 of the NMAC), and these or other department rules and standards. The graduation plan shall be integrated into the transition planning and services provided in compliance with 34 CFR Secs. 300.320(b), 300.324(c).

(a) Graduation plans must include the course of study, projected date of graduation and if the child is not on target

for the graduation plan, the strategies and responsibilities of the public agency, child and family must be identified in the IEP.

(b) Graduation options for children with disabilities at [~~Paragraph (9) of Subsection J of 6.30.2.10 NMAC~~] Paragraph (13) of Subsection J of 6.29.1.9 NMAC must align with state standards with benchmarks when appropriate.

(c) An alternative degree that does not fully align with the state's academic standards, such as a certificate or general educational development credential (GED), does not end a child's right to FAPE pursuant to 34 CFR Sec. 300.102(a)(3).

(2) Appropriate post-secondary transition planning for children with disabilities is essential. Public agencies shall integrate transition planning into the IEP process pursuant to 34 CFR Secs. 300.320(b), 300.324(c) and shall establish and implement appropriate policies, procedures, programs and services to promote successful post-secondary transitions for children with disabilities. Transition services for students 14-21 include the following.

(a) Transition services are a coordinated set of activities for a child with a disability that emphasizes special education and related services designed to meet unique needs and prepare them for future education, employment and independent living.

(b) Transition services are designed to be within a results oriented process that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living or community participation.

(c) Transition services must be based on the individual child's needs, taking into account the child's strengths, preferences and interests and includes:

(i) instruction;

(ii) related services;

(iii) community experiences;

(iv) the development of employment and other post-school adult living objectives; and

(v) when appropriate, acquisition of daily living skills and the provision of a functional vocational evaluation.

(d) Transition services for children with disabilities may be considered special education, if provided as individually designed instruction, aligned with the state standards with benchmarks, or related service, if required to assist a child with a disability to benefit from special education as provided in 34 CFR Sec. 300.43.

(3) State rules require the development of measurable post-school goals beginning not later than the first IEP to be in effect when the child turns 14, or younger, if determined appropriate by the IEP team, and updated annually thereafter. Pursuant to 34 CFR Sec. 300.320(b), the IEP must include:

(a) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment and where appropriate, independent living skills;

(b) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(c) [~~beginning not later than one year before the child reaches the age of majority under state law,~~] a statement that the child has been informed of the child's rights under this title, if any, that will transfer to the child on reaching the age of majority.

(4) Measurable post school goals refer to goals the child seeks to achieve after high school graduation. The goals themselves must be measurable while the child is still in high school. In addition, the nature of these goals will be different depending on the needs, abilities and wishes of each individual child.

(5) For a child whose eligibility terminates due to graduation from secondary school with a regular diploma or due to reaching his twenty-second birthday, the public agency must provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's post-secondary goals pursuant to 34 CFR Sec. 300.305(e)(3).

(6) Students eligible for special education services are entitled to a FAPE through age 21. If a student turns 22 during the school year, that student shall be allowed to complete the school year and shall continue to receive special education and related services during that school year. If the student turns 22 prior to [~~September 1 of the school year,~~] the first day of the school year, the student is no longer eligible to receive special education and related services.

H. Transfers and transmittals. When IEPs must be in effect.

(1) IEPs for children who transfer public agencies in the same state. If a child with a disability (who had an IEP that was in effect in a previous public agency in New Mexico) transfers to a new public agency in New Mexico, and enrolls in a new school within the same school year the new public agency must provide FAPE to the child. The IEP must include services comparable to those described in the child's IEP from the previous public agency, until the new public agency either:

(a) adopts and implements the child's IEP from the previous public agency; or

(b) develops and implements a new IEP that meets the applicable requirements in 34 CFR Secs. 300.320 through 300.324.

(2) IEPs for children who transfer from another state. If a child with a disability (who had an IEP that was in effect in a previous public agency in another state) transfers to a public agency in New Mexico, and enrolls in a new school within the same school year, the new public agency must provide the child with FAPE. The IEP must include services comparable to those described in the child's IEP from the previous agency, until the new public agency:

(a) conducts an evaluation pursuant to 34 CFR Secs. 300.304 through 300.306 (if determined to be necessary by the new public agency); and

(b) develops and implements a new IEP, if appropriate, that meets the applicable requirements in 34 CFR Secs. 300.320 through 300.324.

(3) Transmittal records. To facilitate the transition for a child described in Paragraphs (1) and (2) of this section:

(a) the new public agency in which the child enrolls must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled; and

(b) the previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency.

I. Children in charter schools.

(1) Pursuant to 34 CFR Sec. 300.209, children with disabilities who attend public charter schools and their parents retain all rights under Part B of IDEA.

(2) Charter schools that are public schools of the LEA:

(a) the LEA must serve children with disabilities attending those charter schools in the same manner as the LEA serves children with disabilities in its other schools, including providing supplementary and related services on site at the charter school to the same extent to which the LEA has a policy or practice of providing such services on the site to its other public schools; and

(b) the LEA must provide funds under Part B of IDEA to those charter schools on the same basis as the LEA provides funds to the LEA's other public schools, including proportional distribution based on relative enrollment of children with disabilities, and at the same time as the LEA distributes other federal funds to the LEA's other public

schools, consistent with the state's charter school law; and

(c) if the public charter school is a school of an LEA that receives funding under 34 CFR Sec. 300.705 and includes other public schools:

(i) the LEA is responsible for ensuring that the requirements of this part are met, unless state law assigns that responsibility to some other entity; and

(ii) the LEA must meet the requirements of Paragraph (2) of this subsection.

(3) Public charter schools that are LEAs. If the public charter school is an LEA, consistent with 34 CFR Sec. 300.28, that receives funding under 34 CFR Sec. 300.705, that charter school is responsible for ensuring that the requirements of this part are met, unless state law assigns that responsibility to some other entity. Charter schools who are LEAs authorized under the public education commission must satisfy child find requirements for children enrolled in the charter school.

(4) Public charter schools that are not an LEA or a school that is part of an LEA.

(a) If the public charter school is not an LEA receiving funding under 34 CFR Sec. 300.705, or a school that is part of an LEA receiving funding under 34 CFR Sec. 300.705, the department is responsible for ensuring that the requirements of this part are met.

(b) Subparagraph (a) of this paragraph does not preclude the governor from assigning initial responsibility for ensuring the requirements of this part are met to another entity, however, the department must maintain the ultimate responsibility for ensuring compliance with this part, consistent with 34 CFR Sec. 300.149.

J. Children in state-supported educational programs.

(1) Children placed or referred by other public agencies.

(a) Applicability. The rules in this Paragraph (1) of Subsection J apply to children with disabilities who are being considered for placement in a state-supported educational program or facility by another public agency as a means of providing special education and related services.

(b) Responsibility. Each public agency shall ensure that a child with a disability who is being considered for placement in a state-supported educational program by another public agency has all the rights of a child with a disability who is served by any other public agency, including being provided special education and related services:

(i) in conformance with an IEP;

(ii) at no cost to the child's parents; and

(iii) at a school or facility that is accredited by the department or licensed by the New Mexico department of health.

(c) Service delivery. With informed parent consent pursuant to 34 CFR Sec. 300.300 and Subsection F of 6.31.2.13 NMAC, and pursuant to the procedures in 34 CFR Sec. 300.304 and Subsection D of 6.31.2.10 NMAC, the state-supported program may conduct such additional evaluations and gather such additional information as it considers necessary to assist the IEP team in making the placement decision. The referring public agency and the receiving state-supported educational program shall be jointly responsible for developing IEPs and ensuring that the child receives a free appropriate public education.

(d) Joint IEPs and interagency agreements. Responsibility for services for children placed in or referred to state-supported educational programs shall be defined by a jointly agreed upon IEP or other written agreement between the referring public agency and the state-supported program.

(e) Annual review. At least annually, the referring public agency, the state-supported educational program and the parent shall jointly review the child's IEP and revise it as the joint IEP team deems appropriate.

(2) Children enrolled in state-supported educational programs by parents or other public authorities. A state-supported educational program that accepts a child with a disability at the request of a parent or upon the request or order of a noneducational public authority, and without appropriate participation by the public agency that has primary responsibility for serving the child, assumes all responsibility for ensuring the provision of FAPE. The child's LEA or another public agency with educational jurisdiction may agree to share the responsibility pursuant to a joint IEP or other written agreement between the state-supported program, the other agency and, if appropriate, the parent.

K. Children in detention and correctional facilities.

(1) If a child with a disability is placed in a juvenile or adult detention or correctional facility, the facility must provide the child with FAPE after the facility learns that the child had been eligible for special education and related services in the last educational placement prior to incarceration or otherwise determines that the child is eligible.

(2) Juvenile or adult detention or correctional facilities must take reasonable steps to promptly obtain needed educational records from a child's last known school or educational facility. Record requests and transfers are subject to the regulations under the Family Educational Rights and Privacy Act (FERPA) at 34 CFR Part 99 and the provisions of Paragraph (3) of Subsection L of 6.31.2.13 NMAC. The educational program of a juvenile or adult detention or correctional facility is an educational agency for purposes of the FERPA.

(a) The previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the records request from the juvenile correctional facilities.

(b) To assist juvenile correctional facilities in providing FAPE for children entering the facility during the summer months, districts must provide summer emergency contact information of a person who has access to special education records, to the state's superintendent of juvenile justice services division of the children, youth and family department.

(3) A detention or correctional facility that is unable to obtain adequate records from other agencies, the child or the parents within a reasonable time after the child arrives at the facility, shall evaluate the child who is known or suspected to be a child with a disability as provided in Subsection F of 6.31.2.10 NMAC and develop an IEP for an eligible child without undue delay.

(4) FAPE for eligible students in juvenile or adult detention or correctional facilities shall be made available in programs that are suited to the security requirements of each facility and eligible student. The provisions of 34 CFR Sec. 300.324(d) apply to IEPs for students with disabilities who are convicted as adults under state law and incarcerated in adult prisons.

(5) A state-supported educational program that serves a juvenile or adult detention or correctional facility shall be responsible for ensuring that FAPE is provided to eligible children in that facility.

(6) The local school district in which a detention or correctional facility is located (that is not served by a state-supported educational program) shall be responsible for ensuring that FAPE is made available to eligible children in that facility. A child's LEA of residence or another public agency with educational jurisdiction may agree to share the responsibility pursuant to a written agreement between or among the agencies involved.

(7) Children with disabilities who are detained or incarcerated in detention or correctional facilities are wards of the state and may have surrogate parents appointed pursuant to 34 CFR Sec. 300.519 and Subsection J of 6.31.2.13 NMAC to protect their IDEA rights while in state custody.

(8) The public agency that administers the educational program in a juvenile or adult detention or correctional facility shall ensure that surrogate parents are appointed in cases where no parent

as defined in 34 CFR Sec. 300.30(a) and Paragraph (14) of Subsection B of 6.31.2.7 NMAC is reasonably available or willing to make the educational decisions required for children with disabilities who are housed in that facility.

(9) Children placed in juvenile or adult detention or correctional facilities must be provided learning opportunities and instruction that meet the state standards with benchmarks.

L. Children in private schools or facilities.

(1) Children enrolled by parents in private schools or facilities.

(a) Parentally placed private school children with disabilities means children with disabilities enrolled by their parents in private schools, including religious schools or facilities, such as residential treatment centers, day treatment centers, hospitals, mental health institutions, other than children with disabilities who are covered under 34 CFR Secs. 300.145 through 300.147.

(b) A school district in which a private school or facility is located shall not be considered the resident school district of a school-age person if residency is based solely on the school-age person's enrollment at the facility and the school-age person would not otherwise be considered a resident of the state.

[~~**(b)**~~]**(c)** Each LEA must locate, identify and evaluate all children with disabilities who are enrolled by their parents in private schools, including religious elementary schools and secondary schools located in the education jurisdiction of the LEA, in accordance with 34 CFR Secs. 300.131 and 300.111.

[~~**(c)**~~]**(d)** Each public agency must develop a "service plan" that describes the special education and related services the LEA will provide to a parentally placed child with a disability enrolled in a private school who has been designated to receive services, including the location of the services and any transportation necessary, consistent with 34 CFR Sec. 300.132 and that is developed and implemented in accordance with 34 CFR Secs. 300.137 through 300.139. The provision applies only to private schools and not to private facilities where an IEP must be in place.

[~~**(d)**~~]**(e)** Pursuant to 34 CFR Sec. 300.133, each LEA is obligated to spend a [~~portion~~] proportionate amount of its federal IDEA Part B funds to assist private school children with disabilities placed in a private school or private facility by a parent who assumes responsibility for such placement. In doing so, LEAs must use the formula for calculating proportionate amount and annual count of parentally placed private school children with disabilities in accordance with 34 CFR Sec. 300.133. The public agency shall not use IDEA funds to benefit private schools as provided in 34 CFR Sec. 300.141. The state is not required to distribute state funds for such school-age persons. Furthermore, the Constitution and laws of New Mexico prohibit public agencies from spending state funds to assist private schools or facilities or their students.

[~~**(e)**~~]**(f)** No parentally placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. Pursuant to 34 CFR Sec. 300.137, the LEA must make the final decisions with respect to the services to be provided to eligible parentally placed private school children with disabilities.

[~~**(f)**~~]**(g)** Pursuant to 34 CFR Secs. 300.134 and 300.135, LEAs must ensure timely and meaningful consultation with private school representatives and representatives of parents of parentally placed private school children with disabilities. If the LEA fails to engage in meaningful and timely consultation or did not give due consideration to a request from private school officials, private school officials have the right to submit a complaint to the department. The private school official and the LEA must follow the procedures outlined in 34 CFR Sec. 300.136.

[~~**(g)**~~]**(h)** Pursuant to 34 CFR Secs. 300.140, the due process provisions of Subsection I of 6.31.2.13 NMAC are not applicable except for child find complaints which must be filed in compliance with 34 CFR Sec. 300.140(b). Any complaint that the department or any LEA has failed to meet the requirements in 34 CFR Secs, 300.132 through 300.135 and 300.137 through 300.144 must be filed in accordance with the provisions described in Subsection H of 6.31.2.13 NMAC.

(2) Children placed in or referred to private schools or facilities by New Mexico public agencies. Each public agency shall ensure that a child with a disability who is placed in or referred to a private school or facility by the agency as a means of providing special education and related services is provided services in compliance with the requirements of 34 CFR Secs. 300.146 and 300.147. Such a child has all the rights of a child with a disability who is served by a public agency.

[~~**(3)** Children placed in private schools or facilities by other public authorities. Educational decisions involving children with disabilities shall not be made unilaterally and shall not exclude public agencies having educational jurisdiction from the decision-making process. Educational decisions made by other public authorities are not the responsibility of the public agency if the agency has not been appropriately included in the decision-making process. For children placed in private schools or facilities by other public authorities, the financial responsibility will be governed by interagency agreements pursuant to 34 CFR Sec. 300.103. A public authority that places a child with a disability in a private school or facility such as residential treatment centers, day treatment centers, hospitals or mental health institutions, without appropriate participation by the responsible public agency or agencies becomes financially responsible for providing the child with FAPE unless a public agency with educational jurisdiction agrees to assume all or part of that responsibility.~~]

(3) Children placed in or referred to private schools or facilities by New Mexico public non-educational agencies. For a qualified student or school-age person in need of special education placed in a private school or facility by a New Mexico public noneducational agency with custody or control of the qualified student or school-age person or by a New Mexico court of competent jurisdiction, the school district in which the facility is located shall be responsible for the planning and delivery of special education and related services, unless the qualified student's or school-age person's resident school district has an agreement with the facility to provide such services. The district must make reasonable efforts to involve the qualified student or school-age person's resident school district in the IEP process.

(4) Children placed in or referred to private schools or facilities by public noneducational agencies other than New Mexico public agencies. A school district in which a private school or facility is located shall not be considered the resident school district of a school-age person if residency is based solely on the school-age person's enrollment at the facility and the school-age person would not otherwise be considered a resident of the state.

[~~**(4)**~~]**(5)** Children placed in private schools or facilities by parents when FAPE is at issue. The responsibility of a local educational agency to pay for the cost of education for a child with a disability who is placed in a private school or facility such as residential treatment centers, day treatment centers, hospitals or mental health institutions, by parents who allege that the LEA failed to offer FAPE is governed by the requirements of 34 CFR Sec. 300.148. Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures of Subsection I of 6.31.2.13 NMAC.

(6) If not otherwise governed by this rule, the department will determine which school district is responsible for the cost of educating a qualified student in need

of special education who has been placed in a private school or facility outside the qualified student's resident school district in accordance with the following procedures.

(a) The receiving school district must notify the SEB of the department in writing no later than thirty (30) days after the receiving school district receives notice of the placement. The notice, as described on the department's website, must include: name of student, date of birth of student, date of placement, information regarding the qualified student's resident school district, documentation of placement, including student's IEP, cost of placement, and any other information deemed relevant by the SEB. The receiving school district must provide a copy of the notice to the district identified as the student's resident district.

(b) The district identified as the student's resident district may provide any additional information it deems relevant. Such additional information must be provided no later than 15 days after the resident district receives its copy of the notice described in Subparagraph (a) of this paragraph.

(c) No later than 60 days after its receipt of the notice described in Subparagraph (a) of this paragraph, the SEB will issue its determination as to which school district is responsible for the cost of educating the student, together with the amount of any reasonable reimbursement owed to the receiving school district. The SEB may extend the 60 day timeline for good cause.

(7) The department will assign a unique student identifier for school-age persons who have service plans, including those who are not residents of the state but who are attending private residential treatment facilities in the state.

[~~(5)~~]**(8)** Children schooled at home. Each LEA shall locate, evaluate and determine the eligibility of children with disabilities who are schooled at home pursuant to Secs. 22-2-2(H) NMSA 1978.

[6.31.2.11 NMAC - Rp, 6.31.2.11 NMAC, 6/29/07; A, 12/31/09]

6.31.2.12 EDUCATIONAL SERVICES FOR GIFTED CHILDREN:

A. Gifted child defined. As used in 6.31.2.12 NMAC, "gifted child" means a school-age person as defined in Sec. 22-13-6(D) NMSA 1978 whose intellectual ability paired with subject matter aptitude/ achievement, creativity/divergent thinking, or problem-solving/critical thinking meets the eligibility criteria in 6.31.2.12 NMAC and for whom a properly constituted IEP team determines that special education services are required to meet the child's educational needs.

B. Qualifying areas defined.

(1) "Intellectual ability" means a score two standard deviations above the mean as defined by the test author on a properly administered intelligence measure. The test administrator must also consider the standard error of measure (SEM) in the determination of whether or not criteria have been met in this area.

(2) "Subject matter aptitude/ achievement" means superior academic performance on a total subject area score on a standardized measure, or as documented by information from other sources as specified in Paragraph (2) of Subsection C of 6.31.2.12 NMAC.

(3) "Creativity/divergent thinking" means outstanding performance on a test of creativity/ divergent thinking, or in creativity/divergent thinking as documented by information from other sources as specified in Paragraph (2) of Subsection C of 6.31.2.12 NMAC.

(4) "Problem-solving/critical thinking" means outstanding performance on a test of problem-solving/critical thinking, or in problem-solving/critical thinking as documented by information from other sources as specified in Paragraph (2) of Subsection B of 6.31.2.12 NMAC.

(5) For students with "factors" as specified in Paragraph (2) of Subsection E of 6.31.2.12 NMAC, the impact of these factors shall be documented and alternative methods will be used to determine the student's eligibility.

C. Evaluation procedures for gifted children.

(1) Each district must establish a child find procedure that includes a screening and referral process for students in public school who may be gifted.

(2) Analysis of data. The identification of a student as gifted shall include documentation and analysis of data from multiple sources for subject matter aptitude/achievement, creativity/divergent thinking, and problem solving/critical thinking including:

(a) standardized measures, as specified in Subsection B of 6.31.2.12 NMAC, and

(b) information regarding the child's abilities from other sources, such as collections of work, audio/visual tapes, judgment of work by qualified individuals knowledgeable about the child's performance (e.g., artists, musicians, poets and historians, etc.), interviews, or observations.

(3) The child's ability shall be assessed in all four areas specified in Subsection B of 6.31.2.12 NMAC.

D. Standard method for identification. Under the standard method for identification, students will be evaluated in the areas of intellectual ability, subject matter aptitude/achievement, creativity/ divergent thinking, and problem solving/ critical thinking. A student who meets the criteria established in Subsection B of 6.31.2.12 for intellectual ability and also meets the criteria in one or more of the other areas will qualify for consideration of service. A properly constituted IEP team, including someone who has knowledge of gifted education, will determine if special education services are required to meet the child's educational needs.

E. Alternative method for identification.

(1) A district may apply to the public education department to utilize an alternative protocol for all students. Eligibility of a student will then be determined by a properly administered and collected, department-approved alternative protocol designed to evaluate a student's intellectual ability, subject matter aptitude/ achievement, creativity/divergent thinking, and problem solving /critical thinking.

(2) If an accurate assessment of a child's ability may be affected by factors including cultural background, linguistic background, socioeconomic status or disability condition(s), an alternative protocol as described in Paragraph (1) of Subsection E of 6.31.2.12 NMAC will be used in all districts to determine the student's eligibility. The impact of these factors shall be documented by the person(s) administering the alternative protocol.

(3) The student assistance team (SAT) process requirements will not apply to students who meet the criteria established by the alternative protocols. When a student's overall demonstrated abilities are very superior (as defined by the alternative protocol author), a properly constituted IEP team, including someone who has knowledge of gifted education, will determine if special education services are required to meet the child's educational needs.

F. Applicability of rules to gifted children.

(1) All definitions, policies, procedures, assurances, procedural safeguards and services identified in 6.31.2 NMAC for school-aged children with disabilities apply to school-aged gifted children within the educational jurisdiction of each local school district, including children in charter schools within the district, except:

(a) the requirements of 6.31.2.8 NMAC through 6.31.2.10 NMAC;

(b) [~~and~~] Subsections J, K and L of 6.31.2.11 NMAC regarding child find, evaluations and services for private school children with disabilities, children with disabilities in state-supported educational programs, children with disabilities in detention and correctional facilities and children with disabilities who are schooled at home;

[~~(b)~~]**(c)** the requirements of 34

CFR Secs. 300.530-300.536, Subsection I of 6.31.2.13 NMAC [~~and 6.11.2.10~~] and 6.11.2.11 NMAC regarding disciplinary changes of placement for children with disabilities; and

[~~(c)~~]**(d)** the requirements of 34 CFR Secs. 300.43, 300.320(b) and 6.31.2.11(G)(2) regarding transition planning. Students identified as gifted must meet the requirements at Subsection B of 22-13-1.1 NMSA 1978, which is the next step plan for students without disabilities.

(2) Assuming appropriate evaluations, a child may properly be determined to be both gifted and a child with a disability and be entitled to a free appropriate public education for both reasons. The rules in this section 6.31.2.12 NMAC apply only to gifted children.

(3) Nothing in these rules shall preclude a school district or a charter school within a district from offering additional gifted programs for children who fail to meet the eligibility criteria. However, the state shall only provide funds under Section 22-8-21 NMSA 1978 for department approved gifted programs for those students who meet the established criteria.

G. Advisory committees.

(1) Each school district offering a gifted education program shall create one or more advisory committees of parents, community members, students and school staff members. The school district may create as many advisory committees as there are high schools in the district or may create a district-wide advisory committee.

(2) The membership of each advisory committee shall reflect the cultural diversity of the enrollment of the school district or the schools the committee advises. Representation from all schools the committee is advising is required.

(3) Purposes. The advisory committee shall:

(a) regularly review the goals and priorities of the gifted program, including the operational plans for student identification, evaluation, placement and service delivery;

(b) demonstrate support for the gifted program;

(c) provide information regarding the impact that cultural background, linguistic background, socioeconomic status and disability conditions within the community may have on the child referral, identification, evaluation and service delivery processes;

(d) advocate for children who have been under-represented in gifted services due to cultural or linguistic background, socioeconomic status, or disability conditions, in order to ensure that these children have equal opportunities to benefit from services for gifted students; and

(e) meet three or more times per year at regular intervals.

(4) Formal documentation of committee membership, activities and recommendations shall be maintained. If proposals are made by the committee to address any of the purposes as listed in Subsection G(3) of 6.31.2.12 NMAC, they shall be submitted in writing to the district administration. The administration shall respond in writing to any proposed actions before the next scheduled meeting of the advisory committee.

[6.31.2.12 NMAC - Rp, 6.31.2.12 NMAC, 6/29/07; A, 12/31/09]

6.31.2.13 ADDITIONAL RIGHTS OF PARENTS, STUDENTS AND PUBLIC AGENCIES:

A. General responsibilities of public agencies. Each public agency shall establish, implement and maintain procedural safeguards that meet the requirements of 34 CFR Secs. 300.500-300.536, and all other applicable requirements of these or other department rules and standards.

B. Examination of records. Each public agency shall afford the parents of a child with a disability an opportunity to inspect and review all education records related to the child in compliance with 34 CFR Secs. 300.501(a), 300.613-300.620, 34 CFR Part 99, and any other applicable requirements of these or other department rules and standards.

C. Parent and student participation in meetings. Each public agency shall afford the parents of a child with a disability and, as appropriate, the child, an opportunity to participate in meetings with respect to the identification, evaluation and educational placement or the provision of FAPE to the child, in compliance with 34 CFR Secs. 300.322, 300.501(b) and (c), and any other applicable requirements of these or other department rules and standards.

D. Notice requirements.

(1) Notice of meetings. Each public agency shall provide the parents of a child with a disability with advance written notice that complies with 34 CFR Sec. 300.322 for IEP meetings and any other meetings in which the parent has a right to participate pursuant to 34 CFR Sec. 300.501.

(2) Notice of agency actions proposed or refused. A public agency must give written notice that meets the requirements of 34 CFR Sec. 300.503 to the parents of a child with a disability a reasonable time before the agency proposes or refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE to the child. If the notice relates to a proposed action that also requires parental consent under 34 CFR Sec. 300.300, the agency may give notice at the same time it requests parental consent.

(3) Notice of procedural safeguards. A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents, only one time a school year, except that a copy must be given to the parents, (a) upon initial referral for evaluation; (b) upon receipt of the first state complaint under 34 CFR Secs. 300.151-300.153; (c) upon receipt of the first due process complaint under 34 CFR Sec. 300.507 of the school year; (d) in accordance with the discipline procedures in 34 CFR Sec. 300.530(h); and (e) upon request of the parents. The notice must meet all requirements of 34 CFR Sec. 300.504, including the requirement to inform the parents of their obligation under 34 CFR Sec. 300.148 to notify the public agency if they intend to enroll the child in a private school or facility and seek reimbursement from the public agency. A public agency may place a current copy of the procedural safeguards notice on its internet website if a website exists.

E. Communications in understandable language. Pursuant to 34 CFR Secs. 300.9(a), 300.322(e), 300.503(c) and 300.504(d), each public agency must communicate with parents in understandable language, including the parent's native language or other mode of communication, unless it is clearly not feasible to do so, if necessary for understanding, in IEP meetings, in written notices and in obtaining consent where consent is required.

F. Parental consent.

(1) Informed parental consent as defined in 34 CFR Sec. 300.9 must be obtained in compliance with 34 CFR Sec. 300.300 before (a) conducting an initial evaluation or reevaluation; and (b) initial provision of special education and related services to a child with a disability. Consent for initial evaluation must not be construed as consent for initial provision of special education and related services. If parental consent is not provided for the initial evaluation or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the due process and mediation procedures in Subsection I of 6.31.2.13 NMAC.

(2) Pursuant to 34 CFR Sec. 300.300(d)(1), parental consent is not required before (a) reviewing existing data as part of an evaluation or a reevaluation; or (b) administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

(3) Pursuant to 34 CFR Sec. 300.300(b), if the parents of a child with a disability refuse consent for the initial provision of special education and related services, the public agency may not use the due process and mediation procedures in Subsection I of 6.31.2.13 NMAC in order to

obtain agreement or a ruling that the services may be provided to the child. If the parent refuses consent or fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency will not be considered to be in violation of the requirement to make FAPE available to the child and is not required to convene an IEP team meeting or develop an IEP under 34 CFR Secs. 300.320 and 300.324. All provisions of 34 CFR Sec. 300.300 must be followed with respect to parental consent.

(4) Pursuant to 34 CFR Sec. 300.300(c)(2), informed parental consent need not be obtained for reevaluation if the public agency can demonstrate that it has taken reasonable measures to obtain that consent by using procedures consistent with those in 34 CFR Sec. 300.322(d) and the child's parent has failed to respond.

(5) Pursuant to 34 CFR Sec. 300.300(d)(3), a public agency may not use a parent's refusal to consent to one service or activity for which consent is required to deny the parent or child any other service, benefit or activity of the public agency, except as required by 34 CFR Part 300.

(6) Pursuant to 34 CFR Sec. 300.300(b)(4), parents may revoke consent for the continued provision of all special education and related services for their child. The revocation of consent must be in writing. After providing prior written notice in accordance with 34 CFR Sec. 300.503, the public agency must cease the provision of special education and related services for that child. The public agency may not use the due process and mediation procedures in Subsection I of 6.31.2.13 NMAC in order to obtain agreement or a ruling that services may be provided to the child. The public agency will not be considered to be in violation of the requirement to make FAPE available to the child once consent has been revoked. The public agency will also not be required to convene an IEP team meeting or develop an IEP for the child for further provision of special education and related services.

G. Conflict management and resolution.

(1) Each public agency shall seek to establish and maintain productive working relationships with the parents of each child the agency serves and to deal constructively with disagreements. Toward that end, each public agency is strongly encouraged to provide appropriate training for staff and parents in skills and techniques of conflict prevention and management and dispute resolution, and to utilize an informal dispute resolution method as set forth under Subparagraph (a) of Paragraph (2) of Subsection G of 6.31.2.13 NMAC to resolve disagreements at the local level whenever practicable.

(2) Spectrum of dispute resolution options. To facilitate dispute prevention as well as swift, early conflict resolution whenever possible, the department and the public agency shall ensure that the following range of dispute resolution options is available to parents and public agency personnel.

(a) Informal dispute resolution option. If a disagreement arises between parents and a public agency over a student's IEP or educational program, either the parents or the public agency may convene a new IEP meeting at any time to attempt to resolve their differences at the local level, without state-level intervention.

(b) Third-party assisted intervention. The special education bureau (SEB) of the department will ensure that mediation is available to parents and public agencies who request such third-party assisted intervention before filing a state-level complaint or a request for a due process hearing. The SEB will honor a request for mediation that:

(i) is in writing;

(ii) is submitted to the SEB;

(iii) is a mutual request signed by both parties or their designated representatives;

(iv) includes a statement of the matter(s) in dispute and a description of any previous attempts to resolve these matters at the local level; and

(v) any request that does not contain all of these elements will be declined, with an explanation for the SEB's decision and further guidance, as appropriate.

(c) Formal dispute resolution.

(i) A state-level complaint may be filed with the SEB of the department by the parents of a child, or by another individual or organization on behalf of a child, as described under Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13 NMAC. Once a complaint has been filed, the responding public agency must offer in writing to convene a CAIEP meeting with the parents(s) and other relevant members of the IEP team to address any IEP-related issues raised in the complaint. The parent may accept or decline this offer, or the parties may agree to convene a FIEP meeting or mediation instead, as described under Paragraph (3) of Subsection H of 6.31.2.13 NMAC.

(ii) A request for a due process hearing may be filed by parents or their authorized representative, or by a public agency, as described under Paragraph (5) of Subsection I of 6.31.2.13 NMAC. A resolution session between the parties must be convened by the public agency following a request for a due process hearing, unless the parties agree in writing to waive that option or to convene a FIEP meeting or mediation instead, as described under Paragraph (8) of Subsection I of 6.31.2.13 NMAC.

(d) The Mediation Procedures Act does not apply to mediations conducted under 6.31.2 NMAC.

H. State complaint procedures.

(1) Scope. This Subsection H of 6.31.2.13 NMAC prescribes procedures to be used in filing and processing complaints alleging the failure of the department or a public agency to comply with state or federal laws or regulations governing programs for children with disabilities under the IDEA or with state statutes or regulations governing educational services for gifted children.

(2) Requirements for complaints.

(a) The SEB of the department shall accept and investigate complaints from organizations or individuals that raise issues within the scope of this procedure as defined in the preceding Paragraph (1) of Subsection H of 6.31.2.13 NMAC. The complaint must: (i) be in writing; (ii) be submitted to the SEB (or to the secretary of education, in the case of a complaint against the department); (iii) be signed by the complainant or a designated representative and have the complainant's contact information; (iv) include a statement that the department or a public agency has violated a requirement of an applicable state or federal law or regulation; and (v) contain a statement of the facts on which the allegation of violation is based, and a description of any efforts the complainant has made to resolve the complaint issue(s) with the agency (for a complaint against a public agency). Any complaint that does not contain each of these elements will be declined, with an explanation for the SEB's decision and further guidance, as appropriate.

(b) If the complaint alleges violations with respect to a specific child, the complaint must include the information required by 34 CFR 300.153(b)(4).

(c) The party filing the complaint must forward a copy of the complaint to the public agency serving the child at the same time the party files the complaint with the SEB of the department.

(d) Pursuant to 34 CFR Sec. 300.153(c), the complaint must allege a violation that occurred not more than one year before the date the complaint is received by the SEB in accordance with Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13 NMSAC.

(3) Preliminary meeting.

(a) CAIEP meeting. Upon receipt of a complaint that meets the requirements of Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13 NMAC, the SEB of the department shall acknowledge receipt of the complaint in writing and notify the public agency against which the violation has been alleged. Once a state-level

complaint has been filed, the public agency shall offer in writing to convene a CAIEP meeting to address IEP-related issues raised in the complaint. The parent(s) may accept or decline this offer, or the parties may agree in writing instead to convene a FIEP meeting or mediation, as described in Subparagraph (b) of Paragraph (3) of Subsection H of 6.31.2.13 NMAC. The public agency must (and the parent(s) may) notify the SEB within one business day of agreeing to convene (or not to convene) one of these alternative dispute resolution (ADR) options. If the parties agree to convene a CAIEP meeting, as described at Paragraph D(1) of 6.31.2.7 NMAC, the following requirements apply:

(i) it must take place within 14 days of the date of the SEB's receipt of the complaint;

(ii) it must include the relevant members of the IEP team who have specific knowledge of the facts identified in the complaint; and

(iii) it may not include an attorney of the public agency unless the parent is accompanied by an attorney.

(b) FIEP meeting: mediation. Parties to a state-level complaint may choose to convene a FIEP meeting or mediation instead of a CAIEP meeting. To do so, the public agency must (and the parent may) notify the SEB of the department in writing within 1 business day of reaching their decision to jointly request one of these ADR options. [~~A FIEP meeting or mediation shall be completed not later than 14 days from the date of the SEB's written acknowledgement of the complaint, unless a brief extension is granted by the SEB based on exceptional circumstances.~~] A FIEP meeting or mediation shall be completed not later than 14 days after the assignment of the IEP facilitator or mediator by the SEB, unless a brief extension is granted by the SEB based on exceptional circumstances. Each session in the FIEP or mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the complaint.

(c) Mediation requirements. If the parties choose to use mediation, the following requirements apply.

(i) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings.

(ii) Any mediated agreement must state that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. Any such agreement must also be signed by both the parent and a representative of the agency who has the authority to bind such agency, and shall be enforceable in any state court of competent jurisdiction or in a district court of the United States.

(iii) If a mediated agreement involves IEP-related issues, the agreement must state that the public agency will subsequently convene an IEP meeting to inform the student's service providers of their responsibilities under that agreement, and revise the student's IEP accordingly.

(iv) The mediator shall transmit a copy of the written mediation agreement to each party within 7 days of the meeting at which the agreement was concluded. A mediation agreement involving a claim or issue that later goes to a due process hearing may be received in evidence if the hearing officer rules that part or all of the agreement is relevant to one or more IDEA issues that are properly before the hearing officer for decision.

(v) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.

(vi) Any other requirement provided in 34 CFR 300.506(b) that is not otherwise provided herein.

(4) Complaints and due process hearings on the same issues. Pursuant to 34 CFR Sec. 300.152(c).

(a) The SEB of the department shall set aside any part of a written complaint that is also the subject of a due process hearing under Subsection I of 6.31.2.13 NMAC until the conclusion of the hearing and any civil action. Any issue in the complaint that is not a part of the due process hearing or civil action will be resolved by the SEB as provided in Subsection H of 6.31.2.13 NMAC.

(b) If an issue is raised in a complaint that has previously been decided in a due process hearing involving the same parties, the hearing decision is binding and the SEB must inform the complainant to that effect.

(c) A complaint alleging a public agency's failure to implement a due process decision will be resolved by the SEB as provided in this Subsection H of 6.31.2.13 NMAC.

(5) Complaints against public agencies.

(a) Impartial review. Upon receipt of a complaint that meets the requirements of Paragraph (2) of Subsection H of 6.31.2.13 NMAC above, the SEB of the department shall:

(i) undertake an impartial investigation which shall include complete review of all documentation presented and may include an independent on-site investigation, if determined necessary by the SEB;

(ii) give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(iii) provide the public agency with the opportunity to respond to the allegations in the complaint; and

(iv) review all relevant information and make an independent determination as to whether the public agency is violating a requirement of an applicable state or federal statute or regulation.

(b) Decision. A written decision which includes findings of fact, conclusions, and the reasons for the decision and which addresses each allegation in the complaint shall be issued by the SEB and mailed to the parties within sixty (60) days of receipt of the written complaint, regardless of whether or not the parties agree to convene a CAIEP meeting, a FIEP meeting, or mediation. Such decision shall further include procedures for effective implementation of the final decision, if needed, including technical assistance, negotiations, and if corrective action is required, such action shall be designated and shall include the timeline for correction and the possible consequences for continued noncompliance.

(c) Failure or refusal to comply. If the public agency fails or refuses to comply with the applicable law or regulations, and if the noncompliance or refusal to comply cannot be corrected or avoided by informal means, compliance may be effected by the department by any means authorized by state or federal laws or regulations. The department shall retain jurisdiction over the issue of noncompliance with the law or regulations and shall retain jurisdiction over the implementation of any corrective action required.

(6) Complaints against the department. If the complaint concerns a violation by the department and: is submitted in writing to the secretary of education; is signed by the complainant or a designated representative; includes a statement that the department has violated a requirement of an applicable state or federal law or regulation; contains a statement of facts on which the allegation of violation is based, and otherwise meets the requirements of Paragraph (2) of Subsection H of 6.31.2.13 NMAC, the secretary of education or designee shall appoint an impartial person or impartial persons to conduct an investigation.

(a) Investigation. The person or persons appointed shall: acknowledge receipt of the complaint in writing; undertake an impartial investigation which shall include a complete review of all documentation presented and may include an independent onsite investigation, if necessary; give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint; provide the department with the opportunity to respond to the complaint; and

review all relevant information and make an independent determination as to whether the department is violating a requirement of an applicable state or federal statute or regulation.

(b) Decision. A written decision, including findings of fact, conclusions, recommendations for corrective action, and the reasons for the decision and addressing each allegation in the complaint, shall be issued by the person or persons appointed pursuant to this paragraph and mailed to the parties within sixty (60) days of receipt of the written complaint. The person appointed pursuant to this paragraph has no authority to order rulemaking by the department.

(7) Extension of time limit. An extension of the time limit under Subparagraph (b) of Paragraph (5) or Subparagraph (b) of Paragraph (6) of this Subsection H of 6.31.2.13 NMAC shall be permitted by the SEB of the department only if exceptional circumstances exist with respect to a particular complaint or if the parent or any other party filing a complaint and the public agency involved agree to extend the time to engage in mediation or a CAIEP or FIEP meeting.

(8) Conflicts with federal laws or regulations. If any federal law or regulation governing any federal program subject to this regulation affords procedural rights to a complainant which exceed those set forth in Subsection H of 6.31.2.13 NMAC for complaints within the scope of these rules, such statutory or regulatory right(s) shall be afforded to the complainant. In acknowledging receipt of such a complaint, the SEB shall set forth the procedures applicable to that complaint.

I. Due process hearings.

(1) Scope. This Subsection I of 6.31.2.13 NMAC establishes procedures governing impartial due process hearings for the following types of cases:

(a) requests for due process in IDEA cases governed by 34 CFR Secs. 300.506-300.518 and 300.530-300.532; and

(b) claims for gifted services.

(2) Definitions. In addition to terms defined in 34 CFR Part 300 and 6.31.2.7 NMAC, the following definitions apply to this Subsection I of 6.31.2.13 NMAC.

(a) "Expedited hearing" means a hearing that is available on request by a parent or a public agency under 34 CFR Secs. 300.532(c) and is subject to the requirements of 34 CFR Sec. 300.532(c).

(b) "Gifted services" means special education services to gifted children as defined in Subsection A of 6.31.2.12 NMAC.

(c) "Summary due process hearing" means a hearing designed to proceed more quickly and incur less expense than a standard due process hearing, as explained under Paragraph (15) of Subsection I of 6.31.2.13 NMAC.

(d) "Transmit" means to mail, send by electronic mail or telecopier (facsimile machine) or hand deliver a written notice or other document and obtain written proof of delivery by one of the following means:

(i) an electronic mail system's confirmation of a completed transmission to an e-mail address that is shown to be valid for the individual to whom the transmission was sent;

(ii) a telecopier machine's confirmation of a completed transmission to a number which is shown to be valid for the individual to whom the transmission was sent;

(iii) a receipt from a commercial or government carrier showing to whom the article was delivered and the date of delivery;

(iv) a written receipt signed by the secretary of education or designee showing to whom the article was hand-delivered and the date delivered; or

(v) a due process final decision to any party not represented by counsel in a due process hearing by the U.S. postal service, certified mail, return receipt requested, showing to whom the articles was delivered and the date of delivery.

(3) Bases for requesting hearing. A parent or public agency may initiate an impartial due process hearing on the following matters:

(a) the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child;

(b) the public agency refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE to the child;

(c) the public agency proposes or refuses to initiate or change the identification, evaluation or educational placement of, or services to, a child who needs or may need gifted services;

(d) an IDEA due process hearing provides a forum for reviewing the appropriateness of decisions regarding the identification, evaluation, placement or provision of a free appropriate public education for a particular child with a disability by the public agency that is or may be responsible under state law for developing and implementing the child's IEP or ensuring that a FAPE is made available to the child; the IDEA does not authorize due process hearing officers to consider claims asserting that the department should be required to provide direct services to a child with a disability pursuant to 20 USC Sec. 1413(g)(1) and 34 CFR Sec. 300.227 because the responsible public agency is unable to establish and maintain appropriate programs of FAPE, or that the department has failed to adequately perform its duty of general supervision over educational programs for children with disabilities in New Mexico; accordingly, a due process hearing is not the proper forum for consideration of such claims and the department will decline to refer such claims against it to a hearing officer; such claims may be presented through the state-level complaint procedure under Subsection H of 6.31.2.13 NMAC above.

(4) Bases for requesting expedited hearing.

(a) Pursuant to 34 CFR Sec. 300.532 and 20 USC Sec. 1415(k)(3), a parent may request an expedited hearing to review any decision regarding placement or a manifestation determination under 34 CFR Secs. 300.530-300.531.

(b) Pursuant to 34 CFR Sec. 300.532(c) and 20 USC Sec. 1415(k)(3), a public agency may request an expedited hearing if it believes that maintaining the current placement of a child is substantially likely to result in injury to the child or others.

(5) Request for hearing. A parent requesting a due process hearing shall transmit written notice of the request to the public agency whose actions are in question and to the SEB of the department. A public agency requesting a due process hearing shall transmit written notice of the request to the parent(s) and to the SEB of the department. The written request shall state with specificity the nature of the dispute and shall include:

(a) the name of the child;

(b) the address of the residence of the child (or available contact information in the case of a homeless child);

(c) the name of the school the child is attending;

(d) the name of the public agency, if known;

(e) the name, address and telephone number(s) of the party making the request (or available contact information in the case of a homeless party) and, if the party is represented by an attorney or advocate, the name, address and telephone number(s) of the attorney or advocate;

(f) a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem;

(g) a description of efforts the parties have made to resolve their dispute at the local level before filing a request for due process; and

(h) a proposed resolution of the problem to the extent known and available to the party requesting the hearing at the time;

(i) a request for an expedited hearing must also include a statement of facts sufficient to show that a requesting parent or public agency is entitled to an expedited hearing under 34 CFR Secs. 300.532(c) or 20 USC Sec. 1415(k)(3);

(j) a request for a hearing must

be in writing and signed and dated by the parent or the authorized public agency representative; an oral request made by a parent who is unable to communicate by writing shall be reduced to writing by the public agency and signed by the parent;

(k) a request for hearing filed by or on behalf of a party who is represented by an attorney [~~or advocate~~] shall include a sufficient statement authorizing the representation; a written statement on a client's behalf that is signed by an attorney who is subject to discipline by the New Mexico supreme court for a misrepresentation shall constitute a sufficient authorization; [~~representation by other advocates must be specifically authorized in a writing signed by the party being represented;~~] and

(l) a party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of this paragraph.

(6) Response to request for hearing.

(a) A request for a hearing shall be deemed to be sufficient unless the party receiving the notice of request notifies the hearing officer and the other party in writing that the receiving party believes the request has not met the requirements of Paragraph (5) of Subsection I of 6.31.2.13 NMAC.

(b) Public agency response.

(i) In general. If the public agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process hearing request, such public agency shall, within 10 days of its receipt of the request, send to the parent a response that meets the requirements of 34 CFR Sec. 300.508(e) and 20 USC Sec. 1415(c)(2)(B)(i). This requirement presents an additional opportunity for parties to clarify and potentially resolve their dispute(s).

(ii) Sufficiency. A response filed by a public agency pursuant to (i) of Subparagraph (b) of Paragraph (6) shall not be construed to preclude such public agency from asserting that the parent's due process hearing request was insufficient where appropriate.

(c) Other party response. Except as provided in Subparagraph (b) of Paragraph (6) of Subsection I of 6.31.2.13 NMAC above, the non-complaining party shall, within 10 days of its receipt of the request for due process, send to the requesting party a response that specifically addresses the issues raised in the hearing request. This requirement also presents an opportunity to clarify and potentially resolve disputed issues between the parties.

(d) A party against whom a due process hearing request is filed shall have a maximum of 15 days after receiving the request to provide written notification to the hearing officer of insufficiency under Subparagraph (a) of Paragraph (6) of Subsection I of 6.31.2.13 NMAC. The 15 day timeline for the public agency to convene a resolution session under Paragraph (8) of Subsection I of 6.31.2.13 NMAC below runs at the same time as the 15 day timeline for filing notice of insufficiency.

(e) Determination. Within five days of receipt of a notice of insufficiency under Subparagraph (d) of Paragraph (6) of Subsection I of 6.31.2.13 NMAC above, the hearing officer shall make a determination on the face of the due process request of whether it meets the requirements of Paragraph (5) of Subsection I of 6.31.2.13 NMAC, and shall immediately notify the parties in writing of such determination.

(f) Amended due process request. A party may amend its due process request only if:

(i) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to Paragraph (8) of Subsection I of 6.31.2.13 NMAC; or

(ii) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(g) Applicable timeline. The applicable timeline for a due process hearing under this part shall recommence at the time the party files an amended notice, including the timeline under Paragraph (8) of Subsection I of 6.31.2.13 NMAC.

(7) Duties of the SEB of the department. Upon receipt of a written request for due process, the SEB shall:

(a) appoint a qualified and impartial hearing officer who meets the requirements of 34 CFR Sec. 300.511(c) and 20 USC Sec. 1415(f)(3)(A);

(b) arrange for the appointment of a qualified and impartial mediator or IEP facilitator pursuant to 34 CFR Sec. 300.506 to offer ADR services to the parties;

(c) inform the parent in writing of any free or low-cost legal and other relevant services available in the area; the SEB shall also make this information available whenever requested by a parent; and

(d) inform the parent that in any action or proceeding brought under 20 USC Sec. 1415, a state or federal court, in its discretion and subject to the further provisions of 20 USC Sec. 1415(g)(3)(b) and 34 CFR Sec. 300.517, may award reasonable attorneys' fees as part of the costs to a prevailing party;

(e) the SEB shall also:

(i) keep a list of the persons who serve as hearing officers and a statement of their qualifications;

(ii) appoint another hearing officer if the initially appointed hearing officer excuses himself or herself from service;

(iii) ensure that mediation and FIEP meetings are considered as voluntary and are not used to deny or delay a parent's right to a hearing; and

(iv) ensure that within forty-five (45) days of commencement of the timeline for a due process hearing, a final written decision is reached and a copy transmitted to the parties, unless one or more specific extensions of time have been granted by the hearing officer at the request of either party (or at the joint request of the parties, where the reason for the request is to allow the parties to pursue an ADR option);

(f) following the decision, the SEB shall, after deleting any personally identifiable information, transmit the findings and decision to the state IDEA advisory panel and make them available to the public upon request.

(8) Preliminary meeting.

(a) Resolution session. Before the opportunity for an impartial due process hearing under Paragraphs (3) or (4) of Subsection I of 6.31.2.13 NMAC above, the public agency shall convene a resolution session with the parents and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the due process request, unless the parents and the public agency agree in writing to waive such a meeting, or agree to use the FIEP or mediation process instead. The resolution session:

(i) shall occur within 15 days of the respondent's receipt of a request for due process;

(ii) shall include a representative of the public agency who has decision-making authority on behalf of that agency;

(iii) may not include an attorney of the public agency unless the parent is accompanied by an attorney; and

(iv) shall provide an opportunity for the parents of the child and the public agency to discuss the disputed issue(s) and the facts that form the basis of the dispute, in order to attempt to resolve the dispute;

(v) if the parties desire to have their discussions in the resolution session remain confidential, they may agree in writing to maintain the confidentiality of all discussions and that such discussions can not later be used as evidence in the due process hearing or any other proceeding; and

(vi) if an agreement is reached following a resolution session, the parties shall execute a legally binding agreement that is signed by both the parent and a representative of the agency who has the authority to bind that agency, and which is enforceable in any state court of

competent jurisdiction or in a district court of the United States; if the parties execute an agreement pursuant to a resolution session, a party may void this agreement within three business days of the agreement's execution; further, if the resolution session participants reach agreement on any IEP-related matters, the binding agreement must state that the public agency will subsequently convene an IEP meeting to inform the student's service providers of their responsibilities under that agreement, and revise the student's IEP accordingly.

(b) FIEP meeting; mediation. Parties to a due process hearing may choose to convene a FIEP meeting or mediation instead of a resolution session. To do so, the party filing the request for the hearing must (and the responding party may) notify the hearing officer in writing within one business day of the parties' decision to jointly request one of these options. A FIEP meeting or mediation shall be completed not later than 14 days after the assignment of the IEP facilitator or mediator by the SEB, unless, upon joint request by the parties, an extension is granted by the hearing officer. Each session in the FIEP or mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the hearing. The requirements for mediation, as set forth at Subparagraph (c) of Paragraph (3) of Subsection H of 6.31.2.13 NMAC, apply to mediation in this context, as well.

(c) Applicable timelines.

(i) If the parties agree to convene a resolution session, the applicable timelines for the due process hearing shall be suspended for up to 30 days from the date the due process request was received by the SEB (except in the case of an expedited hearing), and the meeting shall proceed according to the requirements set forth under Subparagraph (a) of Paragraph (8) of Subsection I of 6.31.2.13 NMAC above.

(ii) If the parties agree to convene a FIEP meeting or mediation, the public agency shall contact the person or entity identified by the SEB to arrange for mediation or a FIEP meeting, as appropriate. Except for expedited hearings, the parties to the FIEP meeting or mediation process may jointly request that the hearing officer grant a specific extension of time for the prehearing conference and for completion of the hearing beyond the 45 day period for issuance of the hearing decision. The hearing officer may grant such extensions in a regular case but may not exceed the [~~45 day~~] 20 school day deadline in an expedited case.

(iii) If the parties agree to waive all preliminary meeting options and proceed with the due process hearing, the hearing officer shall send written notification to the parties that the applicable timelines for the due process hearing procedure shall commence as of the date of that notice. The hearing officer shall thereafter proceed with the prehearing procedures, as set forth under Paragraph (12) of Subsection I of 6.31.2.13 NMAC.

(d) Resolution. Upon resolution of the dispute, the party who requested the due process hearing shall transmit a written notice informing the hearing officer and the SEB that the matter has been resolved and withdrawing the request for hearing. The hearing officer shall transmit an appropriate order of dismissal to the parties and the SEB.

(e) Hearing. If the parties convene a resolution session and they have not resolved the disputed issue(s) within 30 days of the receipt of the due process request by the SEB in a non-expedited case, the public agency shall (and the parents may) notify the hearing officer in writing within one business day of reaching this outcome. The hearing officer shall then promptly notify the parties in writing that the due process hearing shall proceed and all applicable timelines for a hearing under this part shall commence as of the date of such notice.

(f) Further adjustments to the timelines may be made as provided in 34 CFR Sec. 300.510(b) and (c).

(g) The resolution of disputes by mutual agreement is strongly encouraged and nothing in these rules shall be interpreted as prohibiting the parties from engaging in settlement discussions at any time before, during or after an ADR meeting, a due process hearing or a civil action.

(9) Hearing officer responsibility and authority. Hearing officers shall conduct proceedings under these rules with due regard for the costs and other burdens of due process proceedings for public agencies, parents and students. In that regard, hearing officers shall strive to maintain a reasonable balance between affording parties a fair opportunity to vindicate their IDEA rights and the financial and human costs of the proceedings to all concerned. Accordingly, each hearing officer shall exercise such control over the parties, proceedings and the hearing officer's own practices as he deems appropriate to further those ends under the circumstances of each case. In particular, and without limiting the generality of the foregoing, the hearing officer, at the request of a party or upon the hearing officer's own initiative and after the parties have had a reasonable opportunity to express their views on disputed issues:

(a) shall ensure by appropriate orders that parents and their duly authorized representatives have timely access to records and information under the public agency's control which are reasonably necessary for a fair assessment of the IDEA issues raised by the requesting party;

(b) shall limit the issues for hearing to those permitted by the IDEA which the hearing officer deems necessary for the protection of the rights that have been asserted by the requesting party in each case;

(c) may issue orders directing the timely production of relevant witnesses, documents or other information within a party's control, protective orders or administrative orders to appear for hearings, and may address a party's unjustified failure or refusal to comply by appropriate limitations on the claims, defenses or evidence to be considered;

(d) shall exclude evidence that is irrelevant, immaterial, unduly repetitious or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in federal courts or the courts of New Mexico; [~~and~~]

(e) may issue such other orders and make such other rulings, not inconsistent with express provisions of these rules or the IDEA, as the hearing officer deems appropriate to control the course, scope and length of the proceedings while ensuring that the parties have a fair opportunity to present and support all allowable claims and defenses that have been asserted; and

(f) shall not permit non-attorneys to represent parties at due process hearings.

(10) Duties of the hearing officer. The hearing officer shall excuse himself or herself from serving in a hearing in which he or she believes a personal or professional bias or interest exists which conflicts with his or her objectivity. The hearing officer shall:

(a) make a determination regarding the sufficiency of a request for due process within 5 days of receipt of any notice of insufficiency, and notify the parties of this determination in writing;

(b) schedule an initial prehearing conference within 14 days of commencement of the timeline for a due process hearing, or as soon as reasonably practicable in an expedited case pursuant to Paragraph (12) of Subsection I of 6.31.2.13 NMAC below;

(c) reach a decision, which shall include written findings of fact, conclusions of law, and reasons for these findings and conclusions and shall be based solely on evidence presented at the hearing;

(d) transmit the decision to the parties and to the SEB within 45 days of the commencement of the timeline for the hearing, unless a specific extension of time has been granted by the hearing officer at the request of a party to the hearing, or at the joint request of the parties where the reason for the request is to permit the parties to pursue an ADR option; for an expedited hearing, no extensions or exceptions beyond the [~~45 day deadline are permitted~~] timeframe provided in Subparagraph (a) of Paragraph (20) of Subsection I of 6.31.2.13 NMAC;

(e) the hearing officer may reopen the record for further proceedings at any

time before reaching a final decision after transmitting appropriate notice to the parties; the hearing is considered closed and final when the written decision is transmitted to the parties and to the SEB; and

(f) the decision of the hearing officer is final, unless a party brings a civil action as set forth in Paragraph (25) of Subsection I of 6.31.2.13 NMAC below.

(11) Withdrawal of request for hearing. A party may unilaterally withdraw a request for due process at any time before a decision is issued. A written withdrawal that is transmitted to the hearing officer, and the other party at least two business days before a scheduled hearing, shall be without prejudice to the party's right to file a later request on the same claims, which shall ordinarily be assigned to the same hearing officer. A withdrawal that is transmitted or communicated within two business days of the scheduled hearing shall ordinarily be with prejudice to the party's right to file a later request on the same claims unless the hearing officer orders otherwise for good cause shown. A withdrawal that is entered during or after the hearing but before a decision is issued shall be with prejudice. In any event, the hearing officer shall enter an appropriate order of dismissal.

(12) Prehearing procedures. Unless extended by the hearing officer at the request of a party, within 14 days of the commencement of the timeline for a due process hearing and as soon as is reasonably practicable in an expedited case, the hearing officer shall conduct an initial prehearing conference with the parent and the public agency to:

(a) identify the issues (disputed claims and defenses) to be decided at the hearing and the relief sought;

(b) establish the hearing officer's jurisdiction over IDEA and gifted issues;

(c) determine the status of the resolution session, FIEP meeting or mediation between the parties, and determine whether an additional prehearing conference will be necessary as a result;

(d) review the hearing rights of both parties, as set forth in Paragraphs (16) and (17) of Subsection I of 6.31.2.13 NMAC below, including reasonable accommodations to address an individual's need for an interpreter at public expense;

(e) review the procedures for conducting the hearing;

(f) set a date, time and place for the hearing that is reasonably convenient to the parents and child involved; the hearing officer shall have discretion to determine the length of the hearing, taking into consideration the issues presented;

(g) determine whether the child who is the subject of the hearing will be present and whether the hearing will be open to the public;

(h) set the date by which any documentary evidence intended to be used at the hearing by the parties must be exchanged; the hearing officer shall further inform the parties that, not less than 5 business days before a regular hearing or, if the hearing officer so directs, not less than two business days before an expedited hearing, each party shall disclose to the other party all evaluations completed by that date and recommendations based on the evaluations that the party intends to use at the hearing; the hearing officer may bar any party that fails to disclose such documentary evidence, evaluation(s) or recommendation(s) by the deadline from introducing the evidence at the hearing without the consent of the other party;

(i) as appropriate, determine the current educational placement of the child pursuant to Paragraph (27) of Subsection I of 6.31.2.13 NMAC below;

(j) exchange lists of witnesses and, as appropriate, entertain a request from a party to issue an administrative order compelling the attendance of a witness or witnesses at the hearing;

(k) address other relevant issues and motions; and

(l) determine the method for having a written, or at the option of the parent, electronic verbatim record of the hearing; the public agency shall be responsible for arranging for the verbatim record of the hearing; and

(m) the hearing officer shall transmit to the parties and the SEB of the department a written summary of the prehearing conference; the summary shall include, but not be limited to, the date, time and place of the hearing, any prehearing decisions, and any orders from the hearing officer.

(13) Each hearing involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

(14) In order to limit testimony at the hearing to only those factual matters which remain in dispute between the parties, on or before 10 days before the date of the hearing, each party shall submit a statement of proposed stipulated facts to the opposing party. On or before five days before the date of the hearing, the parties shall submit a joint statement of stipulated facts to the hearing officer. All agreed-upon stipulated facts shall be deemed admitted, and evidence shall not be permitted for the purpose of establishing these facts.

(15) Summary due process hearing. These summary due process hearing procedures are designed to afford parents and public agencies an alternative, voluntary dispute resolution process that requires less time and expense than a traditional due process hearing. The use of summary due process hearing procedures shall not alter the requirement that the public agency convene a resolution session within 15 days of its receipt of the request for the hearing, unless the parties agree to waive that option in writing or choose to use a FIEP meeting or mediation instead.

(a) Any party requesting a due process hearing may request that the dispute be assigned to a summary due process hearing track. A request for a summary due process hearing may be submitted simultaneously with the request for due process hearing, at the prehearing scheduling conference, or at a later time by agreement of all parties.

(b) Any party opposing a request for summary due process shall state its objection within 5 days of the date of receipt of the request for a summary due process hearing. The summary due process hearing option is voluntary. If a party timely states its opposition to this option, the matter will be placed on a traditional due process hearing track.

(c) On or before 10 days before the date of the hearing, each party shall submit a statement of proposed stipulated facts to the opposing party. On or before five days before the date of the hearing, the parties shall submit a joint statement of stipulated facts to the hearing officer. All agreed-upon stipulated facts shall be deemed admitted, and evidence shall not be permitted for the purpose of establishing these facts.

(d) On or before 5 days before the summary due process hearing, each party shall produce to the opposing party and to the hearing officer a copy of all documents that the party seeks to introduce into evidence at the hearing and identify all witnesses that the party intends to call to testify at the hearing.

(e) Each party shall have one half (1/2) day to present its case. In the event that extensive cross examination, arguments or other factors impede a party's ability to complete its case in one half day, the hearing officer shall have discretion to extend the time for the hearing, as needed.

(f) The hearing officer shall issue a decision to the parties within 7 days of the completion of the summary due process hearing.

(g) Except as modified herein, the procedural rules and procedures applicable to due process hearings as stated in Subsection I of 6.31.2.13 NMAC shall also apply to summary due process hearings.

(16) Any party to a hearing has the right to:

(a) be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(b) present evidence and confront, cross-examine and compel the attendance of witnesses;

(c) prohibit the introduction of any

evidence at the hearing that has not been disclosed to that party at least five business days before a regular hearing or, if the hearing officer so directs in the prehearing summary, at least two business days before an expedited hearing;

(d) obtain a written, or, at the option of the parents, electronic verbatim record of the hearing; and

(e) obtain written, or, at the option of the parents, electronic findings of fact and decisions.

(17) Parents involved in hearings also have the right to:

(a) have the child who is the subject of the hearing present; and

(b) open the hearing to the public.

(18) The record of the hearing and the findings of fact and decisions described above must be provided at no cost to the parents.

(19) Limitations on the hearing.

(a) The party requesting the due process hearing shall not be allowed to raise issues at the hearing that were not raised in the request for a due process hearing (including an amended request, if such amendment was previously permitted) filed under Paragraph (5) of Subsection I of 6.31.2.13 NMAC, unless the other party agrees otherwise.

(b) Timeline for requesting hearing. A parent or agency shall request an impartial due process hearing within two years of the date that the parent or agency knew or should have known about the alleged action that forms the basis of the due process request.

(c) Exceptions to the timeline. The timeline described in Subparagraph (b) of Paragraph (19) of Subsection I of 6.31.2.13 NMAC above shall not apply to a parent if the parent was prevented from requesting the hearing due to:

(i) specific misrepresentations by the public agency that it had resolved the problem that forms the basis of the due process request; or

(ii) the public agency's withholding of information from the parent that was required under this part to be provided to the parent.

(20) Rules for expedited hearings. The rules in Paragraphs (4) through (19) of Subsection I of 6.31.2.13 NMAC shall apply to expedited due process hearings with the following exceptions.

(a) The SEB of the department and the hearing officer shall ensure that a hearing is held within 20 school days of the date the request for hearing is received by the SEB, and a written decision is reached within 10 school days of the completion of the hearing, without exceptions or extensions, and thereafter mailed to the parties.

(b) The hearing officer shall seek to hold the hearing and issue a decision as soon as is reasonably practicable within the time limit described in Subparagraph (a) of Paragraph (20) of Subsection I of 6.31.2.13 NMAC above, and shall expedite the proceedings with due regard for any progress in a resolution session, FIEP meeting or mediation, the parties' need for adequate time to prepare and the hearing officer's need for time to review the evidence and prepare a decision after the hearing.

(c) The parties shall decide whether to convene a resolution session, FIEP meeting, or mediation before the commencement of an expedited hearing in accordance with Paragraph (8) of Subsection I of 6.31.2.13 NMAC, and are encouraged to utilize one of these preliminary meeting options. However, in the case of an expedited hearing, agreement by the parties to convene a resolution session, FIEP meeting or mediation shall not result in the suspension or extension of the timeline for the hearing stated under Subparagraph (a) of Paragraph (20) of Subsection I of 6.31.2.13 NMAC above. The timeline for resolution sessions provided in 34 CFR Sec. 300.532(c)(3) shall be observed.

[~~**(d)** The hearing officer may shorten the five business-day rule for exchanging evidence before the hearing to not less than two business days and shall set the deadline and indicate the consequences of the parties' failure to meet that deadline in the written summary of the prehearing conference.~~]

[~~**(e)**~~]**(d)** [~~The hearing officer may shorten the 15 day timeline for providing notice of insufficiency of a request for an expedited due process hearing to 10 school days.~~] Subparagraph (a) of Paragraph (6) of Subsection I of 6.31.2.13 NMAC relating to sufficiency of the request for the expedited due process hearing does not apply to expedited hearings.

[~~**(f)**~~]**(e)** The hearing officer may shorten the timeline for the exchange of proposed stipulated facts between the parties as he deems necessary and appropriate given the circumstances of a particular case. The hearing officer may also shorten the timeline for providing agreed-upon stipulated facts to the hearing officer to two school days before the hearing.

[~~**(g)**~~]**(f)** Decisions in expedited due process hearings are final, unless a party brings a civil action as provided in Paragraph (25) of Subsection I of 6.31.2.13 NMAC below.

(21) Decision of the hearing officer.

(a) In general. Subject to Subparagraph (b) of Paragraph (21) of Subsection I of 6.31.2.13 NMAC below, a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

(b) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies:

(i) impeded the child's right to a FAPE;

(ii) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or

(iii) caused a deprivation of educational benefits.

(c) Rule of construction. Nothing in this paragraph shall be construed to preclude a hearing officer from ordering a public agency to comply with procedural requirements under this section.

(22) Rule of construction. Nothing in this Subsection I shall be construed to affect the right of a parent to file a complaint with the SEB of the department, as described under Subsection H of 6.31.2.13 NMAC.

(23) Modification of final decision. Clerical mistakes in final decisions, orders or parts of the record and errors therein arising from oversight or omission may be corrected by the hearing officer at any time on the hearing officer's own initiative or on the request of any party and after such notice, if any, as the hearing officer orders. Such mistakes may be corrected after a civil action has been brought pursuant to Paragraph (25) of Subsection I of 6.31.2.13 NMAC below only with leave of the state or federal district court presiding over the civil action.

(24) Expenses of the hearing. The public agency shall be responsible for paying administrative costs associated with a hearing, including the hearing officer's fees and expenses and expenses related to the preparation and copying of the verbatim record, its transmission to the SEB, and any further expenses for preparing the complete record of the proceedings for filing with a reviewing federal or state court in a civil action. Each party to a hearing shall be responsible for its own legal fees or other costs, subject to Paragraph (26) of Subsection I of 6.31.2.13 NMAC below.

(25) Civil action.

(a) Any party aggrieved by the decision of a hearing officer in an IDEA matter has the right to bring a civil action in a state or federal district court pursuant to 20 USC Sec. 1415(i) and 34 CFR Sec. 300.516. Any civil action must be filed within 30 days of the receipt of the hearing officer's decision by the appealing party.

(b) A party aggrieved by the decision of a hearing officer in a matter relating solely to the identification, evaluation, or educational placement of or services to a child who needs or may need gifted services may bring a civil action in a state court of appropriate jurisdiction within 30 days of receipt of the hearing officer's

decision by the appealing party.

(26) Attorney fees.

(a) In any action or proceeding brought under 20 USC Sec. 1415, the court, in its discretion and subject to the further provisions of 20 USC Sec. 1415(i) and 34 CFR Sec. 300.517, may award reasonable attorney fees as part of the costs to:

(i) the parent of a child with a disability who is a prevailing party;

(ii) a prevailing public agency against the attorney of a parent who files a request for due process or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(iii) a prevailing public agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(b) Any action for attorney fees must be filed within 30 days of the receipt of the last administrative decision.

(c) Opportunity to resolve due process complaints. A meeting conducted pursuant to Subparagraph (a) of Paragraph (8) of Subsection I of 6.31.2.13 NMAC shall not be considered:

(i) a meeting convened as a result of an administrative hearing or judicial action; or

(ii) an administrative hearing or judicial action for purposes of this paragraph.

(d) Hearing officers are not authorized to award attorney fees.

(e) Attorney fees are not recoverable for actions or proceedings involving services to gifted children or other claims based solely on state law.

(27) Child's status during proceedings.

(a) Except as provided in 34 CFR Sec. 300.533 and Paragraph (4) of Subsection I of 6.31.2.13 NMAC, and unless the public agency and the parents of the child agree otherwise, during the pendency of any administrative or judicial proceeding regarding an IDEA due process request, the child involved must remain in his or her current educational placement. Disagreements over the identification of the current educational placement which the parties cannot resolve by agreement shall be resolved by the hearing officer as necessary.

(b) If the case involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If a hearing officer agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the public agency and the parents for purposes of Subparagraph (a) of Paragraph (27) of Subsection I of 6.31.2.13 NMAC.

(28) Computation of time. In computing any period of time prescribed or allowed by Subsection I of 6.31.2.13 NMAC, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday. As used in this rule, "legal holiday" includes any day designated as a state holiday.

(29) Effective date and transitional provisions.

(a) The procedures in this Subsection I of 6.31.2.13 NMAC shall govern due process requests received by the SEB after July 29, 2005.

(b) The provisions of the IDEA 2004 that took effect on July 1, 2005, shall apply to due process cases filed between July 1 and July 29, 2005, in the event of irreconcilable conflicts with the state rules as they existed during that time.

(c) The parties to due process cases that were pending on July 29, 2005, may enter into a written agreement to waive the administrative review process that would otherwise be available under the former state rules and proceed directly from a final decision by a hearing officer to a civil action in a state or federal district court. The parties to cases in which administrative appeals were pending on July 29, 2005, and in which the administrative appeal officer has not yet ruled on the merits of any substantive issue may likewise agree to waive the administrative review process but shall decide whether to do so within a reasonable time to be established by the administrative appeal officer.

(d) The parties to cases pending on July 29, 2005, may likewise enter into a written agreement to dismiss any claims under Section 504 of the federal Rehabilitation Act that would otherwise be hearable or administratively reviewable under the former state rules, provided that the hearing or appeal officer has not yet ruled on the merits of any substantive issue raised under an affected Section 504 claim.

(e) Upon receipt of a timely and sufficient motion incorporating an agreement under Subparagraphs (c) or (d) of Paragraph (29) of Subsection I of 6.31.2.13 NMAC above, the authority before whom the case is pending shall enter an appropriate order to implement the agreement.

J. Surrogate parents and foster parents.

(1) Each public agency shall ensure that a qualified surrogate parent is appointed in compliance with 34 CFR Sec. 300.519 when needed to protect the rights of a child with a disability who is within the agency's educational jurisdiction. A surrogate parent need not be appointed if a person who qualifies as a parent under 34 CFR Sec. 300.30(b) and Paragraph (13) of Subsection B of 6.31.2.7 NMAC can be identified.

(2) A foster parent who meets all requirements of 34 CFR Sec. 300.30 may be treated as the child's parent pursuant to that regulation. A foster parent who does not meet those requirements but meets all requirements of 34 CFR Sec. 300.519 may be appointed as a surrogate parent if the public agency that is responsible for the appointment deems such action appropriate.

(3) Pursuant to 34 CFR Sec. 300.519, a surrogate parent may represent the child in all matters relating to the identification, evaluation and educational placement of the child and the provision of FAPE to the child.

K. Transfer of parental rights to students at age 18.

(1) Pursuant to Secs. 12-2A-3 and 28-6-1 NMSA 1978, a person's age of majority begins on the first instant of his or her 18th birthday and a person who has reached the age of majority is an adult for all purposes not otherwise limited by state law. A guardianship proceeding under the probate code is the only way an adult in New Mexico can legally be determined to be incompetent and have the right to make his or her own decisions taken away. Public agencies and their IEP teams are not empowered to make such determinations under New Mexico law. Accordingly, pursuant to 34 CFR Sec. 300.520, when a child with a disability reaches age 18 and does not have a court-appointed general guardian, limited guardian or other person who has been authorized by a court to make educational decisions on the student's behalf or who has not signed a power of attorney as provided under New Mexico law:

(a) a public agency shall provide any notices required by 34 CFR Part 300 to the child and the parents;

(b) all other rights accorded to parents under Part B of the IDEA, New Mexico law or department rules and standards transfer to the child; and

(c) the public agency shall notify the individual and the parents of the transfer of rights.

(2) Pursuant to 34 CFR Sec. 300.320(c), each annual IEP review for a child who is [~~16~~] 14 or older must include a discussion of the rights that will transfer when the child turns 18 and, as appropriate, a discussion of the parents' plans for obtaining a guardian before that time. [~~Each child's IEP beginning not later than when the child turns 17~~] The IEP of a child who is 14 or

older must include a statement that the child and the parent have been informed of the rights that will transfer to the child at age 18.

L. Confidentiality of information.

(1) Confidentiality requirements. Each public agency collecting, using or maintaining any personally identifiable information on children under Part B of the IDEA shall comply with all applicable requirements of 34 CFR Secs. 300.610-300.626, and the Family Educational Rights and Privacy Act, 34 CFR Part 99.

(2) Parental rights to inspect, review and request amendment of education records. Each public agency shall permit parents or their authorized representatives to inspect and review any education records relating to their children that are collected, maintained or used by the agency under Part B of the IDEA pursuant to 34 CFR Sec. 300.613. A parent who believes that information in the education records is inaccurate or misleading or violates the privacy or other rights of the child may request the agency that maintains the information to amend the information pursuant to 34 CFR Sec. 300.618 and shall have the opportunity for a hearing on that request pursuant to 34 CFR Secs. 300.619-300.621 and 34 CFR Sec. 99.22.

(3) Transfer of student records.

(a) Pursuant to 34 CFR Sec. 99.31(a)(2), an educational agency may transfer child records without parental consent when requested by another educational agency in which a child seeks or intends to enroll as long as the sending agency has included the proper notification that it will do so in its required annual FERPA notice to children and parents. In view of the importance of uninterrupted educational services to children with disabilities, each New Mexico public agency is hereby directed to include such language in its annual FERPA notice and to ensure that it promptly honors each proper request for records from an educational agency that has become responsible for serving a child with a disability.

(b) State-supported educational programs and the educational programs of juvenile or adult detention or correctional facilities are educational agencies for purposes of the Family Educational Rights and Privacy Act (FERPA) and are entitled to request and receive educational records on children with disabilities on the same basis as local school districts. Public agencies shall promptly honor requests for records to assist such programs in providing appropriate services to children within their educational jurisdiction.

(c) Pursuant to 34 CFR Sec. 99.34(b), an educational agency that is authorized to transfer student records to another educational agency without parental consent under Sec. 99.31(a)(2) may properly transfer to the receiving agency all educational records the sending agency maintains on a child, including medical, psychological and other types of diagnostic and service information which the agency obtained from outside sources and used in making or implementing educational programming decisions for the child.

(d) Pursuant to [~~Paragraph (3) of Subsection D of 6.30.2.10 NMAC~~] Paragraph (3) of Subsection E of 6.29.1.9 NMAC, 34 CFR Sec. 300.229 and the federal No Child Left Behind Act at 20 USC 7165, any transfer of educational records to a private or public elementary or secondary school in which a child with disabilities seeks, intends, or is instructed to enroll must include the following:

(i) transcripts and copies of all pertinent records as normally transferred for all students;

(ii) the child's current individualized education program with all supporting documentation, including the most recent multidisciplinary evaluations and any related medical, psychological or other diagnostic or service information that was consulted in developing the IEP; and

(iii) disciplinary records with respect to current or previous suspensions or expulsions of the child.

(4) Parental refusals of consent for release of information. If parental consent is required for a particular release of information regarding a child with a disability and the parent refuses consent, the sending or receiving public agency may use the impartial due process hearing procedures specified in Subsection I of 6.31.2.13 NMAC to determine if the information may be released without parental consent. If the hearing officer determines that the proposed release of information is reasonably necessary to enable one or more public agencies to fulfill their educational responsibilities toward the child, the information may be released without the parent's consent. The hearing officer's decision in such a case shall be final and not subject to further administrative review.

(5) Destruction of information.

(a) Pursuant to 34 CFR Sec. 300.624, each public agency shall inform parents when personally identifiable information collected, maintained, or used under 34 CFR Part 300 is no longer needed to provide educational services to the child. As at other times, the parents shall have the right to inspect and review all educational records pertaining to their child pursuant to 34 CFR Sec. 300.613. The information must be destroyed at the request of the parents or, at their option the records must be given to the parents. When informing parents about their rights to destruction of personally identifiable records under these rules, the public agency should advise them that the records may be needed by the child or the parents for social security benefits and other purposes.

(b) If the parents do not request the destruction of personally identifiable information about their children, the public agency may retain that information permanently. In either event, a permanent record of a student's name, address and phone number, grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation. Additional information that is not related to the student's IDEA services may be maintained if allowed under 34 CFR Part 99.

(6) Educational records retention and disposition schedules.

(a) Definitions as used in this paragraph:

(i) "destruction" means physical destruction or removal of personal identifiers from educational records so that the information is no longer personally identifiable; and

(ii) "educational records" means the type of records covered under the definition of "educational records" in 34 CFR Part 99 of the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 USC 1232g (FERPA).

(b) Pursuant to 1.20.2.102 NMAC, the public agency must notify the parents that the public agency must retain specific information for five years to include:

(i) most recent IEP;

(ii) most recent 2 years child progress reports or referral form;

(iii) related services reports;

(iv) summary of academic achievement and functional performance;

(v) parent communication;

(vi) agency community action;

(vii) writing sample; and

(viii) staff reports on behavior.

(c) Federal regulation and department rules require public agencies to inform parents of proposed destruction of special education records (34 CFR Sec. 300.624 and [~~6.30.2 NMAC~~] 6.29.1 NMAC.

(d) Pursuant to 34 CFR Sec. 300.624, the information must be destroyed at the request of the parents. However, a permanent record of a child's name, address and phone number, his or her grades, attendance record, classes attended, grade level completed and year completed may be maintained without time limit. Notice of destruction of child records must include:

(i) informing parents

at the last IEP meeting of personally identifiable information that is no longer needed to provide special education and related service and information that must be retained according to the state for five years under 1.20.1.102 NMAC;

(ii) documentation at the last IEP meeting and prior written notice of the information that is required to be maintained indefinitely;

(iii) documentation at the last IEP meeting and the prior written notice that the parent accepted or rejected the proposed action to maintain records;

(iv) if the parent requests that the agency destroy information not required indefinitely, the agency must maintain the last IEP and prior written notice that states the parent required the public agency to destroy allowable information that must be maintained for 5 years; and

(v) the public agency must inform the parents of the proposed date of destruction of records at the last IEP meeting and document on the prior written notice of action the proposed date of destruction of records.

[6.31.2.13 NMAC - Rp, 6.31.2.13 NMAC, 6/29/07; A, 12/31/09]

NEW MEXICO COMMISSION OF PUBLIC RECORDS

Notice of Repeal

1.18.765 NMAC, Executive Records Retention and Disposition Schedule for the Juvenile Parole Board, is being repealed and replaced with the new 1.18.765 NMAC, Executive Records Retention and Disposition Schedule for the Juvenile Public Safety Advisory Board, effective January 11, 2010. The New Mexico Commission of Public Records at their December 8, 2009 meeting repealed the current rule and approved the new rule.

NEW MEXICO COMMISSION OF PUBLIC RECORDS

December 10, 2009

Leo R. Lucero, Agency Analysis Bureau Chief
NM Commission of Public Records
1205 Camino Carlos Rey
Santa Fe, New Mexico 87505

Mr. Lucero:

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

* 1.18.765 NMAC ERRDS, Juvenile Public Safety Advisory Board

A review of this rule shows that its impact is limited to the individual agency to which it pertain, and it is "unduly cumbersome, expensive or otherwise inexpedient" to publish. Therefore, your request to publish a synopsis for it is approved.

Sincerely,

Sandra Jaramillo
State Records Administrator

SJ/lrl

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NEW MEXICO COMMISSION OF PUBLIC RECORDS

SYNOPSIS
1.18.765 NMAC ERRDS, Juvenile Public Safety Advisory Board

1. Subject matter: 1.18.765 NMAC, Executive Records Retention and Disposition Schedule for the Juvenile Public Safety Advisory Board. This rule is new and replaces 1.18.765 NMAC ERRDS, Juvenile Parole Board, an outdated version that was filed on 06/21/2002. This records retention and disposition schedule is a timetable for the management of specific records series created by the Juvenile Public Safety Advisory Board. It describes each record series by record name, record function, record filing maintenance system, record content, record confidentiality, and record retention. The record retention is the life cycle of each records series. It indicates the retention or length of time a record series must be maintained by the board as well as its final disposition. The retention and disposition requirements in this rule are based on the legal use requirements of the records as well as on their administrative, fiscal and archival value. This rule was developed by the Records Management Division of the State Records Center and Archives (New Mexico Commission of Public Records) and approved by the State Records Administrator, the New Mexico Commission of Public Records and the Juvenile Public Safety Advisory Board.

2. Persons affected: The persons affected are the record producing and record keeping personnel of the Juvenile Public Safety Advisory Board. Persons and entities normally subject to the rules and regulations of the Juvenile Public Safety Advisory Board may also be directly or indirectly affected by this rule.

3. Interests of persons affected: Interests include the records produced and maintained by the Juvenile Public Safety Advisory Board

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

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

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

7. Effective date of this rule: January 11, 2010.

Certification

As counsel for the State Records Center and Archives, I certify that this synopsis provides adequate notice of the content of 1.18.765 NMAC ERRDS, Juvenile Public Safety Advisory Board.

_____
Tania Maestas Date
Assistant Attorney General

NEW MEXICO COMMISSION OF PUBLIC RECORDS

This is an amendment to 1.17.244 NMAC, JRRDS, Bernalillo County Metropolitan Court, section 121, effective 1/11/2010.

1.17.244.121 CRIMINAL CASE FILE:

A. Program: criminal division departmental files

B. Maintenance: chronological, numerical

C. Description: contains pre-trial service interview report, resetting notices, judge disqualification, judge recusal, counsel waiver, entry of appearance, motions, orders, notice of hearing, routing slips, rap sheet, pre-sentence report, driver history, affidavit and bench warrant, notice of failure to appear in court, school completion, probation payments, community service completion, probation completion, sentencing notice, death certificate, verdict sheets, treatment center report and evaluation, correspondence, memoranda, etc.

D. Retention:

(1) Cases involving domestic violence or driving under the influence of liquor or drugs: permanent (34-8A-6 (C), NMSA 1978), transfer to archives 25 years after case is closed

(2) Case files with potential for enhancement of judgment: three years after date case closed

(3) Case files with no potential for enhancement of judgment: one year after date case closed

[7-13-98; 1.17.244.121 NMAC - Rn, 1 NMAC 3.2.92.244.191, 7/22/2002; A, 1/11/2010]

NEW MEXICO COMMISSION OF PUBLIC RECORDS

This is an amendment to 1.18.631 NMAC, ERRDS, Department of Workforce Solutions adding Sections 205 and 301 effective 1/11/2010.

1.18.631.205 PUBLIC WORKS MINIMUM WAGE VIOLATION REGISTER:

A. Program: public works

B. Maintenance system: chronological by state fiscal year, then alphabetical by company name

C. Description: register containing information about companies accused of violating the use of public work funds. Register may include notification date, contractor information (i.e., name, address etc.), dollar amounts, type of violation (i.e., payroll, wage and hour), certification number, decision number, general letter date, penalty letter date, debarment letter date, amount settled, etc.

D. Retention: seven years after close of the state fiscal year in which created

[1.18.631.205 NMAC - Rp, 1.18.631.963 NMAC, 1/11/2010]

[All violation documentation can be found in the wage decision file, 1.18.631.201 NMAC.]

1.18.631.301 QUALITY CONTROL

AUDIT CASE FILE:

A. Program: quality control

B. Maintenance system: chronological by federal fiscal year and week assigned

C. Description: records concerning internal audits conducted on unemployment insurance benefit claim records. File may include earning verifications, last employer information, determination of investigation, claimant questionnaire, statement of facts, employer information transmittal, benefits payment information, registration and work search, separation information, statement of understanding, fact finding report, correspondence, etc.

D. Retention: five years after close of the federal fiscal year in which audit completed

[1.18.631.301 NMAC - Rp, 1.18.631.681 NMAC, 1/11/2010]

NEW MEXICO COMMISSION OF PUBLIC RECORDS

This is an amendment to 1.18.690 NMAC, ERRDS, Children, Youth and Families Department sections 91 and 92, effective 1/11/2010.

1.18.690.91 JUVENILE PAROLE HEARINGS:

A. Program: juvenile parole

B. Maintenance system: chronological by hearing date

C. Description: list of decisions made by the parole board on juveniles at the parole board hearings. Record may show board members present, juvenile's name, juvenile's facility number, county, type of discharge, effective date, parole term, special conditions, date of hearing, etc.

D. Retention: three years from date of hearing

E. Confidentiality: confidential per Section 32A-2-32 NMSA 1978

[1.18.690.91 NMAC - Rp, 1.18.765.102, NMAC, 1/11/2010]

1.18.690.92 PAROLE REVOCATION HEARING PROCEEDINGS:

A. Program: juvenile parole

B. Maintenance system: chrono-alphabetical by hearing date and then juvenile name

C. Description: verbatim record of the revocation hearing

D. Retention: three years from date of hearing

E. Confidentiality: confidential as per Section 32A-2-32 NMSA 1978

[1.18.690.92 NMAC - Rp, 1.18.765.104, NMAC, 1/11/2010]

NEW MEXICO PUBLIC REGULATION COMMISSION

INSURANCE DIVISION

This is an amendment to 13.10.10 NMAC Sections 9, 11, and 13, effective December 31, 2009.

13.10.10.9 BOARD OF DIRECTORS:

A. Appointed members. The superintendent shall announce his appointments to the board at the annual membership meeting.

B. Elected members.

(1) Prior to the annual membership meeting, the board or its nominating committee shall select a nominee to succeed each board director who was elected by the general membership of the pool and whose term is scheduled to expire on June 30 of that year. If applicable, such nominee will ensure the required representation as set forth in Subsection C of Section 59A-54-4 NMSA 1978. Such nominees shall be made known to the members of the pool at least 30 days prior to the annual membership meeting.

(2) The board shall compile a list of all members of the pool. At least 30 days prior to the annual membership meeting, a notice and proxy shall be sent to all members of the pool soliciting votes for membership on the board.

(3) At the annual membership meeting, the pool administrator shall tabulate the results and prepare a list of the nominees who have received the most votes for election to the board. Each pool member shall be entitled to cast one vote in electing a member to the board and shall be permitted to cast such vote in person or by proxy. [~~The members shall be entitled to vote only for those nominees who would be a representative of its type of health insurer. For example, only non-profit health care plans would be eligible to vote in the election for the board director representing non-profit health care plans.~~]

(4) In order to achieve consistent participation and representation, each elected member of the pool shall designate a person to serve on the board as its representative, with the ability to reappoint a person in the case of a permanent vacancy, with the provision for one identified alternate person.

C. Succession. The appointed members of the board of directors shall serve until their successors have been duly appointed to serve. The previously elected members of the board of directors shall serve until the end of their term, until they resign, or until they are no longer eligible under the law to be a member of the board of directors, whichever occurs first.

[11-30-98; 13.10.10.9 NMAC - Rn, 13 NMAC 10.10.9, 4-13-01; A, 8-31-06; A, 12/31/09]

13.10.10.11 MEETING PROCEDURES:

A. Special meetings. Special meetings of the board may be called by a majority of the directors or the chairman of the board, and will be held at the time and place fixed by the person calling the special meeting.

B. Notice. Written notice stating the time, place and, if a special meeting, the purpose, will be delivered either personally, by mail, or by telegram at the direction of the person calling the meeting, to each director at least 24 hours before the scheduled date of the meeting. If mailed or telegraphed, a notice is deemed delivered when deposited, postage or charges prepaid, with the transmitting agency, addressed to the director. The board may establish dates and times for regularly scheduled meetings.

C. Quorum. A majority of the current members of the board in attendance either in person or by telephone will constitute a quorum at board meetings. The act of a majority of directors voting in person or by written proxy at a meeting at which a quorum is present will be the act of the board, except a two-thirds majority of the entire board is required for actions dealing with the levy of assessments, approval and discharge of the pool administrator, removal of officers, or for the pool to borrow money or to encumber assets of the pool. The directors may act only as a board with each director having one vote.

D. Proxy. A written proxy may be given only to other board members and shall be [~~given~~] submitted to the chair at the time the vote is taken. No director shall be allowed to cast more than one proxy vote. [~~Pool members selected may have alternates serve in their place but only if the alternate member was designated on the same basis as the original director.~~] Any action required or permitted to be taken at a meeting of the directors may be taken without a meeting if a consent in writing setting forth the action so taken is signed by all of the directors.

E. Waiver of notice. Whenever any notice is required to be given to any director, a waiver thereof in writing signed by the person entitled to the notice is equivalent to the giving of timely notice. The attendance of a director at a meeting constitutes a waiver of notice of the meeting except when attendance is for the sole purpose of objecting because the meeting is

not lawfully called or convened.

F. Record of meetings. A written record of the proceedings of each board meeting shall be made. The original of this record shall be retained by the secretary of the board and a copy shall be forwarded to the superintendent. Copies shall be available upon request.

G. Participation methods. Members of the board, or any committee designated by the board, may participate in a meeting of the board, or of any committee, by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and such participation in a meeting shall constitute presence in person at the meeting.

H. Consent required for action without meeting. Any action required by the act or this plan to be taken at a meeting of the board, or any action which may be taken at a meeting of the board or of a committee of the board, may be taken without a meeting if a consent in writing, setting forth the actions so taken, shall be signed by all of the directors, or all of the members of the committee, as the case may be. The consent to action without a meeting shall have the same effect as a unanimous vote of the board or of the committee taking the action.

[11-30-98; 13.10.10.11 NMAC -Rn & A, 13 NMAC 10.10.11, 4-13-01; A, 8-31-06; A, 12/31/09]

13.10.10.13 COMMITTEES:

A. Appointment. The board shall appoint such committees as it may from time to time deem necessary. Such committees may include, but are not limited to, an [~~executive committee, a nominating committee, a forms committee, an actuarial committee, an underwriting committee, a legal affairs committee, and a grievance committee.~~] executive, finance, and legal committees.

B. Delegation of authority. The board may authorize a committee to take any action that the board has the power to take except for action on assessments, premiums, changes in policy benefits, and changes in the plan of operation as long as the motion to delegate the authority passes by a vote sufficient to fulfill the vote requirements for the board itself to take the delegated action.

C. Expenses. Members of special or standing committees may be allowed expenses for attending committee meetings as determined by the board subject to the Per Diem and Mileage Act.

[11-30-98; 13.10.10.13 NMAC - Rn, 13 NMAC 10.10.13, 4-13-01; A, 12/31/09]

NEW MEXICO PUBLIC REGULATION COMMISSION

INSURANCE DIVISION

This is an amendment to 13.2.5 NMAC, Sections 1; 5 - 7; 9; 12; 15 - 27, effective 1/1/2010. This rule has also been renumbered and reformatted from 13 NMAC 2.5 (filed 05/27/1997) to 13.2.5 NMAC in accordance with current NMAC requirements , effective 1/1/2010.

13.2.5.1 ISSUING AGENCY: New Mexico [~~State Corporation Commission, Department~~] Public Regulation Commission, Division of Insurance, Post Office Box 1269, Santa Fe, NM 87504-1269. [7/1/97; 13.2.5.1 NMAC - Rn, 13 NMAC 2.5.1 & A, 1/1/2010]

13.2.5.2 SCOPE: [~~This rule applies to every insurer except that:~~

~~A. an insurer having direct premiums written in this state of less than one million dollars ($1,000,000) in any calendar year and fewer than one thousand policyholders or certificateholders of directly written policies nationwide at the end of such calendar year shall be exempt from this rule for such year unless:~~

~~(1) the insurer has assumed premiums pursuant to contracts and/or treaties of reinsurance of one million dollars ($1,000,000) or more; or~~

~~(2) the superintendent makes a specific finding that compliance is necessary for the superintendent to carry out statutory responsibilities;~~

~~B. foreign or alien insurers filing audited financial reports in another state are exempt from this rule if:~~

~~(1) the superintendent finds the other state's requirement of audited financial reports to be substantially similar to the requirements of this rule;~~

~~(2) a copy of the audited financial report, the report on significant deficiencies in internal controls, and the accountant's letter of qualifications which are filed with such other state are filed with the superintendent in accordance with the filing dates specified in this rule. Canadian insurers may submit accountants' reports as filed with the Canadian dominion department of insurance; and~~

~~(3) a copy of any report of adverse financial condition filed with such other state is filed with the superintendent within the time specified in this rule.~~]

A. Every insurer shall be subject to this rule.

B. Insurers having direct premiums written in this state of less than $1,000,000 in any calendar year and less than 1,000 policyholders or certificateholders of direct written policies nationwide at the end of the calendar year shall be exempt from this rule for the year, unless the superintendent makes a specific finding that compliance is necessary for the superintendent to carry out statutory responsibilities.

C. Insurers having assumed premiums pursuant to contracts and/or treaties of reinsurance of $1,000,000 or more are not exempt.

D. Foreign or alien insurers filing the audited financial report in another state, pursuant to that state's requirement for filing of audited financial reports, which has been found by the superintendent to be substantially similar to the requirements herein, are exempt from this rule if:

(1) a copy of the audited financial report, communication of internal control related matters noted in an audit, and the accountant's letter of qualifications that are filed with the other state are filed with the superintendent in accordance with the filing dates specified in this rule respectively (Canadian insurers may submit accountants' reports as filed with the office of the superintendent of financial institutions, Canada); and

(2) a copy of any notification of adverse financial condition report filed with the other state is filed with the superintendent within the time specified in this rule.

E. Foreign or alien insurers required to file management's report of internal control over financial reporting in another state are exempt from filing the report in this state provided the other state has substantially similar reporting requirements and the report is filed with the commissioner of the other state within the time specified.

[1/1/94; 13.2.5.2 NMAC - Rn, 13 NMAC 2.5.2 & A, 1/1/2010]

13.2.5.5 EFFECTIVE DATE: January 1, 1994, unless a later date is cited at the end of a section [~~or paragraph. Repromulgated in NMAC format effective July 1, 1997~~].

[1/1/94, 7/1/97; 13.2.5.5 NMAC - Rn, 13 NMAC 2.5.5 & A, 1/1/2010]

13.2.5.6 OBJECTIVE: [~~The purpose of this rule is to improve the New Mexico insurance department's surveillance of the financial condition of insurers by requiring an annual examination by independent certified public accountants of the financial statements reporting the financial position and the results of operations of insurers.~~] The purpose of this rule is to improve the New Mexico division of insurance's surveillance of the financial condition of insurers by requiring: (1) an annual audit of financial statement reporting the financial position and the results of operations of insurers by independent certified public accountants;

(2) communication of internal control related matters noted in an audit; and (3) management's report of internal control over financial reporting.

[1/1/94; 13.2.5.6 NMAC - Rn, 13 NMAC 2.5.6 & A, 1/1/2010]

13.2.5.7 DEFINITIONS:

A. **"Accountant"** or **"independent certified public accountant"** means an independent certified public accountant or accounting firm in good standing with the American institute of certified public accountants (AICPA) and in all states in which he or she is licensed to practice; for Canadian and British companies, it means a Canadian-chartered or British-chartered accountant.

B. An **"affiliate"** of, or person **"affiliated"** with, a specific person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

C. **"Audit committee"** means a committee (or equivalent body) established by the board of directors of an entity for purpose of overseeing the accounting and financial reporting processes of an insurer or group of insurers, and audits of financial statements of the insurer or group of insurers. The audit committee of any entity that controls a group of insurers may be deemed to be the audit committee for one or more of these controlled insurers solely for the purposes of this rule at the election of the controlling person. If an audit committee in not designated by the insurers, the insurer's entire board of directors shall constitute the audit committee.

[~~A~~]D. **"Audited financial report"** means and includes all items specified in 13.2.5.10, 13.2.5.11 and 13.2.5.12 NMAC.

E. **"Indemnification"** means an agreement of indenmity or a release from liability where the intent or effect is to shift or limit in any manner the potential liability of the person or firm for failure to adhere to applicable auditing or professional standards, whether or not resulting in part from knowing of other misrepresentations made by the insurer or its representatives.

F. **"Independent board member"** has the same meaning as described in 13.2.5.16 NMAC.

[~~B~~]G. **"Insurer"** means an authorized insurer, an eligible surplus lines insurer, and a registered risk retention group, unless the context clearly indicates otherwise.

H. **"Group of insurers"** means those licensed insurers included in the reporting requirements of NMSA 1978, Article 37, or a set of insurers as identified by management, for the purpose of assessing the effectiveness of internal control over financial reporting.

I. **"Internal control over financial reporting"** means a process effected by an entity's board of directors, management and other personnel designed to provide reasonable assurance regarding the reliability of the financial statements, i.e., those items specified in Subsections A and B of 13.2.5.22 NMAC of this rule and includes those policies and procedures that:

(1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets;

(2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of the financial statements, i.e., those items specified in Subsections A and B of 13.2.5.22 NMAC of this rule and that receipts and expenditures are being made only in accordance with authorizations of management and directors; and

(3) provide reasonable assurance regarding prevention or timely detection of authorized aquisition, use or disposition of assets that could have a material effect on the financial statements, i.e., those items specified in Subsections A and B of 13.2.5.22 NMAC of this rule.

J. **"SEC"** means the united states securities and exchange commission.

K. "Section 404" means Section 404 of the Sarbanes-Oxley Act of 2002 and the SEC's rules and regulations promulgated thereunder.

L. **"Section 404 report"** means management's report on "internal control over financial reporting" as defined by the SEC and the related attestation report of the independent certified public accountant.

M. **"SOX complaint entity"** means an entity that either is required to be compliant with, or voluntarily is compliant with, all of the following provisions of the Sarbanes-Oxley Act of 2002:

(1) the preapproval requirements of Section 201 (Section 10A(i) of the Securities Exchange Act of 1934);

(2) the audit committee independence requirements of Section 301 (Section 10A (m)(3) of the Securities Exchange Act of 1934); and

(3) the internal control over financial reporting requirements of Section 404 (item 308 of SEC regulation S-K).

[1/1/94; 13.2.5.7 NMAC - Rn, 13 NMAC 2.5.7 & A, 1/1/2010]

13.2.5.9 FILING DATES AND EXTENSIONS:

A. All insurers shall have an annual audit by an independent certified public accountant and shall file an annual audited financial report with the superintendent on or before June 1 for the year ended December 31 immediately preceding. The superintendent may require an insurer to file an audited financial report earlier than June 1 with ninety days advance notice to the insurer.

B. The superintendent may grant extensions of the June 1 filing date for thirty-day periods for good cause shown. The request for extension must be submitted in writing not less than ten days prior to the filing date. The insurer and its independent certified public accountant must show the reasons for requesting such extension in sufficient detail to permit the superintendent to make an informed decision with respect to the requested extension.

C. If an extension of annual audited financial report is granted in accordance with the provisions in Subsection B of 13.2.5.9 NMAC, a similar extension of thirty (30) days is granted to the filing of management's report of internal control over financial reporting.

D. Every insurer required to file an annual audited financial report pursuant to this rule shall designate a group of individuals as constituting its audit committee, as defined in Subsection C of 13.2.5.7 NMAC. The audit committee of an entity that controls an insurer may be deemed to be the insurer's audit committee for purposes of this rule at the election of the controlling person.

[1/1/94; 13.2.5.9 NMAC - Rn, 13 NMAC 2.5.9 & A, 1/1/2010]

13.2.5.12 CONTENTS OF REPORT: The annual audited financial report shall include the following:

A. report of independent certified public accountant;

B. balance sheet reporting admitted assets, liabilities, capital and surplus;

C. statement of operations;

D. statement of cash flows;

E. statement of changes in capital and surplus;

F. notes to financial statements, including:

(1) those required by the appropriate NAIC annual statement instructions and the NAIC accounting practices and procedures manual;

(2) a reconciliation of differences, if any, between the annual audited financial report filed pursuant to this rule and the annual statement filed pursuant to Section 59A-5-29 NMSA 1978, with a written description of the nature of these differences;

(3) a summary of ownership and relationships of the insurer and all affiliated companies; and

(4) any other notes required by generally accepted accounting principles; and

H. accountant's letter of qualifications, as described in this rule.
[1/1/94; 13.2.5.12 NMAC - Rn, 13 NMAC 2.5.12 & A, 1/1/2010]

13.2.5.15 QUALIFICATIONS OF INDEPENDENT CERTIFIED PUBLIC ACCOUNTANT:

[~~A. The superintendent shall not recognize any person or firm as a qualified independent certified public accountant that is not in good standing with the American institute of certified public accountants and in all states in which the accountant is licensed to practice, or, for a Canadian or British company, that is not a chartered accountant.~~

~~B. The superintendent shall not recognize any natural person as a qualified independent certified public accountant who:~~

~~(1) has been convicted of fraud, bribery, a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Sections 1961; 1968, or any other dishonest conduct or practices under federal or state law;~~

~~(2) has been found to have violated the New Mexico Insurance Code with respect to any previous financial reports submitted pursuant to this rule; or~~

~~(3) has demonstrated a pattern or practice of failing to detect or disclose material information in previous reports filed under the provisions of this rule.~~

~~C. Except as otherwise provided in this section, an independent certified public accountant shall be recognized as qualified as long as he or she conforms to the standards of the profession as contained in the Code of Professional Ethics of the American institute of certified public accountants and the Code of Ethics and Rules of Professional Conduct of the New Mexico state board of public accountancy, or similar code.~~

~~D. The superintendent may hold a hearing to determine whether an independent certified public accountant is qualified within the meaning of this rule to express an opinion on the financial statements made in the annual audited financial report required by this rule. The superintendent may, after considering the evidence presented, rule that the accountant is not qualified and may require the insurer to replace the accountant with another person or firm whose relationship with the insurer is qualified within the meaning of this rule.~~]

A. The superintendent shall not recognize a person or firm as a qualified independent certified public accountant if the person or firm:

(1) is not in good standing with the AICPA and in all states in which the accountant is licensed to practice, or, for a Canadian or British company, that is not a chartered accountant; or

(2) has either directly or indirectly entered into an agreement of indemnity or release from liability, collectively referred to as indemnification, with respect to the audit of the insurer.

B. Except as otherwise provided in this rule, the superintendent shall recognize an independent certified public accountant as qualified as long as he or she conforms to the standards of his or her profession, as contained in the code of professional ethics of the AICPA and rules and regulations and code of ethics and rules of professional conduct of the New Mexico board of public accountancy, or similar code.

C. A qualified independent certified public accountant may enther into an agreement with an insurer to have disputes relating to an audit resolved by mediation or arbitration. However, in the event of a delinquency proceeding commenced against the insurer under NMSA 1978, Chapter 59A, Article 41, the mediation or arbitration provisions shall operate at the option of the statutory successor.

D. The lead or coordinating audit partner having primary responsibility for the audit may not act in that capacity for more than five (5) consecutive years. The person shall be disqualified from acting in that or a similar capacity for the same company or its insurance subsidiaries or affiliates for a period of five (5) consecutive years. An insurer may make application to the superintendent for relief from the above rotation requirement on the basis of unusual circumstances. This application should be made at least thirty (30) days before the end of the calendar year. The superintendent may consider the following factors in determining if the relief should be granted:

(1) number of partners, expertise of the partners or the number of insurance claims in the currently registered firm;

(2) premium volume of the insurer; or

(3) number of jurisdictions in which the insurer transacts business.

E. The insurer shall file, with its annual statement filing, the approval for relief from Subsection D of this section with the states that it is licensed in or doing business in and with the NAIC. If the nondomestic state accepts electronic filing with the NAIC, the insurer shall file the approval in an electronic format acceptable to the NAIC.

F. The superintendent shall neither recognize as a qualified independent certiied public accountant, nor accept an annual audited financial report, prepare in whole or in part by, a natural person who:

(1) has been convicted of fraud, bribery, a violation of the racketeer influenced and corrupt organizations act, 18 U.S.C. Sections 1961 to 1968, or any dishonest conduct or practices under federal or state law;

(2) has been found to have violated the insurance laws of this state with respect to any previous reports submitted under this rule; or

(3) has demonstrated a pattern or practice of ailing to detect or disclose material information in previous reports filed under the provisions of this rule.

G. The superintendent may hold a hearing, as provided in NMSA 1978, Chapter 59A, Article 4, to determine whether an independent certified public accountant is qualified and, considering the evidence presented, may rule that the accountant is not qualified for purposes of expressing his or her opinion on the financial statements in the annual audited financial report made pursuant to this rule and require the insurer to replace the accountant with another whose relationship with the insurer is qualified within the meaning of this rule.

H. The superintendent shall not recognize as a qualified independent certified public accountant, nor accept an annual audited financial report, prepared in whole or in part by an accountant who provides to an insurer, comtemporaneously with the audit, the following non-audit services:

(1) bookkeeping or other services related to the accounting records or financial statements of the insurer;

(2) financial information systems design and implementation;

(3) appraisal or valuation services, fairness opinions, or contribution-in-kind reports;

(4) actuarially-oriented advisory services involving the determination of amounts recorded in the financial statements; the accountant may assist an insurer in understanding the methods, assumptions and inputs used in the determination of amounts recorded in the financial statement only if it is reasonable to conclude that the services provided will not be subject to the audit procedures during an audit of the insurer's financial statements; an accountant's actuary may also issue an actuarial opinion or certification ("opinion") on an insurer's reserves if the following conditions have been met:

(a) neither the accountant nor the accountant's actuary has performed any management functions or made any management decisions;

(b) the insurer has competent personnel (or engages a third party actuary) to estimate the reserves for which management takes responsibility; and

(c) the accountant's actuary tests the reasonableness of the reserves after the insurer's management has determined the amount of the reserves;

(5) internal audit outsourcing

services;

(6) management functions or human resources;

(7) broker or dealer, investment adviser, or investment banking services;

(8) legal services or expert services unrelated to the audit; or

(9) any other services that the superintendent determines, by rule, are impermissible.

I. In general, the principles of independence with respect to services provided by the qualified independent certified public accountant are largely predicated on three basic principles, violations of which would impair the accountant's independence. The principles are that the accountant cannot function in the role of management, cannot audit his or her own work, and cannot serve in an advocacy role for the insurer.

J. Insurers having direct written and assumed premiums of less than $100,000,000 in any calendar year may request an exemption from Subsection H of this section. The insurer shall file with the superintendent a written statement discussing the reasons why the insurer should be exempt from these provisions. If the superintendent finds, upon review of this statement, that compliance with this rule would constitute a financial or organizational hardship upon the insurer, an exemption may be granted.

K. A qualified independent certified public accountant who performs the audit may engage in other non-audit services, including tax services, that are not described in Subsection H of this section or that do not conflict with Subsection I of this section, only if the activity is approved in advance by the audit committee, in accordance with Subsection L of this section.

L. All auditing services and non-audit services provided to an insurer by the qualified independent certified public accountant of the insurer shall be preapproved bythe audit committee. The preapproval requirement is waived with respect to non-audit services if the insurer is a SOX complaint entity or a direct or indirect wholly-owned subsidiary of a SOX comliant entity or:

(1) the aggregate amount of all such non-audit services provided to the insurer constitutes not more than five percent (5%) of the total amount of fees paid by the insurer to its qualified independent certified public accountant during the fiscal year in which the non-audit services are provided;

(2) the services were not recognized by the insurer at the time of the engagement to be non-audit services; and

(3) the services are promptly brought to the attention of the audit committee and approved prior to the completion of the audit by the audit committee or by one or more members of the audit committee who are the members of the board of directors to whom authority to grant such approvals has been delegated by the audit committee.

M. The audit committee may delegate to one or more designated members of the audit committee the authority to grant the preapprovals required by Subsection L of this section. The decisions of any member to whom this authority is delegated shall be presented to the full audit committee at each of its scheduled meetings.

N. The superintendent shall not recognize an independent certified public accountant as qualified for a particular insurer is a member of the board, president, chief executive officer, controller, chief financial officer, chief accounting officer, or any person serving in an equivalent position for that insurer, was employed by the independent certified public accountant and participated in the audit of that insurer during the one-year period preceding the date that the most current statutory opinion is due. This section shall only apply to partners and senior managers involved in the audit. An insurer may make application to the superintendent for relief from the above requirement on this basis of unusual circumstances.

O. The insurer shall file, with its annual statement filing, the approval for relief from Subsection N of this section with the states that it is licensed in or doing business in and the NAIC. If the nondomestic state accepts electronic filing with the NAIC, the insurer shall file the approval in an electronic format acceptable to the NAIC.

[1/1/94; 13.2.5.15 NMAC - Rn, 13 NMAC 2.5.15 & A, 1/1/2010]

13.2.5.16 REQUIREMENTS FOR AUDIT COMMITTEE: This section as in 13.2.5.16 NMAC shall not apply to foreign or alien insurers licensed in this state or an insurer that is a SOX complaint entity or a direct or indirect wholly-owned subsidiary of a SOX complaint entity.

A. The audit committee shall be directly responsible for the appointment, compensation and oversight of the work of any accountant, including resolution of disagreements between management and the accountant regarding financial reporting, for the purpose of preparing or issuing the audited financial report or related work pursuant to this rule. Each accountant shall report directly to the audit committee.

B. Each member of the audit committee shall be a member of the board of directors of the insurer or a member of the board of directors of an entity elected pursuant to Subsection E of this section and Subsection C of 13.2.5.7 NMAC.

C. In order to be considered independent for purposes of this section, a member of the audit committee may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee, accept any consulting, advisory or other compensatory fee from the entity or be an affiliated person of the entity or any subsidiary thereof. However, if law requires board participation by otherwise non-independent members, the law shall prevail and such members may participate in the audit committee and be designated as independent for audit committee purposes, unless they are an officer or employee of the insurer or one of its affiliates.

D. If a member of the audit committee ceases to be independent for reasons outside the member's reasonable control, that person, with notice by the responsible entity to the state, may remain an audit committee member of the responsible entity until the earlier of the next annual meeting of the responsible entity or one year from the occurrence of the event that caused the member to be no longer independent.

E. To exercise the election of the controlling person to designate the audit committee for purposes of this rule, the ultimate controlling person shall provide a written notice to the commissioners of the affected insurers. Notification shall be made timely prior to the issuance of the statutory audit report and include a description of the basis for the election. The election can be changed through notice to the superintendent by the insurer, which shall include a description of the basis for the change. The election shall remain in effect for perpetuity, until recinded.

F. The audit committee shall require the accountant that performs for an insurer any audit required by this rule to timely report to the audit committee in accordance with the requirements of SAS 61, communication with audit committees, or its replacement, including:

(1) all significant accounting prolicies and material permitted practices;

(2) all material alternative treatments of financial information within statutory accounting principles that have been discussed with management officials of the insurer, ramifications of the use of the alternative disclosures and treatments, and the treatment preferred by the accountant; and

(3) other material written communications between the accountant and the management of the insurer, such as any management letter or schedule of unadjusted differences.

G. If an insurer is a member of an insurance holding company system, the reports required by Subsection F may be provided to the audit committee on an aggregate basis for insurers in the holding

company system, provided that any substantial differences among insurers in the system are identified to the audit committee.

H. The proportion of independent audit committee members shall meet or exceed the following criteria:

Prior Calendar Year Direct Written and Assumed Premiums		
$0 - $300,000,000	Over $300,000,000 - $500,000,000	Over $500,000,000
No minimum requirements.	Majority (50% or more) of members shall be independent.	Supermajority of members (75% or more) shall be independent.

I. An insurer with direct written and assumed premium, excluding premiums reinsured with the federal crop insurance corporation and federal flood program, less than $500,000,000 may make application to the superintendent for a waiver from the requirements of this section based upon hardship. The insurer shall file, with its annual statement filing, the approval for relief from this section with the states that it is licensed in or doing business in and the NAIC. If the nondomestic state accepts electronic filing with the NAIC, the insurer shall file the approval in an electronic format acceptable to the NAIC.

[13.2.5.16 NMAC - N, 1/1/2010]

[~~13.2.5.16~~] 13.2.5.17 ROTATION OF ACCOUNTANTS REQUIRED:

A. After January 1, [~~1996~~] 2010, no partner or other person responsible for rendering a report may act in that capacity for more than [~~seven~~] five consecutive years. Following any such period of service the person shall be disqualified from acting in that or a similar capacity for the same company or its insurance subsidiaries or affiliates for a period of two years.

B. An insurer may make application to the superintendent for relief from this rotation requirement on the basis of unusual circumstances. The superintendent may consider the following factors in determining if the relief should be granted:

(1) the number of partners, expertise of the partners or the number of insurance clients in the currently registered firm;

(2) the premium volume of the insurer; and

(3) the number of jurisdictions in which the insurer transacts business.

[1/1/94; 13.2.5.17 NMAC - Rn, 13 NMAC 2.5.16 & A, 1/1/2010]

[~~13.2.5.17~~] 13.2.5.18 CONSOLIDATED OR COMBINED AUDITS: An insurer may make written application to the superintendent for approval to file consolidated or combined annual audited financial reports in lieu of separate annual audited financial reports if the insurer is part of a group of insurance companies which utilizes a pooling or one hundred percent reinsurance agreement that affects the solvency and integrity of the insurer's reserves and such insurer cedes all of its direct and assumed business to the pool. In such cases, a columnar consolidated or combined worksheet shall be filed with the report, as follows:

A. amounts shown on the consolidated or combined audited financial report shall be shown on the worksheet;

B. amounts for each insurer subject to this section shall be stated separately;

C. noninsurance operations may be shown on the worksheet on a combined or individual basis;

D. explanations of consolidated and eliminated entries shall be included; and

E. a reconciliation shall be included of any differences between the amounts shown in the individual insurer columns of the worksheet and comparable amounts shown on the annual statements of the insurers.

[1/1/94; 13.2.5.18 NMAC - Rn, 13 NMAC 2.5.17, 1/1/2010]

[~~13.2.5.18~~] 13.2.5.19 SCOPE OF EXAMINATION AND REPORT OF INDEPENDENT CERTIFIED PUBLIC ACCOUNTANT:

A. The superintendent shall not accept any annual audited financial report prepared in whole or in part by any person or firm that is not recognized as a qualified independent certified public accountant.

B. The examination of the insurer's financial statements shall be conducted in accordance with generally accepted auditing standards.

C. The independent certified public accountant shall use such other procedures illustrated in the national association of insurance commissioners' financial condition examiner's handbook as he may deem necessary.

[1/1/94; 13.2.5.19 NMAC - Rn, 13 NMAC 2.5.18, 1/1/2010]

[~~13.2.5.19~~] 13.2.5.20 REPORT OF ADVERSE FINANCIAL CONDITION:

A. An insurer shall require its independent certified public accountant to report, in writing, within five business days to the board of directors or its audit committee any determination by him that the insurer has materially misstated its financial condition as reported to the superintendent as of the balance sheet date currently under examination or that the insurer does not meet the minimum capital and surplus requirements of the New Mexico Insurance Code as of that date.

B. An insurer who has received a report of adverse financial condition shall forward a copy of the report to the superintendent within five business days of receiving it and shall furnish to the independent certified public accountant evidence that the report of adverse financial condition was forwarded to the superintendent.

C. If the independent certified public accountant fails to receive such evidence within the required five business day period, the independent certified public accountant shall furnish to the superintendent a copy of its report of adverse financial condition within the next five business days.

D. No independent public accountant shall be liable in any manner to any person for any statement made in connection with this section if such statement is made in good faith compliance with this section.

E. If the accountant, subsequent to the date of the audited financial report filed pursuant to this rule, becomes aware of facts which might have affected his report, the department notes the obligation of the accountant to take such action as prescribed in Volume 1, Section AU 561 of the Professional Standards of the American Institute of Certified Public Accountants.

[1/1/94; 13.2.5.19 NMAC - Rn, 13 NMAC 2.5.20, 1/1/2010]

[~~13.2.5.20~~] 13.2.5.21 REPORT ON [~~SIGNIFICANT DEFICIENCIES~~]UNREMEDIATED MATERIAL WEAKNESSES IN

INTERNAL CONTROLS:

A. Within sixty days after the filing of the annual audited financial statements, each insurer shall furnish the superintendent with a written report prepared by the accountant describing any [~~significant deficiencies~~] unremediated material weaknesses in the insurer's internal control structure noted by the accountant during the audit. SAS No. [~~60~~] 112, Communication of Internal Control Structure Matters Noted in an Audit (AU Section 325A of the Professional Standards of the American Institute of Certified Public Accountants) requires an accountant to communicate [~~significant deficiencies~~] unremediated material weaknesses (known as "reportable conditions") noted during a financial statement audit to the appropriate parties within an entity. If no unremediated weakness were noted, the cumminication should so state.

B. The insurer shall provide a description of remedial actions taken or proposed to correct [~~significant deficiencies~~] unremediated material weaknesses, if such actions are not described in the accountant's [~~report~~] communication.

C. No report should be issued if the accountant does not identify [~~significant deficiencies~~] unremediated material weaknesses.

[1/1/94; 13.2.5.21 NMAC - Rn, 13 NMAC 2.5.20 & A, 1/1/2010]

13.2.5.22 MANAGEMENT'S REPORT OF INTERNAL CONTROL OVER FINANCIAL REPORTING:

A. Every insurer required to file an audited financial report pursuant to this rule that has annual direct written and assumed premiums, excluding premiums reinsured with the federal crop insurance corporation and federal flood program, of $500,000,000 or more shall prepare a report of the insurer's or group of insurers' internal control over financial reporting, as these terms are defined in this rule. The report shall be filed with the superintendent along with the communication of internal control related matters noted in an audit described in this rule. Management's report of internal control over financial reporting shall be as of December 31 immediately preceding.

B. Notwithstanding the premium threshold in Subsection A of 13.2.5.22 NMAC; the superintendent may require an insurer to file management's report of internal control over financial reporting if the insurer is in any RBC level event, or meets any one or more of the standards of an insurer deemed to be in hazardous financial condition.

C. An insurer or a group of insurers that is: (1) directly subject to Section 404; (2) part of a holding company system whose parent is directly subject to Section 404; (3) not directly subject to Section 404, but is a SOX complaint entity; or (4) a member of a holding company system whose parent is not directly subject to Section 404, but is a SOX complaint entity; may file its or its parent's Section 404 report and an addendum in satisfaction of this requirement provided that those internal controls of the insurer or group of insurers having a material impact on the preparation of the insurer's or group of insurers' audited statutory financial statements were included in the scope of the Section 404 report. The addendum shall be a positive statement by management that there are no material processes with respect to the preparation of the insurer's or group of insurers' audited statutory financial statements excluded from the Section 404 report. If there are internal controls of the insurer or group of insurers that have a material impact on the preparation of the insurer's or group of insurers' audited statutory financial statements and those internal controls were not included in the scope of the Section 404 report, the insurer or group of insurers may either file (i) a report required by 13.2.5.22 NMAC, or (ii) the Section 404 report and a report required by 13.2.5.22 NMAC for those internal controls that have a material impact on the preparation of the insurer's or group of insurers' audited statutory financial statements not covered by the Section 404 report.

D. Management's report of internal control over financial reporting shall include:

(1) a statement that management is responsible for establishing and maintaining adequate internal control over financial reporting;

(2) a statement that management has established internal control over financial reporting and an assertion, to the best of management's knowledge and belief, after diligent inquiry, as to whether its internal control over financial reporting is effective to provide reasonable assurance regarding the reliability of financial statements in accordance with statutory accounting principles;

(3) a statement that briefly describes the approach or processes by which management evaluated the effectiveness of its internal control over financial reporting;

(4) a statement that briefly describes the scope of work that is included and whether any internal controls were excluded;

(5) disclosure of any unremediated material weaknesses in the internal control over financial reporting identified by management as of December 31 immediately preceding; management is not permitted to conclude that the internal control over financial reporting is effective to provide reasonable assurance regarding the reliability of financial statements in accordance with statutory accounting principles if there is one or more unremediated material weaknesses in its internal control over financial reporting;

(6) a statement regarding the inherent limitations of internal control systems; and

(7) signatures of the chief executive officer and the chief financial officer (or equivalent position/title).

E. Management shall document and make available upon financial condition examination the basis upon which its assertions, required in Subsection D of 13.2.5.22 NMAC, are made. Management may base its assertions, in part, upon its review, monitoring and testing of internal controls undertaken in the normal course of its activities.

F. Management shall have discretion as to the nature of the internal control framework used, and the nature and extent of documentation, in order to make its assertion in a cost effective manner and, as such, may include assembly of or reference to existing documentation.

G. Management's report on internal control over financial reporting, required by Subsection A of 13.2.5.22 NMAC, and any documentation provided in support thereof during the course of a financial condition examination, shall be kept confidential by the state insurance department.

[13.2.5.22 NMAC - N, 1/1/2010]

[~~13.2.5. 21~~] 13.2.5.23 ACCOUNTANT'S LETTER OF QUALIFICATIONS: The accountant shall furnish the insurer with a letter stating:

A. that the accountant is independent with respect to the insurer and conforms to the standards of the profession as contained in the *code of professional ethics* of the American institute of certified public accountants and the code of ethics and rules of professional conduct of the New Mexico state board of public accountancy, or similar code;

B. the background and experience in general, and the experience in audits of insurers, of the staff assigned to the examination and whether each is an independent certified public accountant (however, nothing in this rule shall be construed as prohibiting the accountant from utilizing such staff as is deemed appropriate if such use is consistent with generally accepted auditing standards);

C. that the accountant understands that the annual audited financial report and his opinion will be filed in compliance with this rule and that the superintendent will rely on this information in the monitoring of the financial condition of insurers;

D. that the accountant

consents to the requirements of this rule regarding CPA workpapers and agrees to make them available for review by the superintendent, his designee or his appointed agent;

E. that the accountant is properly licensed by an appropriate state licensing authority and is a member in good standing of the American institute of certified public accountants; and

F. that the accountant is in compliance with the requirements of [~~13 NMAC 2.5.15 and 2.5.16~~] 13.2.5.15 NMAC and 13.2.5.17 NMAC.

[1/1/94; 13.2.5.23 NMAC - Rn, 13 NMAC 2.5.21 & A, 1/1/2010]

[~~13.2.5.22~~] 13.2.5.24 C P A WORKPAPERS:

A. For purposes of this rule, workpapers are the records kept by the independent certified public accountant of the procedures followed, the tests performed, the information obtained, and the conclusions reached pertinent to his examination of the financial statements of an insurer. Workpapers, accordingly, may include audit planning documentation, work programs, analyses, memoranda, letters of confirmation and representation, abstracts of company documents and schedules or commentaries prepared or obtained by the independent certified public accountant in the course of his examination of the financial statements of an insurer and which support his opinion.

B. Every insurer required by this rule to file an audited financial report, shall require the accountant to make available for review by department examiners[~~,~~] and examiners designated by the superintendent, all workpapers prepared in the conduct of his examination and any communications related to the audit between the accountant and the insurer, at the offices of the insurer, at the insurance department or at any other reasonable place designated by the superintendent. The insurer shall require that the accountant retain the audit workpapers and communications until the insurance department has filed a report on examination covering the period of the audit but no longer than seven years from the date of the audit report.

C. Reviews by insurance department examiners shall be considered investigations and all working papers and communications obtained during the course of such investigations shall be afforded the same confidentiality as examination workpapers generated by the department. Photocopies of pertinent audit workpapers may be made and retained by the department.

[1/1/94; 13.2.5.24 NMAC - Rn, 13 NMAC 2.5.22 & A, 1/1/2010]

[~~13.2.5.23~~] 13.2.5.25 EXEMPTIONS:

A. Upon written application of any insurer, the superintendent may grant an exemption from compliance with any and all provisions of this rule if the superintendent finds, upon review of the application, that compliance with this rule would constitute a financial or organizational hardship upon the insurer.

B. An exemption may be granted at any time and from time to time for a specified period or periods.

C. Within ten days from a denial of an insurer's written request for an exemption from this rule, such insurer may request in writing a hearing on its application for an exemption. Such hearing shall be held in accordance with the New Mexico Insurance Code, Chapter 59A, Article 4, NMSA 1978.

[1/1/94; 13.2.5.25 NMAC - Rn, 13 NMAC 2.5.23 & A, 1/1/2010]

[~~13.2.5.24~~] 13.2.5.26 EFFECTIVE DATES FOR REPORTING REQUIREMENTS:

A. Domestic insurers retaining a certified public accountant on the effective date of this rule who qualifies as independent shall be required to file all reports required by this rule for the year ending December 31, [~~1993~~] 2010 and each year thereafter, unless the superintendent permits otherwise.

B. Domestic insurers not retaining a certified public accountant on the effective date of this rule who qualifies as independent shall be required to file the following documents with the superintendent for the year ending December 31, [~~1993~~] 2009:

(1) report of independent certified public accountant;

(2) actual [~~balanca~~] balance sheet

(3) notes to audited balance sheet.

C. For the year ending December 31, [~~1994~~] 2010 and each year thereafter, such insurers shall file with the superintendent all reports required by this rule.

D. Foreign insurers shall comply with this rule for the year ending December 31, [~~1993~~] 2010 and each year thereafter, unless the superintendent permits otherwise.

[1/1/94; 13.2.5.26 NMAC - Rn, 13 NMAC 2.5.24 & A, 1/1/2010]

[~~13.2.5.25~~] 13.2.5.27 CANADIAN AND BRITISH COMPANIES:

A. In the case of Canadian and British insurers, the annual audited financial report shall be defined as the annual statement of total business on the form filed by such companies with their domiciliary supervisory authority, duly audited by an independent chartered accountant.

B. For such insurers, the letter of compliance required by 13.2.5.13 NMAC shall state that the accountant is aware of the requirements relating to the annual audited statement filed with the superintendent pursuant to this rule and shall affirm that the opinion expressed is in conformity with such requirements.

[1/1/94; 13.2.5.27 NMAC - Rn, 13 NMAC 2.5.25, 1/1/2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT

SECURITIES DIVISION

The Securities Division of the New Mexico Regulation and Licensing Department hereby repeals all rules in Title 12, Chapter 11 NMAC and adopts new rules as follows:

12.11.1 NMAC, General Provisions (filed 6-02-2003) repealed 1-1-2010 and replaced by 12.11.1 NMAC, General Provisions, effective 1-1-2010.

12.11.2 NMAC, Broker-Dealers and Sales Representatives (filed 1-16-2002) repealed 1-1-2010 and replaced by 12.11.2 NMAC, Broker-Dealers and Agents, effective 1-1-2010.

Those relevant portions of 12 NMAC 11.2 Subparts 6 and 7 (filed 4-19-1999) [12.11.3 NMAC] repealed 1-1-2010 and replaced by 12.11.3 NMAC, Broker-Dealer and Agents Records, effective 1-1-2010.

12.11.4 NMAC, Broker Dealer and Sales Representatives Rules of Conduct and Prohibited Business Practices (filed 12-9-2008) repealed 1-1-2010 and replaced by 12.11.4 NMAC, Broker-Dealer and Agents Rules of Conduct and Prohibited Business Practices, effective 1-1-2010.

12.11.5 NMAC, Investment Advisors and Investment Advisor Representatives and Federal Covered Advisors (filed 1-16-2002) repealed 1-1-2010 and replaced by 12.11.5 NMAC, Investment Advisors and Investment Advisor Representatives and Federal Covered Advisors, effective 1-1-2010.

12 NMAC 11.3 Subpart 6, Investment Advisors' Records (filed 4-19-99) [12.11.6 NMAC] repealed 1-1-2010 and replaced by 12.11.6 NMAC, Investment Advisors and Investment Advisor Representatives Records, effective 1-1-2010.

12.11.7 NMAC, Investment Advisers And Investment Adviser Representatives

Rules of Conduct And Prohibited Business Practices (filed 12/9/2008) repealed 1-1-2010 and replaced by 12.11.7 NMAC, Investment Advisers And Investment Adviser Representatives Rules of Conduct And Prohibited Business Practices, effective 1-1-2010.

Those relevant portions of 12 NMAC 11.4; numbered Subpart 1, General Provisions, Subpart 2, Registration by Filing (filed 4-19-1999), Subpart 3, Registration by Coordination, Subpart 4, Registration by Qualification, Subpart 5, Prospectus Requirements and Subpart 9, Registration and Renewal of a Definite Amount of Securities by Investment Companies (all filed 4-19-99) [12.11.8 NMAC] repealed 1-1-2010 and replaced by 12.11.8 NMAC, Registration of Securities - General Provisions, effective 1-1-2010.

That relevant portion of 12 NMAC 11.4; numbered Subpart 8, Registration of Securities (filed 4-19-99) and Subpart 10, Adoption of NASAA Statements of Policy for Registration of Certain Types of Securities (filed 4-19-99) [12.11.9 NMAC] repealed 1-1-2010 and replaced by 12.11.9 NMAC, Standards Applicable to Registered Offerings, effective 1-1-2010.

That relevant portion of 12 NMAC 11.4, numbered Subpart 6, Small Company Offering Registration (SCOR) (filed 4-19-99) [12.11.10 NMAC] repealed 1-1-2010 and replaced by 12.11.10 NMAC, Small Company Offering Registration (SCOR), effective 1-1-2010.

Those relevant portions of 12 NMAC 11.4, Registration and Exemption of Securities (filed 4-19-99) [12.11.11 NMAC] repealed 1-1-2010 and replaced by 12.11.11 NMAC, Exempt Securities, effective 1-1-2010.

12.11.12 NMAC, Exempt Transactions (filed 1-16-2002) repealed 1-1-2010 and replaced by 12.11.12 NMAC, Exempt Transactions, effective 1-1-2010.

That relevant portion of 12 NMAC 11.4; numbered Subpart 7, Registration Exemptions (filed 4-19-99) [12.11.13 NMAC] repealed 1-1-2010 and replaced by 12.11.13 NMAC, Uniform Limited Offering Exemption, effective 1-1-2010.

12 NMAC 11.4, numbered Subpart 11, Covered Securities (filed 4-19-99) [12.11.14 NMAC] repealed 1-1-2010 and replaced by 12.11.14 NMAC, Notice Filings for Offerings of Covered Securities, effective 1-1-2010.

12 NMAC 11.5, Fraudulent Practices (filed 4-19-99) [12.11.15 NMAC] repealed 1-1-2010 and replaced by 12.11.15 NMAC, Fraudulent Practices, effective 1-1-2010.

12.11.16 NMAC, Forms (filed 1-16-02) repealed 1-1-2010 and replaced by 12.11.16 NMAC, Forms, effective 1-1-2010.

12.11.17 NMAC, Use of Senior-Specific Certifications and Professional Designations (filed 12-9-2008) repealed 1-01-2010 and replaced by 12.11.17 NMAC, Use of Senior-Specific Certifications and Professional Designations, effective1-01-2010.

NEW MEXICO REGULATION AND LICENSING DEPARTMENT

SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 1 GENERAL PROVISIONS

12.11.1.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.
[12.11.1.1 NMAC - Rp, 12.11.1.1 NMAC, 1-1-2010]

12.11.1.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as a broker-dealer, an investment adviser or an issuer of securities, and their representatives and agents.
[12.11.1.2 NMAC - Rp, 12.11.1.2 NMAC, 1-1-2010]

12.11.1.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701 NMSA 1978, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".
[12.11.1.3 NMAC - Rp, 12.11.1.3 NMAC, 1-1-2010]

12.11.1.4 DURATION: Permanent.
[12.11.1.4 NMAC - Rp, 12.11.1.4 NMAC, 1-1-2010]

12.11.1.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.
[12.11.1.5 NMAC - Rp, 12.11.1.5 NMAC, 1-1-2010]

12.11.1.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.
[12.11.1.6 NMAC - Rp, 12.11.1.6 NMAC, 1-1-2010]

12.11.1.7 DEFINITIONS: The definitions in this section apply throughout the New Mexico Uniform Securities Act and the rules in Title 12 Chapter 11 NMAC unless the context otherwise requires.

A. "Affiliate" means a person who directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with another person.

B. "Bank" as defined in Section 58-13C-102B(3) is limited to institutions whose deposits or share accounts are insured to the maximum amount authorized by statute by the federal deposit insurance corporation, the national credit union share insurance fund or a successor authorized by federal law.

C. "Branch office" means any location where one or more agents or investment adviser representatives regularly conducts the business of effecting or attempting to effect transactions in any security, or transacting investment advisory business, or is held out as such, excluding:

(1) any location that is established solely for customer service and/or back office type functions where no sales activities are conducted and that is not held out to the public as a branch office;

(2) any location that is the agent's or investment adviser's primary residence, provided that:

(a) only one agent or investment adviser representative, or multiple such agents or representatives who reside at that location and are members of the same immediate family, conduct business at the location;

(b) the location is not held out to the public as an office and the associated person does not meet with customers at the location;

(c) neither customer funds nor securities are handled at that location;

(d) the agent or investment adviser representative is assigned to a designated branch office, and such designated branch office is reflected on all business cards, stationery, advertisements and other communications to the public by such agent or investment adviser representative;

(e) the agent's or investment adviser's correspondence and communications with the public are subject to the firm's supervision;

(f) electronic communications (e.g., e-mail) are made through the firm's electronic system;

(g) all orders are entered through the designated branch office or an electronic

system established by the firm that is reviewable at the branch office;

(h) written supervisory procedures pertaining to supervision of sales activities conducted at the residence are maintained by the firm; and

(i) a list of the residence locations is maintained by the firm;

(3) any location, other than a primary residence, that is used for securities business for less than 30 business days in any one calendar year, provided that such location complies with the provisions of Subparagraphs (a) through (h) of Paragraph (2) of this subsection;

(4) any office of convenience, where agents or investment adviser representatives occasionally and exclusively by appointment meet with customers, which is not held out to the public as an office; and

(5) a temporary location established in response to the implementation of a business continuity plan;

(6) notwithstanding the exclusions provided in Paragraphs (1) through (5) of this subsection, any location that is responsible for supervising the activities of persons associated with the member at one or more non-branch locations of the member is considered to be a branch office.

D. "Broker-dealer" as defined in Section 58-13C-102C does not include:

(1) a pension or profit sharing trust, when effecting transactions for its own account; or

(2) an investment adviser registered under the New Mexico Uniform Securities Act or registered under the Investment Advisers Act of 1940 when placing orders for the accounts of its clients in accordance with rules prescribed by the director, provided that no commission or other remuneration is received by the investment adviser for placing orders.

E. "Control person" means an officer, director, managing partner or trustee, manager of a limited liability company or person of similar status or function or any security holder who owns beneficially or of record ten percent or more of any class of securities of an issuer.

F. "CRD" means the internet-based central registration depository that is the central licensing and registration system for broker-dealers, agents and regulators in the United States.

G. "FDIC" means the federal deposit insurance corporation of the United States.

H. "FINRA" means the financial industry self-regulatory organization created in July 2007 through the consolidation of NASD and the member regulation, enforcement and arbitration functions of the New York stock exchange. As the successor to NASD, FINRA is the entity designated as the filing depository by the SEC for purposes of the Investment Advisers Act of 1940, 15 U.S.C section 80b-1 et seq.

I. "Institutional investor" as defined Section 58-13C-102L includes but is not limited to:

(1) an entity, other than a natural person, which is directly engaged in the business of, and derives at least eighty percent of its annual gross income from, investing, purchasing, selling or trading in securities of more than one issuer and not of its own issue, and that has gross assets in excess of $10,000,000 at the end of its latest fiscal year;

(2) a state, a political subdivision of a state or an agency or corporate or other instrumentality of a state or a political subdivision of a state; or

(3) a federally recognized Indian tribe or pueblo that has total assets in excess of $10,000,000 and that has obtained certification from the division that it is an institutional investor.

J. "IARD" means the internet-electronic filing system for registration and disclosures by investment advisers and their associated persons developed and operated by FINRA according to the requirements of the system's sponsors, the SEC and NASAA.

K. "Investment contract" as used in Section 58-13C-102DD includes any investment by which an offeree furnishes initial value to an offeror, and a portion of this initial value is subjected to the risks of the enterprise, and the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind over and above the initial value will accrue to the offeree as a result of the operation of the enterprise, and the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.

L. "NASAA" means the North American securities administrators association, www.nasaa.org. whose membership is comprised of securities administrators in the 50 states, the District of Columbia, the U.S. Virgin Islands, Puerto Rico, Canada, and Mexico, and whose activities include among others development of model rules and uniform forms for use by state regulatory agencies.

M. "NASD" was a self-regulatory organization commonly known as the national association of securities dealers responsible for the operation and regulation of the Nasdaq stock market and over-the-counter markets and consolidated into FINRA in July 2007.

N. An **"offer"** is made within the meaning of Subsection O of Section 58-13C-202, so far as the securities holders of an issuer are concerned, if there is submitted to the vote of the securities holders a proposal, plan or agreement for:

(1) a reclassification of securities of such issuer which involves the substitution or exchange of a security for another security;

(2) a statutory merger or consolidation in which securities of the issuer will become or be exchanged for securities of another issuer;

(3) a transfer of assets of the issuer to another person in consideration of the issuance of securities of the other person or any of its affiliates; or

(4) a sale of securities of the issuer to another person in consideration of the issuance or transfer to such issuer of securities of the other person or any of its affiliates.

O. "Pledgee" within the meaning of Section 58-13C-202G of the New Mexico Uniform Securities Act includes a "secured party" as that term is defined in Section 55-9-102(a)(71) NMSA 1978.

P. "SEC" means the securities and exchange commission of the United States.

[12.11.1.7 NMAC - Rp, 12.11.1.7 NMAC, 1-1-2010]

12.11.1.8 [RESERVED]

12.11.1.9 FINDINGS OF THE DIRECTOR: The director finds that adoption of these rules is in the public interest, appropriate for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of the New Mexico Uniform Securities Act.

[12.11.1.9 NMAC - Rp, 12.11.1.9 NMAC, 1-1-2010]

12.11.1.10 SEVERABILITY: If any provision of these rules shall be determined to be invalid, such invalidity shall not affect other provisions which can be given effect without the invalid provision, and to this end the provisions of these rules are declared severable.

[12.11.1.10 NMAC - Rp, 12.11.1.10 NMAC, 1-1-2010]

12.11.1.11 FEES: The fees set forth in this section do not include fees set by statute or as determined elsewhere in these rules; are expressly prescribed for the expenses of various matters arising pursuant to authority under the New Mexico Uniform Securities Act; are chargeable to the applicant or registrant; and unless otherwise provided, are payable at the time an application or notice is filed. None of the fees paid are refundable.

A. Administrative fees.

(1) The fee for processing a name

change in registration statements on file is $50.00.

(2) The fee for processing a name change for a registered broker-dealer or a registered investment adviser is $50.00.

(3) The fee for an interpretative opinion, pursuant to Section 58-13C-605D, or for a no action letter is $300.00.

B. Inspection fees. Broker-dealers and investment advisers registered or required to be registered shall be charged a fee of $100.00 per examiner per day plus actual costs of transportation and lodging where applicable for examinations conducted pursuant to Section 58-13C-411D.

C. Successor firm fees.

(1) An application for registration of a successor firm pursuant to Section 58-13C-407A shall be accompanied by a fee of $300.00.

(2) An application for registration of successor firms pursuant to Section 58-13C-407A shall be accompanied by an administrative fee of $35.00 for each representative's registration which must be transferred to the successor firm.

[12.11.1.11 NMAC - Rp, 12.11.1.11 NMAC, 1-1-2010]

12.11.1.12 ADMINISTRATIVE PROCEDURE:

A. Application of rule. These rules govern proceedings conducted pursuant to Section 58-13C-604B of the New Mexico Uniform Securities Act.

B. Service. Service of subpoenas, notices of intent, summary orders, notices of opportunity for hearing and final orders shall be made either:

(1) personally;

(2) by certified mail, return receipt requested, sent to the last known address of the person; or

(3) by such other means as are reasonably calculated to give actual notice.

C. Administrative conferences.

(1) Any person entitled to a hearing pursuant to Section 58-13C-604B may submit a written request to the director for an informal conference to discuss an order issued or proposed to be issued by the director. A request for an informal conference will not affect a person's right to a formal hearing pursuant to Section 58-13C-604B provided that a proper request for a hearing is made pursuant to Section 58-13C-604B(2). However, any person requesting an informal conference with the director must specifically waive in writing the time deadlines for setting a formal hearing pursuant to Section 58-13C-604B(2). Upon the granting of an informal conference, the formal hearing will be indefinitely postponed pending the outcome of the informal conference. A person who has formerly waived the right to have a hearing set within 60 days pursuant to Section 58-13C-604B(2) may reinstate a request for a formal hearing by written notice to the director.

(2) The director may, at the director's discretion, grant a request for an informal conference for the purpose of settlement or simplification of the issues. Conduct and statements made during informal conferences are not admissible as evidence to prove either liability or a violation of the New Mexico Uniform Securities Act or the rules thereunder. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution.

(3) If consistent with Section 58-13C-604B, the director may dispose of proceedings pending pursuant to that section by stipulation, agreed settlement, consent order or default.

D. Motions. Any motion made prior to the commencement of any hearing must be made in writing to the director. Motions other than those for an extension of time or for additional discovery must be accompanied by a memorandum of law and served on the opposing party. Motions shall be a maximum of ten pages in length. The director may, at the director's sole discretion, rule without a hearing upon any procedural or discovery motion not disposing of the merits of the proceeding. All motions not specifically acted upon by the director shall be deemed denied upon the filing of the final order of the director in the proceeding.

E. Discovery. Parties may, by motion to the director, request reasonable discovery in addition to those procedures granted in Section 58-13C-604B(8). The director may, at the director's sole discretion, grant or deny further discovery, or impose such limitations or conditions on discovery as may be necessary in the interests of economy and expeditious decision making. Parties are encouraged to seek agreement on the scope of discovery before presenting a motion for additional discovery to the director.

F. Venue. All hearings conducted pursuant to Section 58-13C-604B shall be conducted in the offices of the securities division or other convenient place within Santa Fe county. The director may, at the director's discretion, hold the hearing in another county of this state upon a finding that good cause exists to do so.

G. Evidence. In a proceeding held pursuant to Section 58-13C-604B, the formal rules of evidence do not apply and the director or hearing officer may admit any evidence and may give probative effect to evidence that is of a kind commonly relied on by reasonably prudent people in the conduct of serious affairs.

H. Findings of fact and conclusions of law. The director or hearing officer may require all parties of record to file proposed findings of fact, conclusions of law or final orders at the close of the hearing.

I. Costs on appeal. The party seeking review pursuant to Section 58-13C-609 shall pay all costs of appeal, including the expenses of preparation of the record and transcript.

J. Default orders.

(1) A respondent that has received actual or constructive notice of the entry of either a summary order or notice of intent, together with a notice of opportunity for hearing, and fails to respond or appear within the time set forth in Section 58-13C-604B(2) shall be deemed to have admitted the allegations set forth in the summary order or notice of intent and shall be deemed to have consented to entry of a final order as proposed in the summary order or notice of intent.

(2) A respondent that has received actual or constructive notice of a hearing having been set and fails to appear, either in person or through counsel, at the time and place set for such hearing shall be deemed to have admitted the allegations set forth in the summary order or notice of intent that was entered in the matter before the hearing officer and shall be deemed to have consented to entry of a final order.

[12.11.1.12 NMAC - Rp, 12.11.1.12 NMAC, 1-1-2010]

12.11.1.13 ADOPTION OF UNIFORM FORMS:

A. The following uniform forms promulgated by the SEC, including subsequent amendments, are hereby adopted by reference for use in New Mexico:

(1) "Form ADV", *uniform application for investment adviser registration*;

(2) "Form ADV-E", *uniform certificate of accounting of client securities and funds in the possession or custody of an investment adviser*;

(3) "Form ADV-H", *uniform application for a temporary or continuing hardship exemption*;

(4) "Form ADV-W", *uniform notice of withdrawal from registration as investment adviser*;

(5) "Form BD", *uniform application for broker-dealer registration*;

(6) "Form BDW", *uniform request for broker-dealer withdrawal*; and

(7) "Form D", *notice of sale of securities pursuant to regulation D.*

B. The following uniform forms promulgated by FINRA and approved by the SEC, including subsequent amendments, are hereby adopted by reference for use in New Mexico:

(1) "Form BR", *uniform branch office registration form*;

(2) "Form U-4", *uniform application for securities industry registration or transfer*; and

(3) "Form U-5", *uniform termination notice for investment adviser registration.*

C. The following uniform forms adopted by NASAA, including subsequent amendments, are hereby adopted by reference for use in New Mexico:

(1) "Form NF", *uniform investment company notice filing*;

(2) "Form U-1", *uniform application to register securities;*

(3) "Form U-2", *uniform consent to service of process*;

(4) "Form U-2A", *uniform corporate resolution;* and

(5) "Form U-7", *small company offerings registration*.

[12.11.1.12 NMAC - N, 1-1-2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT
SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 2 BROKER-DEALERS AND AGENTS

12.11.2.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.
[12.11.2.1 NMAC - Rp, 12.11.2.1 NMAC, 1-1-2010]

12.11.2.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as an investment adviser or an issuer of securities, and their agents.
[12.11.2.2 NMAC - Rp, 12.11.2.2 NMAC, 1-1-2010]

12.11.2.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to make, amend and rescind rules as are necessary to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".
[12.11.2.3 NMAC - Rp, 12.11.2.3 NMAC, 1-1-2010]

12.11.2.4 DURATION: Permanent.
[12.11.2.4 NMAC - Rp, 12.11.2.4 NMAC, 1-1-2010]

12.11.2.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.
[12.11.2.5 NMAC - Rp, 12.11.2.5 NMAC, 1-1-2010]

12.11.2.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.
[12.11.2.6 NMAC - Rp, 12.11.2.6 NMAC, 1-1-2010]

12.11.2.7 DEFINITIONS: [RESERVED]

12.11.2.8 APPLICATIONS FOR REGISTRATION:

A. Applications for registration by broker-dealers and agents who are members of FINRA shall be filed with CRD on forms established for the CRD and, in addition thereto, the broker-dealer shall file with the director a financial statement that is current within 90 days of the date the application is received by the division, and a completed affidavit of no sales or an explanation why such affidavit cannot be completed.

B. Applications for registration and annual reports of broker-dealers and agents not members of the FINRA shall be filed with the director on forms BD, U-4, and affidavit of no sales, as designated in 12.11.16 NMAC. If the applicant cannot complete the affidavit of no sales, then the applicant shall file an explanation why such affidavit cannot be completed.

C. An "application" for purposes of Section 58-13C-406A shall include any information required by the director pursuant to Section 58-13C-406A(2).

D. Annual reports required by the New Mexico Uniform Securities Act or rules promulgated thereunder shall be filed with the director on or before December 31 of each year.
[12.11.2.8 NMAC - Rp, 12.11.2.8 NMAC, 1-1-2010]

12.11.2.9 REGISTRATION FEES:

A. Registration fees required of broker-dealers and agents who are members of FINRA shall be paid to CRD, in accordance with FINRA instructions. Annual renewal fees shall be paid no later than December 31 of each year.

B. Registration fees required of broker-dealers and agents who are not members of the FINRA shall be paid to the division. Annual renewal fees shall be paid to the division on or before December 31 of each year.
[12.11.2.9 NMAC - Rp, 12.11.2.9 NMAC, 1-1-2010]

12.11.2.10 EXAMINATION REQUIREMENTS - AGENTS: Each applicant for initial registration as a broker-dealer or agent is required to pass with a grade of at least 70 percent, within two years prior to the date the application for registration is filed in this state, the uniform securities agent state law examination (series 63) or uniform combined state law examination (series 66), and one of the general securities examinations in Subsection A below, unless the applicant's proposed securities activities will be restricted, in which case the applicant is required to pass, in addition to the series 63 or series 66 examination, each examination in Subsections B to I of this section that relates to the applicant's proposed securities activities:

A. FINRA non-member general securities examination (series 2) or, in the case of applicants registered with FINRA, the general securities registered representative examination (series 7);

B. investment company products/variable contracts representative examination (series 6);

C. limited registered representative examination (series 17);

D. direct participation program representative examination (series 22);

E. municipal securities representative examination (series 52);

F. corporate securities representative examination (series 62);

G. government securities limited representative qualification examination (series 72);

H. Canada modules of the series 7 examination (series 37 and 38);

I. Japan module of the series 7 examination (series 47).
[12.11.2.10 NMAC - Rp, 12.11.2.10 NMAC, 1-1-2010]

12.11.2.11 EXAMINATION REQUIREMENTS WAIVER: The examination requirement in 12.11.2.10 NMAC is waived for any applicant who meets the criteria set forth in either Subsections A or B of this section.

A. The applicant has been registered, within two years prior to the date the application for registration is filed in this state, as agents or as a broker-dealer under the securities law of any other state that requires passing the uniform securities agent state law examination or the uniform combined state law examination and has been registered with FINRA, within two

years prior to the date the application for registration is filed, to engage in the type of business for which the applicant is applying for registration.

B. The applicant has been registered under the New Mexico Uniform Securities Act within two years prior to the date the application is filed as an agent or broker-dealer to engage in the type of business for which the applicant is seeking registration.

[12.11.2.11 NMAC - Rp, 12.11.2.11 NMAC, 1-1-2010]

12.11.2.12 EXAMINATION REQUIREMENTS - PRINCIPAL: Prior to issuance of an initial registration as a broker-dealer, and at all times thereafter, at least one registered sales representative located at the principal office of the broker-dealer, and, except as provided in 12.11.2.24 NMAC, at least one sales representative located at each branch office in this state, who are so identified in the registration application, shall be designated to act in a supervisory capacity in each such office. Each supervisor designated in accordance with this section shall meet the examination requirements specified in 12.11.2.10 NMAC for applicants whose securities activities will not be restricted and shall pass with a grade of at least 70 percent the examination in Subsection A of this section. If the broker-dealer's proposed securities activities will be restricted, the designated supervisor is required to pass each examination in Subsections B to D of this section that relates to the broker-dealer's proposed securities activities:

A. general securities principal examination (series 24);

B. investment company products/variable contracts principal examination (series 26);

C. direct participation programs principal examination (series 39);

D. municipal securities principal examination (series 53).

[12.11.2.12 NMAC - Rp, 12.11.2.12 NMAC, 1-1-2010]

12.11.2.13 NOT COMPLETED AND WITHDRAWN APPLICATIONS: Any application for registration which is not completed or withdrawn within six months from the date it is initially received may be deemed materially incomplete, and the director may issue an order denying the registration.

[12.11.2.13 NMAC - Rp, 12.11.2.13 NMAC, 1-1-2010]

12.11.2.14 AUTOMATIC EFFECTIVENESS: Pursuant to Section 58-13C-406C, a registration becomes automatically effective 45 days after all requirements have been met and all requested information has been filed, provided that no proceeding under Section 58-13C-412 has been instituted. A registration may become effective sooner than 45 days after the filing of an application if:

A. the director issues a registration before the expiration of 45 days; or

B. the director transmits approval of the registration status of an agent or broker-dealer through the CRD of the FINRA.

[12.11.2.14 NMAC - Rp, 12.11.2.14 NMAC, 1-1-2010]

12.11.2.15 SECTION 202K EXEMPTION: Persons effecting only transactions exempt pursuant to Section 58-13C-202K who are duly licensed New Mexico real estate agents or duly registered under the New Mexico Mortgage Loan Company and Loan Broker Act are exempt from the requirements of Sections 58-13C-401A and 58-13C-402A.

[12.11.2.15 NMAC - Rp, 12.11.2.15 NMAC, 1-1-2010]

12.11.2.16 ISSUER AGENTS - SCOR OFFERINGS: Persons acting for an issuer effecting offers and sales of securities registered pursuant to 12.11.10 NMAC, Small Company Offering Registration (SCOR), to whom no commissions or other similar compensation is paid or given directly or indirectly for effecting such transactions are exempt from the requirements of Sections 58-13C-401A and 58-13C-402A.

[12.11.2.16 NMAC - Rp, 12.11.2.16 NMAC, 1-1-2010]

12.11.2.17 CANADIAN BROKER-DEALERS AND SALES REPRESENTATIVES EXEMPTION: A broker-dealer and its authorized agents are exempt from the registration requirements of Sections 58-13C-401A and 58-13C-402A if:

A. the broker-dealer and its authorized agents are located in Canada;

B. the broker-dealer and its authorized agents are licensed or registered pursuant to the laws of one or more Canadian provinces or territories;

C. the broker-dealer has no place of business in this state; and

D. the transactions in this state are limited to the following:

(1) transactions with a person who is temporarily in this state and with whom the Canadian broker-dealer had a bona fide broker-dealer-client relationship before the person entered the United States; or

(2) transactions with a person who is present in this state in relation to a self-directed tax advantaged retirement plan in Canada of which the person is the holder or contributor.

[12.11.2.17 NMAC - Rp, 12.11.2.17 NMAC, 1-1-2010]

12.11.2.18 NET CAPITAL REQUIREMENTS AND AGGREGATE INDEBTEDNESS LIMITATIONS:

A. Every broker-dealer, whether or not subject to Rule 15c3-1 of the Securities Exchange Act of 1934, shall maintain net capital in such minimum amounts as are designated in that rule for the activities to be engaged in by a broker-dealer in this state.

B. The aggregate indebtedness of each broker-dealer whether or not subject to rule 15c3-1 of the Securities Exchange Act of 1934 shall not exceed the levels prescribed in that rule.

C. If a broker-dealer is an individual, the person shall segregate from personal capital in a separate account an amount sufficient to satisfy the net capital requirement, and the amount so segregated shall be utilized solely for the business for which the broker-dealer is registered.

D. The director may by order exempt any broker-dealer from the provisions of this rule, either unconditionally or upon specified conditions, if by reason of the broker-dealer's membership on a national securities exchange or the special nature of its business and its financial position, and the safeguards that have been established for the protection of customers' funds and securities, the provisions are not necessary in the public interest or for the protection of investors.

[12.11.2.18 NMAC - Rp, 12.11.2.18 NMAC, 1-1-2010]

12.11.2.19 FIDELITY BONDS:

A. Every broker-dealer shall file with the director a surety bond in the amount set by the director, with a minimum of $100,000 and a maximum of $1,000,000, except as provided in Subsections B and C of 12.11.2.19 NMAC. The bond shall comply with the requirements of Subsection E of Section 411of the New Mexico Uniform Securities Act.

B. Broker-dealers who are members of the securities investor protection corporation will not be required to file the surety bond.

C. Broker-dealers who do not have custody of customer funds or securities will not be required to file the surety bond.

D. Issuer agents shall file with the director a surety bond in the amount set by the director, with a minimum of $10,000 and a maximum of $100,000.

[12.11.2.19 NMAC - Rp, 12.11.2.19 NMAC, 1-1-2010]

12.11.2.20 USE OF INTERNET FOR GENERAL DISSEMINATION OF

INFORMATION ON PRODUCTS AND SERVICES:

A. Broker-dealers and agents who use the internet to distribute information on available products and services through communications made on the internet directed generally to anyone having access to the internet and transmitted through internet communications shall not be considered to be "transacting business" in this state for purposes of Sections 58-13C-401A and 58-13C-402A of the New Mexico Uniform Securities Act based solely on that fact, provided that:

(1) the internet communication contains a legend in which it is clearly stated that:

(a) the broker-dealer or agent in question may only transact business in this state if first registered, excluded, or exempted from state broker-dealer or agent registration requirements; and

(b) follow-up, individualized responses to persons in this state by the broker-dealer or agent that involve either effecting or attempting to effect transactions in securities, or rendering of personalized investment advice for compensation, will not be made without compliance with broker-dealer or agent registration requirements, or an applicable exemption or exclusion;

(2) the internet communication contains a mechanism which includes, but is not limited to, technical "firewalls" or other implemented policies and procedures, designed reasonably to ensure that before any subsequent, direct communication with prospective customers or clients in this state, the broker-dealer and agent are first registered in this state or qualify for an exemption or exclusion from the registration requirement;

(3) the internet communication is limited to the dissemination of general information on products and services and does not involve either effecting or attempting to effect transactions in securities, or rendering personalized investment advice for compensation in this state over the internet; and

(4) with respect to broker-dealer or agent internet communications:

(a) the broker-dealer affiliation of the agent is prominently disclosed within the internet communication;

(b) the broker-dealer with whom the agent is associated retains responsibility for reviewing and approving the content of any internet communication by agent;

(c) the broker-dealer with whom the agent is associated first authorizes the distribution of information on the particular products and services through the internet communication; and

(d) when disseminating information through the internet communication, the agent acts within the scope of the authority granted by the broker-dealer.

B. This rule extends to state broker-dealer and agent registration requirements only, and does not excuse compliance with applicable securities registration, antifraud or related provisions.

C. Nothing in this rule shall be construed to affect the activities of any broker-dealer or agent engaged in business in this state that is not subject to the jurisdiction of the director as provided in the National Securities Markets Improvements Act of 1996, as amended.

[12.11.2.20 NMAC - Rp, 12.11.2.20 NMAC, 1-1-2010]

12.11.2.21 REPORTING REQUIREMENTS:

A. Each broker-dealer shall file with the director a copy of any complaint related to its business, transactions or operations naming the broker-dealer or any of its partners, officers, members, sales representatives or agents as defendants in any civil or criminal proceeding, or in any administrative or disciplinary proceeding by any public or private regulatory agency, within 20 days of the date the complaint is served on the broker-dealer; a copy of any answer or reply thereto filed by the broker-dealer within ten days of the date such is filed; and a copy of any decision, order or sanction made with respect to any such proceeding within twenty days of the date the decision, order or sanction is rendered.

B. Each broker-dealer shall file with the director a notice of transfer of control or change of name not less than thirty days prior to the date on which the transfer of control or change of name is to become effective or such shorter period as the director may permit.

C. Except as otherwise provided in this section, all material changes in the information included in a broker-dealer's most recent application for registration shall be set forth in an amendment to form BD filed with the director within thirty days after the change occurs.

D. Every broker-dealer shall file with the director the following reports concerning its net capital and aggregate indebtedness:

(1) immediate facsimile, telegraphic or written notice whenever the net capital of the broker-dealer is less than is required under 12.11.2.18 NMAC specifying the respective amounts of its net capital and aggregated indebtedness on the date of the notice; and

(2) a copy of every report or notice required to be filed by the broker-dealer pursuant to Rule 17a-11 of the Securities Exchange Act of 1934.

E. Each broker-dealer shall give immediate written notice to the director of the theft or disappearance of any New Mexico customers' securities or funds that are in the custody or control of its offices, whether within or outside this state, stating all material facts known to it concerning the theft or disappearance. However, if a broker-dealer complies with the provisions of 17 C.F.R. 240.17(f)(1), such broker-dealer need not give the notice required by this subsection.

F. Each broker-dealer shall file with the director a copy of any subordination agreement relating to the broker-dealer, within ten days after the agreement has been entered into, unless prior thereto the broker-dealer has filed a copy of the agreement with a national securities exchange or association of which it is a member.

G. Each broker-dealer shall notify the director in writing at least ten days prior to opening and not more than ten days after closing in this state any "branch office" as defined in these rules. The notification shall include such information as the director may request.

[12.11.2.21 NMAC - Rp, 12.11.2.21 NMAC, 1-1-2010]

12.11.2.22 FILING DOCUMENTS WITH THE DIRECTOR: Broker-dealers and agents may satisfy filing requirements contained in these rules by filing required documents with CRD where appropriate.

[12.11.2.22 NMAC - Rp, 12.11.2.22 NMAC, 1-1-2010]

12.11.2.23 DENIAL, SUSPENSION AND REVOCATION: Any order denying, suspending, revoking, canceling or limiting the registration of, and any order barring, a broker-dealer or agent may include such other sanctions as the director finds appropriate.

[12.11.2.23 NMAC - Rp, 12.11.2.23 NMAC, 1-1-2010]

12.11.2.24 BRANCH OFFICE SUPERVISORY REQUIREMENTS: Every registered broker-dealer must employ at its principal office and at each branch office in this state at least one person designated to act in a supervisory capacity who is registered as an agent in this state and has satisfied the supervisory examination requirement in 12.11.2.12 NMAC. Designated supervisors must meet the requirements of this section at the time that the principal or branch office located in this state opens for business. Except as provided in Subsection A of 12.11.2.24 NMAC, the designated supervisor must be physically located in the office that he or she supervises. After a principal or branch office located in this state opens for business,

if the designated supervisor no longer meets the requirements of this section, the broker-dealer shall have 90 days from the first date of noncompliance to meet the requirements of this section, provided that the broker-dealer notifies the director in writing of the event of noncompliance within five days of such event and further sets forth the method of supervision pending the replacement of the designated supervisor.

A. For single agent branch offices, the supervisory requirement of this section shall be satisfied if at least one person registered in this state who meets the examination requirements of sections 12.11.2.10 NMAC and 12.11.2.12 NMAC is employed on a full-time basis by the broker-dealer, and the broker-dealer shall:

(1) meet the supervisory requirements of FINRA;

(2) conduct annual on-site field audits, by its compliance department, of each single agent branch office, including, but not limited to, an examination for compliance with books and records requirements, for evidence of outside business activity, and for evidence that such activity was properly disclosed to and approved by the firm;

(3) maintain in its principal office the results of all field audits conducted pursuant to Paragraph (2) of this subsection;

(4) contact annually either telephonically or in writing a random sampling of at least 10 percent of the clients of each agent operating from single agent branch offices to determine if such agents are complying with 12.11.4.16 NMAC, including, but not limited to, whether agents are conducting any business with clients other than business that has been disclosed to the broker-dealer; if clients are contacted telephonically the broker-dealer shall maintain a written memorandum summarizing the questions asked and the clients' responses; and

(5) comply with any additional conditions that the director may by order impose, if the director finds the issuance of such order is necessary or appropriate in the public interest or for the protection of investors.

B. Branch office sales supervisors who have no supervisory or compliance responsibility for net capital or investment banking functions may substitute the general securities sales supervisor examination (series 8 or series 9/10) for the general securities principal exam (series 24).

[12.11.2.24 NMAC - Rp, 12.11.2.24 NMAC, 1-1-2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT

SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 3 BROKER-DEALER AND AGENTS RECORDS

12.11.3.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.

[12.11.3.1 NMAC - Rp, 12 NMAC 11.2.1.1, 1-1-2010]

12.11.3.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as a broker-dealer or an issuer of securities, and their agents.

[12.11.3.2 NMAC - Rp, 12 NMAC 11.2.1.2, 1-1-2010]

12.11.3.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to make, amend and rescind rules as are necessary to carry out the provisions of the New Mexico Uniform Securities Act Sections 58-13C-101 to 701 NMSA 1978, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".

[12.11.3.3 NMAC - Rp, 12 NMAC 11.2.1.3, 1-1-2010]

12.11.3.4 DURATION: Permanent.

[12.11.3.4 NMAC - Rp, 12 NMAC 11.2.1.4 NMAC, 1-1-2010]

12.11.3.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.

[12.11.3.5 NMAC - Rp, 12 NMAC 11.2.1.5, 1-1-2010]

12.11.3.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.

[12.11.3.6 NMAC - Rp, 12 NMAC 11.2.1.6, 1-1-2010]

12.11.3.7 DEFINITIONS: [RESERVED]

12.11.3.8 BROKER-DEALERS REQUIRED BY FEDERAL LAW TO KEEP RECORDS: Every registered broker-dealer subject to the Securities Exchange Act of 1934 ("the 1934 Act") and which is a member of a self-regulatory organization shall prepare and keep current the records required by the 1934 Act and the appropriate self-regulatory organization.

[12.11.3.8 NMAC - Rp, 12 NMAC 11.2.6.1, 1-1-2010]

12.11.3.9 BROKER-DEALERS RECORDS: Every registered broker-dealer not subject to 12.11.3.8 NMAC shall prepare and keep current the following books and records relating to its business:

A. blotters (or other records of original entry) containing an itemized daily record of all purchases and sales of securities, all receipts and deliveries of securities (including certificate numbers), all receipts and disbursements of cash and all other debits and credits; such records shall show the account for which each such transaction was effected, the name and amount of securities, the unit and aggregate purchase or sale price (if any), the trade date, and the name or other designation of the person from whom purchased or received or to whom sold or delivered;

B. ledgers or other records reflecting all assets and liabilities, income, expense and capital accounts;

C. ledgers or other records reflecting securities in transfer, dividends and interest received, securities borrowed and securities loaned, moneys borrowed and moneys loaned (together with a record of the collateral therefor and any substitutions in the collateral), and securities failed to receive and failed to deliver;

D. a securities record or ledger reflecting separately for each security as of the clearance dates, all "long" or "short" positions (including securities in safekeeping) carried by the broker-dealer for its account or for the account of its customers or partners, and showing the location of all securities long and the offsetting position to all securities short, and in all cases the name or designation of the account in which each position is carried;

E. a memorandum of each order (order ticket), and of any other instruction given or received for the purchase or sale of securities, whether executed or unexecuted; the memorandum shall show the terms and conditions of the order or instruction; any modification or cancellation thereof; the account for which entered; whether the transaction was unsolicited; the time of entry; the price at which executed; and, to the extent feasible, the time of execution or cancellation; orders entered pursuant to the exercise of discretionary power by the broker-dealer, or any employee thereof, shall be so designated; the term "time of entry" shall mean the time when the broker-dealer transmits the order or instructions for execution or, if it is not so transmitted, the time when it is received;

F. a memorandum (order

ticket) of each purchase and sale of securities for the account of the broker-dealer showing the price and, to the extent feasible, the time of execution;

G. copies of confirmations of all purchases and sales of securities, whether the confirmations are issued by the broker-dealer or the issuer of the security involved, and copies of notices of all other debits and credits for securities, cash and other items for the account of customers and partners of the broker-dealer;

H. copies of all communications, correspondence and other records relating to securities transactions with customers;

I. a separate file containing all complaints made or submitted by customers to the broker-dealer or its agents relating to securities transactions; in this subsection, "complaint" means any written or oral statement of a customer alleging a grievance involving the activities of persons under the control of the broker-dealer in connection with the solicitation or execution of any transaction or the disposition of any securities or funds of that customer that would constitute a violation of the New Mexico Uniform Securities Act or any rule or order thereunder;

J. a customer information form (new account information worksheet) for each customer; if recommendations are to be made to the customer, the form shall include information regarding the customer's name, address, telephone number, age, occupation, annual income, net worth and investment objectives or, if the customer refuses to provide the required information upon request, a notation to that effect;

K. for each cash and margin account established and maintained with the broker-dealer, information setting forth the name and address of the beneficial owner of each account, and copies of all guarantees of accounts and all margin, lending and option agreements; in the case of joint, partnership, corporate and limited liability accounts, the records required by this subsection must be executed by persons authorized to transact business for the account;

L. copies of all powers of attorney and other evidence of the granting of any discretionary authority with respect to a customer's account;

M. a record of the proof of money balances of all ledger accounts in the form of trial balances;

N. all partnership agreements or, in the case of a corporation, all articles of incorporation, by-laws, minute books and stock certificate books or, in the case of a limited liability company, all articles of organization and operating agreements of the broker-dealer;

O. a separate file containing copies of all advertising by the broker-dealer in the conduct of its securities business; and

P. a computation made quarterly (on a calendar year basis) of its net capital and ratio of its aggregate indebtedness to its net capital on form X-17A-5 of the SEC's FOCUS report as it may be amended from time to time.

[12.11.3.9 NMAC - Rp, 12 NMAC 11.2.6.2, 1-1-2010]

12.11.3.10 BROKER-DEALERS PRESERVATION OF RECORDS: Every registered broker-dealer not subject to 12.11.3.8 NMAC shall preserve for at least five years, the most recent two years in an easily accessible place, all records required under 12.11.3.9 NMAC except that records required under Subsections J and L of 12.11.3.9 NMAC shall be preserved by the broker-dealer for at least five years after the closing of the account; and records required under Subsection N of 12.11.3.9 NMAC shall be preserved by the broker-dealer for at least five years after withdrawal or expiration of its registration in this state. After a record or other document has been preserved for one year as required under this section, a microfilm copy thereof may be substituted for the remainder of the required period.

[12.11.3.10 NMAC - Rp, 12 NMAC 11.2.6.3, 1-1-2010]

12.11.3.11 BROKER-DEALER BRANCH OFFICE RECORDS: Except as provided in Subsection E below, every branch office of a registered broker-dealer not subject to 12.11.3.8 NMAC shall prepare and keep current the following records:

A. copies of the records described in Subsections E, G, H, I, J and O of 12.11.3.9 NMAC;

B. blotters (or other records of original entry) setting forth an itemized daily record of all purchases and sales of securities; this requirement may be satisfied by maintaining a unit filing system where the order ticket information (described in Subsection E of 12.11.3.9 NMAC) required in Subsection A of 12.11.3.11 NMAC is accumulated and segregated on a daily basis;

C. blotters (or other records of original entry) setting forth an itemized daily record of all receipts and deliveries of securities (including certificate numbers) and all receipts and disbursements of cash;

D. copies of customer monthly or other periodic statements that are issued by the broker-dealer or that are furnished to the broker-dealer by the issuer of a security purchased by a customer of the broker-dealer; and

E. branch offices of broker-dealers engaged solely in the offer and sale of either securities issued by open-end investment companies, face-amount certificate companies or unit investment trusts registered under the Investment Company Act of 1940, or the securities of direct participation program issuers, or both, shall prepare and keep current copies of those records described in Subsections C, E, H, I and J of 12.11.3.9 NMAC.

[12.11.3.11 NMAC - Rp, 12 NMAC 11.2.6.4, 1-1-2010]

12.11.3.12 BROKER-DEALER PRESERVATION OF BRANCH OFFICE RECORDS: The records required in 12.11.3.11 NMAC shall be preserved at the branch office for a period of not less than five years, the most recent two years in an easily accessible place, except that customer new account forms shall be preserved for a period of not less than three years after the closing of the account. After a record or document has been preserved for one year as required under this subsection, a microfilm copy thereof may be substituted for the remainder of the required period.

[12.11.3.12 NMAC - Rp, 12 NMAC 11.2.6.5, 1-1-2010]

12.11.3.13 RECORDS OF CLEARING BROKER-DEALER: This part does not require a registered broker-dealer to make and keep such records of transactions cleared for the registrant by another registered broker-dealer as are customarily made and kept by the clearing broker-dealer.

[12.11.3.13 NMAC - Rp, 12 NMAC 11.2.6.6, 1-1-2010]

12.11.3.14 DIRECTOR MAY ORDER EXEMPTION: The director may by order exempt any broker-dealer from all or part of the requirements of this part, either unconditionally or upon specified conditions, if by reason of the special nature of its business, the director finds the issuance of the order is necessary or appropriate in the public interest or for the protection of investors.

[12.11.3.14 NMAC - Rp, 12 NMAC 11.2.6.7, 1-1-2010]

12.11.3.15 AGENT RECORDS: Every registered agent shall have and keep current the following records relating to customer securities transactions, unless the director by order exempts an agent from all or part of the requirements of this part:

A. the customer information form as set forth in Subsection J of 12.11.3.9 NMAC;

B. a securities holding record for each customer including the customer's name, address, telephone number, age, occupation, investment objectives and a chronological listing of the names and amount of all securities purchased or sold for the account of the customer, including the date of each transaction, and the unit purchase or sale price; and

C. the record requirements may not be satisfied by maintaining a file of confirmations unless permitted by order of the director.
[12.11.3.15 NMAC - Rp, 12 NMAC 11.2.7, 1-1-2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT
SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 4 BROKER-DEALER AND AGENTS RULES OF CONDUCT AND PROHIBITED BUSINESS PRACTICES

12.11.4.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.
[12.11.4.1 NMAC - Rp, 12.11.4.1 NMAC, 1-1-2010]

12.11.4.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as a broker-dealer or an issuer of securities, and their agents.
[12.11.4.2 NMAC - Rp, 12.11.4.2 NMAC, 1-1-2010]

12.11.4.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to make, amend and rescind rules as are necessary to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701 NMSA 1978, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".
[12.11.4.3 NMAC - Rp, 12.11.4.3 NMAC, 1-1-2010]

12.11.4.4 DURATION: Permanent.
[12.11.4.4 NMAC - Rp, 12.11.4.4 NMAC, 1-1-2010]

12.11.4.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.
[12.11.4.5 NMAC - Rp, 12.11.4.5 NMAC, 1-1-2010]

12.11.4.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.
[12.11.4.6 NMAC - Rp, 12.11.4.6 NMAC, 1-1-2010]

12.11.4.7 DEFINITIONS: **[RESERVED]**

12.11.4.8 WRITTEN CONFIRMATIONS: Except as provided in 12.11.4.9 NMAC, each broker-dealer shall give or send to the customer a written confirmation, promptly after execution, and before settlement, of each transaction. The confirmation shall set forth:

A. a description of the security purchased or sold, the date of the transaction, the price at which the security was purchased or sold and any commission charged;

B. whether the broker-dealer was acting for its own account, as agent for the customer, as agent for some other person, or as agent for both the customer and some other person;

C. when the broker-dealer is acting as agent for the customer, either the name of the person from whom the security was purchased or to whom it was sold, or the fact that the information will be furnished upon the request of the customer, if the information is known to, or with reasonable diligence may be ascertained by, the broker-dealer; and

D. whether the transaction was unsolicited.
[12.11.4.8 NMAC - Rp, 12.11.4.8 NMAC, 1-1-2010]

12.11.4.9 COMPLIANCE WITH RULE 10b-10: If applicable, compliance with Rule 10b-10 of the Securities Exchange Act of 1934 shall be deemed compliance with 12.11.4.8 NMAC.
[12.11.4.9 NMAC - Rp, 12.11.4.9 NMAC, 1-1-2010]

12.11.4.10 WRITTEN SUPERVISORY PROCEDURES: Each broker-dealer shall establish and keep current a set of written supervisory procedures and a system for applying such procedures, which may be reasonably expected to prevent and detect any violations of the New Mexico Uniform Securities Act and rules and orders thereunder. The procedures shall include the designation by name or title of a number of supervisory employees reasonable in relation to the number of its registered agents, offices and transactions in this state. A complete set of the procedures and system for applying them shall be kept and maintained at every branch office.
[12.11.4.10 NMAC - Rp, 12.11.4.10 NMAC, 1-1-2010]

12.11.4.11 CONTRACT WAIVING RIGHTS PROHIBITED: A broker-dealer shall not enter into any contract with a customer if the contract contains any condition, stipulation or provision binding the customer to waive any rights under the New Mexico Uniform Securities Act or any rule or order thereunder. Any such condition, stipulation or provision is void.
[12.11.4.11 NMAC - Rp, 12.11.4.11 NMAC, 1-1-2010]

12.11.4.12 NET WORTH WITHDRAWALS PROHIBITED: No broker-dealer shall permit or effect a withdrawal of any part of its net worth, including subordinated indebtedness, whether by redemption, retirement, repurchase, repayment, or otherwise, that would cause its net capital or its aggregate indebtedness to violate Subsections A or B of 12.11.2.18 NMAC, without prior written approval of the director.
[12.11.4.12 NMAC - Rp, 12.11.4.12 NMAC, 1-1-2010]

12.11.4.13 CUSTOMER COPIES OF CONTRACTS: Each broker-dealer shall provide each customer with a conformed copy of all contracts or agreements between the broker-dealer and the customer, and a copy of the customer information forms prescribed under Subsections J and K of 12.11.3.9 NMAC, not later than 15 days after the initial securities transaction effected in the customer's account.
[12.11.4.13 NMAC - Rp, 12.11.4.13 NMAC, 1-1-2010]

12.11.4.14 BROKER-DEALER ASSOCIATION WITH A DEPOSITORY INSTITUTION: No broker-dealer may associate with a depository institution by contract, agreement or other means unless promotional and account-establishing functions are performed or supervised by persons registered as agents representing the broker-dealer.
[12.11.4.14 NMAC - Rp, 12.11.4.14 NMAC, 1-1-2010]

12.11.4.15 PROHIBITED BUSINESS PRACTICES BY BROKER-DEALERS: The following are deemed to be unethical and dishonest conduct or practices by a broker-dealer under Section 58-13C-412C(13) NMSA 1978 without limiting those terms to the practices specified herein:

A. causing any unreasonable delay in the delivery of securities purchased by any of its customers, or in the payment upon request of free credit balances reflecting completed transactions of any of its customers;

B. inducing trading in a customer's account which is excessive in size or frequency in view of the financial resources and character of the account;

C. recommending to a customer the purchase, sale or exchange of any securities without reasonable grounds to believe that the recommendation is suitable for the customer on the basis of information

furnished by the customer after reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other information known by the broker-dealer;

D. executing a transaction on behalf of a customer without authority to do so;

E. executing a transaction for the account of a customer upon instruction from a third party without first obtaining written discretionary authority from the customer, unless the discretionary power relates solely to the time or price for the execution of orders, or both;

F. exercising any discretionary power in effecting a transaction for a customer's account without first obtaining written discretionary authority from the customer, unless the discretionary power relates solely to the time or price for the execution of orders, or both;

G. extending, arranging for, or participating in arranging for credit to a customer in violation of the Securities Exchange Act of 1934 or the regulations of the Federal Reserve Board;

H. executing any transaction in a margin account without obtaining from its customer a written margin agreement not later than 15 calendar days after the initial transaction in the account;

I. failing to segregate customers' free securities or securities in safekeeping;

J. hypothecating a customer's securities without having a lien thereon unless written consent of the customer is first obtained, except as permitted by rules of the SEC;

K. charging its customer an unreasonable commission or service charge in any transaction executed as agent for the customer;

L. entering into a transaction for its own account with a customer with an unreasonable markup or markdown;

M. entering into a transaction for its own account with a customer in which a commission is charged;

N. entering into a transaction with or for a customer at a price not reasonably related to the current market price;

O. executing orders for the purchase by a customer of securities not registered or exempted unless the transaction is exempted under the New Mexico Uniform Securities Act;

P. representing itself as a financial or investment planner, consultant, or adviser, when the representation does not accurately describe the nature of the services offered, the qualifications of the person offering the services and the method of compensation for the services;

Q. violating any material rule of any securities exchange or national securities association of which it is a member with respect to any customer, transaction or business in this state;

R. failing to furnish to a customer purchasing securities in an offering, not later than the date of confirmation of the transaction, either a final prospectus or a preliminary prospectus and an additional document, which together include all information set forth in the final prospectus;

S. introducing customer transactions on a "fully disclosed" basis to another broker-dealer that is not registered under the New Mexico Uniform Securities Act;

T. recommending to a customer that the customer engage the services of an investment adviser that is not registered under the New Mexico Uniform Securities Act or the Investment Advisers Act of 1940; and

U. using in a misleading manner any term or abbreviation that states or implies that a person has special expertise, certification, or training in financial planning, including but not limited to, the misleading use of a senior-specific certification or designation as set forth in 12.11.17 NMAC.

[12.11.4.15 NMAC - Rp, 12.11.4.15 NMAC, 1-1-2010]

12.11.4.16 PROHIBITED BUSINESS PRACTICES BY AGENTS: The following are deemed to be unethical or dishonest conduct or practices by an agent under Section 58-13C-412C(13) NMSA 1978 without limiting those terms to the practices specified herein:

A. borrowing money or securities from, or lending money or securities to, a customer;

B. acting as a custodian for money, securities or an executed stock power of a customer;

C. effecting securities transactions with a customer not recorded on the regular books or records of the broker-dealer which the agent represents, unless the transactions are disclosed to, and authorized in writing by, the broker-dealer prior to execution of the transactions;

D. effecting transactions in securities for an account operating under a fictitious name, unless disclosed to, and permitted in writing by, the broker-dealer or issuer which the agent represents;

E. sharing directly or indirectly in profits or losses in the account of any customer without first obtaining written authorization of the customer and the broker-dealer which the agent represents;

F. dividing or otherwise splitting commissions, profits or other compensation receivable in connection with the purchase or sale of securities in this state with any person not so registered as an agent for the same broker-dealer, or for a broker-dealer under direct or indirect common control;

G. using advertising describing or relating to the agent's securities business unless the advertising clearly identifies the name of the agent's employing broker-dealer or issuer;

H. misrepresenting the services of a registered investment adviser on whose behalf the agent is soliciting business or accounts; and

I. engaging in any of the practices specified in Subsections B, C, D, E, F, G, H, O, P, Q, R, T and U of 12.11.4.15 NMAC.

[12.11.4.16 NMAC - Rp, 12.11.4.16 NMAC, 1-1-2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT
SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 5 INVESTMENT ADVISERS, INVESTMENT ADVISER REPRESENTATIVES AND FEDERAL COVERED ADVISERS

12.11.5.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.

[12.11.5.1 NMAC - Rp, 12.11.5.1 NMAC, 1-1-2010]

12.11.5.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as an investment adviser and their representatives.

[12.11.5.2 NMAC - Rp, 12.11.5.2 NMAC, 1-1-2010]

12.11.5.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701 NMSA 1978, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".

[12.11.5.3 NMAC - Rp, 12.11.5.3 NMAC, 1-1-2010]

12.11.5.4 DURATION: Permanent.

[12.11.5.4 NMAC - Rp, 12.11.5.4 NMAC, 1-1-2010]

12.11.5.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited

at the end of a section.
[12.11.5.5 NMAC - Rp, 12.11.5.5 NMAC, 1-1-2010]

12.11.5.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.
[12.11.5.6 NMAC - Rp, 12.11.5.6 NMAC, 1-1-2010]

12.11.5.7 DEFINITIONS: The following definitions apply throughout this part.

A. "Custody" means holding, directly or indirectly, client funds or securities, or having any authority to obtain possession of them or having the ability to appropriate them.

(1) Custody includes:

(a) possession of client funds or securities, unless received inadvertently and returned to the sender promptly, but in any case within three business days of receiving them;

(b) any arrangement (including a general power of attorney) under which the investment adviser is authorized or permitted to withdraw client funds or securities maintained with a custodian upon the adviser's instruction to the custodian; and

(c) any capacity (such as a general partner of a limited partnership, managing member of a limited liability company or a comparable position for another type of pooled investment vehicle, or trustee of a trust) that gives the investment adviser, an owner of the investment adviser, or a supervised person of the investment adviser legal ownership of or access to client funds or securities.

(2) Receipt of checks drawn by clients and made payable to unrelated third parties will not meet the definition of custody if forwarded to the third party within 24 hours of receipt and the adviser maintains the records required.

B. For purposes of 12.11.5 NMAC, an investment adviser shall not be deemed to be exercising "discretion" or "discretionary authority" when it places trade orders with a broker-dealer pursuant to a third party trading agreement if:

(1) the investment adviser has executed a separate investment adviser contract exclusively with its client which acknowledges that a third party trading agreement will be executed to allow the investment adviser to effect securities transactions for the client in the client's broker-dealer account;

(2) the investment adviser contract specifically states that the client does not grant discretionary authority to the investment adviser and the investment adviser in fact does not exercise discretion with respect to the account; and

(3) a third party trading agreement is executed between the client and a broker-dealer which specifically limits the investment adviser's authority in the client's broker-dealer account to the placement of trade orders and deduction of investment adviser fees.
[12.11.5.7 NMAC - N, 1-1-2010]

12.11.5.8 ELECTRONIC FILING WITH DESIGNATED ENTITY:

A. Designation. Pursuant to Section 58-13C-406A, the director designates the IARD and the CRD to receive and store filings and collect related fees from investment advisers and investment adviser representatives on behalf of the director.

B. Use of the IARD and the CRD. Unless otherwise provided, all investment adviser and investment adviser representative applications, amendments, reports, notices, related filings and fees required to be filed with the director shall be filed electronically with and transmitted to the IARD or the CRD.

C. Electronic signature. When a signature or signatures are required by the particular instructions of any filing made through the IARD or the CRD, the applicant or a duly authorized officer of the applicant, as required, shall affix his or her electronic signature to the filing by typing his or her name in the appropriate fields and submitting the filing to the IARD or the CRD. Submission of a filing in this manner shall constitute evidence of legal signature by any individuals whose names are typed on the filing.

D. Non-IARD and non-CRD filings. Notwithstanding Subsection B of this section, any documents or fees required to be filed with the director that are not permitted to be filed with or cannot be accepted by the IARD or the CRD shall be filed directly with the director.

E. Hardship exemptions. This subsection provides two "hardship exemptions" from the requirements to make electronic filings.

(1) Temporary hardship exemption.

(a) Investment advisers registered or required to be registered under the New Mexico Uniform Securities Act that experience unanticipated technical difficulties that prevent submission of an electronic filing to the IARD may request a temporary hardship exemption from the requirements to file electronically.

(b) To request a temporary hardship exemption, the investment adviser must:

(i) file the form ADV-H in paper format with the director no later than one business day after the filing that is the subject of the form ADV-H was due; and

(ii) submit the filing that is the subject of the form ADV-H in electronic format to the IARD no later than seven business days after the filing was due.

(c) The temporary hardship exemption will be deemed effective upon receipt by the director of the complete form ADV-H. Multiple temporary hardship exemption requests within the same calendar year may be disallowed by the director.

(2) Continuing hardship exemption. The director may exclude, by order, an investment adviser from the requirement to make electronic filings with the IARD. Such order will be granted only if the director determines that such an exemption is consistent with the public interest and the protection of investors.
[12.11.5.8 NMAC - N, 1-1-2010]

12.11.5.9 APPLICATION FOR INVESTMENT ADVISER REGISTRATION:

A. Initial application. The application for initial registration as an investment adviser pursuant to Section 58-13C-406A shall be made by completing the form ADV in accordance with the form instructions and by filing the form with the IARD. The application for initial registration shall also include the following:

(1) a financial statement demonstrating compliance with the requirements of 12.11.5.23 NMAC, if necessary;

(2) the fee required by Section 58-13C-410C;

(3) for sole proprietors, proof of compliance by the applicant with the examination requirements of 12.11.5.14 NMAC unless such proof is available to the director through the CRD; and

(4) any other information required by the director.

B. Annual renewal. Pursuant to Section 58-13C-406D, a registration is effective until midnight on December 31st of the year for which the application for registration was filed. An investment adviser may renew a registration through the IARD and shall pay the fee required by Section 58-13C-410C.

C. Amendments.

(1) Pursuant to Section 58-13C-406B, if the information or record contained in an application filed under this section is or becomes inaccurate or incomplete in a material respect, the registrant shall promptly file a correcting amendment in accordance with the instructions in the form ADV.

(2) An amendment will be considered to be filed promptly if it is filed within 30 days of the event that requires the filing.

D. Completion of filing. An application for initial registration or renewal is not considered filed for purposes of Section 58-13C-406 until the required fee and all additional information requested by the director has been received by the director.
[12.11.5.9 NMAC - Rp, 12.11.5.8 NMAC, 1-1-2010]

12.11.5.10 APPLICATION FOR INVESTMENT ADVISER REPRESENTATIVE REGISTRATION:

A. Initial application. The application for initial registration pursuant to Section 59-13C-406A shall be made by completing form U-4 in accordance with the form instructions and by filing the form U-4 with the CRD. The application for initial registration shall also include the following:

(1) proof of compliance by the investment adviser representative applicant with the examination requirements set out in 12.11.5.14 NMAC unless such proof is available to the director through the CRD; and

(2) the fee required by Section 58-13C-410D.

B. Annual renewal. Pursuant to Section 58-13C-406D, a registration is effective until midnight on December 31st of the year for which the application for registration was filed. An investment adviser representative registration may be renewed through the CRD with payment of the fee required by Section 58-13C-410D.

C. Amendments.

(1) Pursuant to Section 58-13C-406B, if the information or record contained in an application filed under this section is or becomes inaccurate or incomplete in a material respect, the investment adviser or investment adviser representative shall promptly file a correcting amendment in accordance with the instructions in the form U-4. The investment adviser and the investment adviser representative are under a continuing obligation to update information required by the form U-4 as changes occur.

(2) An amendment will be considered to be filed promptly if the amendment is filed within 30 days of the event that requires the filing.

D. Completion of filing. An application for initial registration or a renewal is not considered filed for purposes of Section 58-13C-406 until the required fee and all additional information and records requested by the director pursuant to Section 58-13C-410D have been received.
[12.11.5.10 NMAC - Rp, 12.11.5.8 NMAC, 1-1-2010]

12.11.5.11 NOTICE FILING REQUIREMENTS FOR FEDERAL COVERED INVESTMENT ADVISERS:

A. Notice Filing. The notice filing for a federal covered investment adviser under Section 58-13C-405C of the New Mexico Uniform Securities Act shall be filed with the IARD on an executed form ADV. A notice filing shall be deemed filed when the fee required by Section 58-13C-410E and the complete form ADV are filed with and accepted by the IARD on behalf of the state.

B. Annual renewal. The annual renewal of the notice filing for a federal covered investment adviser pursuant to Section 58-13C-405C shall be filed with the IARD. The renewal of the notice filing for a federal covered investment adviser shall be deemed filed when the fee required by Section 58-13C-410E is filed with and accepted by the IARD on behalf of the state.

C. Updates and amendments.

(1) A federal covered investment adviser shall file with the IARD, in accordance with the instructions in the form ADV, any amendments to the federal covered investment adviser's form ADV by filing an annual updating amendment within 90 days after the end of its fiscal year.

(2) In addition to filing its annual updating amendment, the federal covered investment adviser shall amend its form ADV by filing additional amendments promptly with the IARD if:

(a) information provided in response to items 1, 3, 9, or 11 of part 1A or items 1, 2.A through 2.F, or 2.I or part 1.B of form ADV become inaccurate in any way;

(b) information provided in response to items 4, 8, 10 of part 1.A or item 2.G of part 1.B of form ADV become materially inaccurate; or

(c) information provided in its brochure becomes materially inaccurate.

(3) An amendment shall be considered to be filed promptly if filed within 30 days of the event that requires the filing of the amendment.
[12.11.5.11 NMAC - Rp, 12.11.5.16 NMAC, 1-1-2010]

12.11.5.12 INVESTMENT ADVISER BROCHURE RULE:

A. DEFINITIONS. For the purpose of this section:

(1) "contract for impersonal advisory services" means any contract relating solely to the provision of investment advisory services:

(a) by means of written material or oral statements which do not purport to meet the objectives or needs of specific individuals or accounts;

(b) through the issuance of statistical information containing no expression of opinion as to the investment merits of a particular security; or

(c) any combination of the foregoing services;

(2) "entering into," in reference to an investment advisory contract, does not include an extension or renewal without material change of any such contract which is in effect immediately prior to such extension or renewal; and

(3) "investment company contract" means a contract with an investment company registered under the Investment Company Act of 1940 which meets the requirements of Section 15(c) of that act.

B. General Requirements. Unless otherwise provided in this section, an investment adviser, registered or required to be registered pursuant to Section 403 of the New Mexico Uniform Securities Act shall, in accordance with the provisions of this section, furnish each advisory client and prospective advisory client with a written disclosure statement which may be a copy of part II of its form ADV or written documents containing at least the information then so required by part II of form ADV, or such other information as the director may require.

C. Delivery.

(1) An investment adviser, except as provided in Paragraph (2) of this subsection, shall deliver the statement required by this section to an advisory client or prospective advisory client:

(a) not less than 48 hours prior to entering into any investment advisory contract with such client or prospective client; or

(b) at the time of entering into any such contract, if the advisory client has a right to terminate the contract without penalty within five business days after entering into the contract.

(2) The delivery of the statement required by Paragraph (1) of this subsection need not be made in connection with entering into:

(a) an investment company contract; or

(b) a contract for impersonal advisory services requiring a payment of less than $200.00.

D. Offer to deliver.

(1) An investment adviser, except as provided in Paragraph (2) of this subsection, annually shall, without charge, deliver or offer in writing to deliver upon written request to each of its advisory clients the statement required by this section.

(2) The delivery or offer required by Paragraph (1) of this subsection need not be made to advisory clients receiving advisory services solely pursuant to:

(a) an investment company contract; or

(b) a contract for impersonal advisory services requiring a payment of less than $200.00.

(3) With respect to an advisory client entering into a contract or receiving advisory services pursuant to a contract for impersonal advisory services which requires a payment of $200.00 or more, an offer of the type specified in Paragraph (1) of this subsection shall also be made at the time of entering into an advisory contract.

(4) Any statement requested in writing by an advisory client pursuant to an offer required by this section must be mailed or delivered within seven days of the receipt of the request.

E. Omission of inapplicable information. If an investment adviser renders substantially different types of investment advisory services to different advisory clients, any information required by part II of form ADV may be omitted from the statement furnished to an advisory client or prospective advisory client if such information is applicable only to a type of investment advisory service or fee which is not rendered or charged, or proposed to be rendered or charged, to that client or prospective client.

F. Other disclosures. Nothing in this section shall relieve any investment adviser from any obligation pursuant to any provision of the New Mexico Uniform Securities Act or the rules and regulations thereunder or other federal or state law to disclose any information to its advisory clients or prospective advisory clients not specifically required by this section.

[12.11.5.12 NMAC - N, 1-1-2010]

12.11.5.13 TERMINATION, TRANSFER AND WITHDRAWAL:

A. Termination of investment adviser representative's employment or association. Pursuant to Section 58-13C-408A, if an investment adviser representative registered under the New Mexico Uniform Securities Act terminates employment by or association with an investment adviser or a federal covered investment adviser or terminates activities that require registration as an investment adviser representative, the investment adviser or federal covered investment adviser shall complete the form U-5 in accordance with the form instructions and promptly file the form with CRD. If the investment adviser representative learns that the investment adviser or federal covered investment adviser has not filed the form, then the investment adviser representative shall promptly file it. The form will be considered to be filed promptly if it is filed within 30 days of the termination.

B. Transfer of investment adviser representative's employment or association. Pursuant to Section 58-13C-408B, if an investment adviser representative registered under the New Mexico Uniform Securities Act terminates employment by or association with an investment adviser or federal covered investment adviser and begins employment by or association with another investment adviser or federal covered investment adviser, an initial application for registration must by filed in compliance with Section 58-13C-406 and 12.11.5.10 NMAC.

C. Withdrawal.

(1) The application for withdrawal of a registration by an investment adviser pursuant to Section 58-13C-409 shall be made by following the instructions on form ADV-W and filing the form ADV-W with the IARD.

(2) The application for withdrawal of registration as an investment adviser representative pursuant to Section 58-13C-409 shall be made by following the instructions on form U-5 and filing the form U-5 with the CRD.

[12.11.5.13 NMAC - N, 1-1-2010]

12.11.5.14 EXAMINATION REQUIREMENTS: An individual applying to be registered as an investment adviser or investment adviser representative under the New Mexico Uniform Securities Act shall provide the director with proof of obtaining a passing score on either:

A. the uniform investment adviser law examination (series 65 - post 1999 version); or,

B. the general securities representative examination (series 7) and the uniform combined state law examination (series 66 - post 1999 version).

[12.11.5.14 NMAC - Rp, 12.11.5.9 NMAC, 1-1-2010]

12.11.5.15 LIMITED REGISTRATION: Any individual whose proposed advisory activities will be restricted shall provide the director with proof of obtaining a passing score on the uniform combined state law examination (series 66 - post 1999 version) and each examination in the following paragraphs that relates to the applicant's proposed activities:

A. the investment company products/variable contracts representative examination (series 6);

B. the limited registered representative examination (series 17);

C. the direct participation programs representative examination (series 22);

D. the municipal securities representative examination (series 52);

E. the corporate securities representative examination (series 62);

F. the government securities limited representative examination (series 72);

G. the Canada modules of the series 7 examination (series 37 and 38);

H. the Japan module of the series 7 examination (series 47).

[12.11.5.15 NMAC - Rp, 12.11.5.10 NMAC, 1-1-2010]

12.11.5.16 EXAMINATION REQUIREMENTS WAIVER: The examination requirement in 12.11.5.14 NMAC is waived for any applicant who meets the criteria set forth in any one of the paragraphs in this section:

A. the applicant has been licensed or registered within two years prior to the date the application is filed as an investment adviser or investment adviser representative under the securities law of another state requiring examinations equivalent to the examinations designated in 12.11.5.14 NMAC;

B. the applicant has been licensed or registered within two years prior to the date the application is filed as an investment adviser or investment adviser representative under the securities law of another state requiring examinations equivalent to:

(1) either the uniform investment adviser law examination (series 65 - pre 2000 version) or the uniform combined state law examination (series 66 - pre 2000 version); and

(2) either the national association of securities dealers non-member general securities examination (series 2) or the general securities registered representative examination (series 7);

C. the applicant has been registered or licensed as an investment adviser or an investment adviser representative under the New Mexico Uniform Securities Act or its predecessor act within two years prior to the date the application is filed.

[12.11.5.16 NMAC - Rp, 12.11.5.11 NMAC, 1-1-2010]

12.11.5.17 PROFESSIONAL DESIGNATION WAIVERS: The examination requirements of sections 12.11.5.14 NMAC and 12.11.5.18 NMAC shall not apply to an individual who currently holds at least one of the following professional designations:

A. chartered financial analyst certification (CFA);

B. chartered investment counselor certification (CIC);

C. certified financial planner designation (CFP);

D. chartered financial consultant certification (ChFC); or

E. certified public accountant with a personal financial specialist designation (PFS).

[12.11.5.17 NMAC - Rp, 12.11.5.12 NMAC, 1-1-2010]

12.11.5.18 EXAMINATION

REQUIREMENTS - PRINCIPAL: Prior to initial registration as an investment adviser, and at all times thereafter, the applicant is required to have at least one designated supervisor who, in addition to passing the examinations required in 12.11.5.14 NMAC, has passed, within two years prior to the date the application for registration is filed in this state, the general securities principal examination (series 24) or the general securities sales supervisor qualification examination (series 9/10), unless waived under 12.11.5.17 NMAC. An investment adviser which does not have more than one person associated with the firm who is registered pursuant to the New Mexico Uniform Securities Act is not required to have a designated supervisor and is not required pass examinations in addition to those required in 12.11.5.14 NMAC.
[12.11.5.18 NMAC - Rp, 12.11.5.13 NMAC, 1-1-2010]

12.11.5.19 LIMITED REGISTRATION: An applicant may apply for a limited registration to engage in activities limited to one or more of the categories set forth in 12.11.5.15 NMAC, provided the applicant has passed the examination in the category for which the applicant is applying and the applicant has submitted a written statement to the director setting forth how the applicant's activities will be limited in this state and, in the case of an investment adviser representative seeking a limited registration, how the representative will be adequately supervised.
[12.11.5.19 NMAC - Rp, 12.11.5.14 NMAC, 1-1-2010]

12.11.5.20 SOLICITORS:

A. Definitions for purposes of this section:

(1) "solicitor" means any individual, person or entity who, directly or indirectly, receives a cash fee or any other economic benefit for soliciting, referring, offering or otherwise negotiating for the sale or selling of investment advisory services to clients on behalf of an investment adviser;

(2) "client" includes any prospective client.

B. It shall be unlawful for any investment adviser, registered or required to be registered, to pay a cash fee or any other economic benefit, directly or indirectly, in connection with solicitation activities unless:

(1) the solicitor is registered as an investment adviser representative or is exempt from registration as provided for in Subsection E of this section;

(2) the solicitor to whom a cash fee or any other economic benefit is paid for such referral is not a person described in Paragraphs (2) through (6), (8) or (11) through (13) of Section 58-13C-412C of NMSA 1978;

(3) the cash fee or any other economic benefit is paid by the investment adviser with respect to solicitation activities that are impersonal in nature in that they are provided solely by means of:

(a) written material or oral statements which do not purport to meet the objectives or needs of the specific client;

(b) statistical information containing no expressions of opinions as to the merits of particular securities; or

(c) any combination of the foregoing services,

(4) the cash fee or any other economic benefit is paid pursuant to a written agreement to which the investment adviser is a party and all of the following conditions are met:

(a) the written agreement:

(i) describes the solicitation or referral activities to be engaged in by the solicitor on behalf of the investment adviser and the cash fee or any other economic benefit to be received for such activities;

(ii) contains an undertaking by the solicitor to perform its duties under the agreement in a manner consistent with the instructions of the investment adviser and the provisions of the New Mexico Uniform Securities Act and rules thereunder; and

(iii) requires that the solicitor, at the time of any solicitation or referral activities for which a cash fee or any other economic benefit is paid or to be paid by the investment adviser, provide the client with a current copy of the investment adviser's disclosure document required under rule 203(b)-1 and a separate disclosure statement as described in Subsection C of this section;

(b) the investment adviser receives from the client, prior to or at the time of entering into any written investment advisory contract, a signed and dated acknowledgement of receipt of the investment adviser's written disclosure statement and the solicitor's written disclosure document;

(c) the investment adviser makes a bona fide effort and has a reasonable basis for believing that the solicitor has complied with the agreement; and

(d) the foregoing requirements in Subparagraphs (a), (b) and (c) of Paragraph (4) of this subsection shall not apply where the solicitor is:

(i) a partner, officer, director or employee of such investment adviser; or

(ii) a partner, officer, director or employee of a person that controls, is controlled by, or is under common control with such investment adviser, provided the status of the solicitor is disclosed to the client at the time of the solicitation or referral.

C. The separate written disclosure document required to be furnished by the solicitor to the client pursuant to Item (iii) of Subparagraph (a) of Paragraph (4) of Subsection B of this section shall contain the following information:

(1) the name of the solicitor;

(2) the name of the investment adviser;

(3) the nature of the relationship, including any affiliation, between the solicitor and the investment adviser;

(4) a statement that the solicitor will be compensated for solicitation or referral services by the investment adviser;

(5) the terms of the compensation arrangement including a description of the cash fee or any other economic benefit paid or to be paid to the solicitor; and

(6) the amount of compensation the client will pay, if any, in addition to the advisory fees, and whether the cash fee or any other economic benefit paid to the solicitor will be added to the advisory fee, creating a differential with respect to the amount charged to other advisory clients who are not subject to the solicitor compensation arrangement.

D. Nothing in this rule shall be deemed to relieve any person of any fiduciary or other obligation to which such person may be subject under any law.

E. A solicitor is not required to be registered as an investment adviser or as an investment adviser representative if the solicitor is in compliance with all requirements of Subsections B and C in this section, and the solicitor either:

(1) receives compensation that consists of a one-time payment only; or

(2) receives an order of the director waiving the registration requirement.
[12.11.5.20 NMAC - N, 1-1-2010]

12.11.5.21 NOT COMPLETED AND WITHDRAWN APPLICATIONS: Any application for registration that is not completed or withdrawn within six months from the date it is initially received may be deemed materially incomplete and the director may issue an order denying the application.
[12.11.5.21 NMAC - Rp, 12.11.5.15 NMAC, 1-1-2010]

12.11.5.22 CUSTODY OF CLIENT FUNDS OR SECURITIES BY INVESTMENT ADVISERS:

A. Section definitions. For purposes of this section:

(1) "independent representative" means a person who:

(a) acts as agent for an advisory client, including in the case of a pooled investment vehicle, for limited partners of a limited partnership, members of a limited

liability company, or other beneficial owners of another type of pooled investment vehicle, and by law or contract is obligated to act in the best interest of the advisory client or the limited partners, members or other beneficial owners;

(b) does not control, is not controlled by, and is not under common control with the adviser; and

(c) does not have, and has not had within the past two years, a material business relationship with the adviser;

(2) "qualified custodian" means:

(a) a bank or savings association that has deposits insured by the FDIC under the Federal Deposit Insurance Act;

(b) a registered broker-dealer holding the client assets in customer accounts;

(c) a registered futures commission merchant under Section 4f(a) of the Commodity Exchange Act, holding the client assets in customer accounts, but only with respect to clients' funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon; and

(d) a foreign financial institution that customarily holds financial assets for its customers, provided that the foreign financial institution keeps the advisory clients' assets in customer accounts segregated from its proprietary assets; and

(3) "supervised person" means any partner, officer, director (or other person occupying a similar status or performing similar functions), or employee of an investment adviser, or other person who provides investment advice on behalf of the investment adviser and is subject to the supervision and control of the investment adviser.

B. General provision. It shall be unlawful and a fraudulent or deceptive act, practice, or course of business for any investment adviser registered or required to be registered in New Mexico to take or have custody of any securities or funds of any client unless the investment adviser complies with the provisions of this section.

C. Notice to director. The investment adviser shall promptly notify the director in writing that the investment adviser has or may have custody. Such notification is required to be given on form ADV.

D. Qualified custodian. The funds and securities shall be maintained by a qualified custodian:

(1) in a separate account for each client under that client's name; or

(2) in accounts that contain only the funds and securities of the adviser's clients, under the adviser's name as agent or trustee for the clients.

E. Notice to clients. When the investment adviser opens an account with a qualified custodian for maintaining a client's funds or securities, the adviser shall notify the client promptly in writing of the qualified custodian's name and address and of the manner in which the funds and securities are maintained. The adviser shall notify the client promptly in writing of any changes to this information.

F. Account statements.

(1) Account statements must be sent to clients, either by:

(a) a qualified custodian; the investment adviser must have a reasonable basis for believing that the qualified custodian sends an account statement, at least quarterly, to each client for which it maintains funds or securities, identifying the amount of funds and of each security in the account at the end of the period and setting forth all transactions during that period; or

(b) the investment adviser.

(2) If the investment adviser sends account statements to its clients, the adviser must comply with the following requirements:

(a) the investment adviser shall send an account statement, at least quarterly, to each client for whom the investment adviser has custody of funds or securities, identifying the amount of funds and of each security of which the investment adviser has custody at the end of the period and setting forth all transactions during that period;

(b) the investment adviser shall engage an independent certified public accountant who shall verify all of those funds and securities by actual examination at least once during each calendar year at a time chosen by the accountant without prior notice or announcement to the adviser and that is irregular from year to year, and shall file a certificate on form ADV-E, 17 C.F.R. Section 279.8, with the director within 30 days after the completion of the examination, stating that it has examined the funds and securities and describing the nature and the extent of the examination; and

(c) the terms of engagement of the independent certified public accountant shall require that, upon finding any material discrepancies during the course of the examination, such accountant shall notify the director within one business day of the finding, by means of a facsimile transmission or electronic mail, followed by first class mail, directed to the attention of the director.

(3) Limited partnerships and limited liability companies. If the investment adviser is a general partner of a limited partnership (or managing member of a limited liability company, or holds a comparable position for another type of pooled investment vehicle), the account statements required under this subsection must be sent to each limited partner (or member or other beneficial owner or their independent representative).

(4) Revocable trusts. If an investment adviser, owner of an investment adviser, or supervised person of an investment adviser is serving as trustee of a revocable trust and the investment adviser acts as the investment adviser to that trust, the account statements required under this subsection must be sent to the grantor of the trust. If the trust assets are being maintained by a qualified custodian, the adviser shall instruct the custodian to send the statements directly to the grantor and must have a reasonable basis for believing the statements are being sent.

(5) Irrevocable trusts.

(a) If an investment adviser, owner of an investment adviser, or supervised person of an investment adviser is serving as trustee of an irrevocable trust and the investment adviser acts as the investment adviser to that trust, the investment adviser shall send a notice annually to every beneficiary entitled to receive the annual report of the trustee pursuant to Section 46A-8-813C, NMSA 1978. The investment adviser is not required to send this notice to beneficiaries for whom the trustee is also the legal guardian.

(b) The notice must state that:

(i) the investment adviser or one of its owners or supervised persons is serving as the trustee for the trust;

(ii) the investment adviser is providing advisory services to the trust; and

(iii) the beneficiary may receive, upon request, a copy of the account statements required by this subsection.

(c) The notice required by Subparagraph (a) of this paragraph may be sent with the annual report of the trustee required by Section 46A-8-813C, NMSA 1978.

(d) The investment adviser shall arrange for the account statements to be sent to each beneficiary requesting statements. If the trust assets are being maintained by a qualified custodian, the adviser shall instruct the custodian to send the statements directly to the requesting beneficiaries and must have a reasonable basis for believing the statements are being sent. If more than three beneficiaries request statements, the custodian may charge a fee, reflecting its actual costs of copying and mailing the statements, to each beneficiary receiving them.

(6) Co-trustees. Compliance with Paragraphs (4) and (5) of this subsection is not required if the trust has at least one co-trustee who is neither a relative of, nor within the past three years has had a material business relationship with, the investment adviser or any of its owners or supervised persons, and the trust's assets are maintained

by a qualified custodian who is sending a copy of the account statements required by Paragraph (1) of this subsection directly to the co-trustee.

G. Independent representatives. A client may designate an independent representative to receive, on his behalf, notices and account statements as required under Subsections E and F of this section.

H. Direct fee deduction.

(1) An adviser who has custody by virtue of having fees directly deducted from client advisory accounts must also provide the following safeguards:

(a) the investment adviser must have written authorization from the client to deduct advisory fees from the account with the qualified custodian; and

(b) each time a fee is directly deducted from a client account, the investment adviser must concurrently:

(i) send the qualified custodian an invoice of the amount of the fee to be deducted from the client's account; and

(ii) send the client an invoice itemizing the fee; itemization includes the formula used to calculate the fee, the amount of assets under management the fee is based on, and the time period covered by the fee; invoices need not be sent more frequently than every quarter, provided that the invoice must show the calculation of each fee deducted during the quarter.

(2) An investment adviser is not required to comply with Item (ii) of Subparagraph (b) of Paragraph (1) of this subsection) for any client who waives in writing the right to receive an itemized invoice. The waiver must describe the right being waived and must be on a document that does not address any other matter.

(3) Whenever account statements are required to be sent to a grantor or beneficiary of a trust pursuant to Paragraphs 4 or 5 of Subsection F of this section, the adviser shall send to that person the itemized invoice required by Item (ii) of Subparagraph (b) of Paragraph (1) of this subsection unless the person has executed a waiver in accordance with this subsection.

(4) The investment adviser must notify the director in writing that the investment adviser intends to use the safeguards provided in Paragraph (1) of this subsection. Such notification is required to be given on the form ADV.

(5) An investment adviser having custody solely by virtue of having fees directly deducted from client advisory accounts and who complies with this subsection and with Subsections D through G of this section is not required to:

(a) meet the financial requirements for custodial advisers set forth in Subsection B of 12.11.5.24 NMAC; and

(b) file an audited balance sheet on form ADV, part II, Schedule G, unless required for some reason other than having custody of client assets.

I. Mutual fund shares. With respect to shares of an open-end investment company as defined in Section 5(a)(1) of the Investment Company Act of 1940, 15 U.S.C. Section 80a-5(a)(1), an investment adviser may use the mutual fund's transfer agent in lieu of a qualified custodian for purposes of complying with this section.

J. Certain privately offered securities.

(1) An investment adviser is not required to comply with this section with respect to securities that are:

(a) acquired from the issuer in a transaction or chain of transactions not involving any public offering;

(b) uncertificated, and ownership thereof is recorded only on books of the issuer or its transfer agent in the name of the client; and

(c) transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer.

(2) This subsection applies to securities held for the account of a limited partnership (or limited liability company or other type of pooled investment vehicle) only if the limited partnership is audited and the audited financial statements are distributed as required by Subsection K of this section.

K. Limited partnerships subject to annual audit. An investment adviser is not required to comply with Paragraph (3) of Subsection F of this section with respect to the account of a limited partnership (or limited liability company or another type of pooled investment vehicle) that is subject to audit at least annually and distributes its audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners) within 120 days of the end of the fiscal year, or in the case of a fund of funds within 180 days of the end of the fiscal year.

L. Registered investment companies. An investment adviser is not required to comply with this section with respect to the account of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 to -64).

M. Client funds or securities not maintained with qualified custodian. An investment adviser who intends to have custody of client funds or securities but is not able to utilize a qualified custodian, as defined in this section, must:

(1) first obtain the written approval of the director, and

(2) comply with Subsections C through G of this section, to the extent applicable, including performing those functions that would otherwise be performed by the qualified custodian.

N. Beneficial trusts. An investment adviser who has custody of client assets solely because the investment adviser, an owner of the investment adviser, or a supervised person of the investment adviser is a trustee for a beneficial trust and the beneficial owner of the trust is a parent, grandparent, spouse, sibling, child or grandchild of the trustee is not required to file an audited balance sheet on form ADV, part II, schedule G if the investment adviser complies with this section. These relationships include "step" relationships.

[12.11.5.22 NMAC - N, 1-1-2010]

12.11.5.23 MINIMUM FINANCIAL REQUIREMENTS FOR INVESTMENT ADVISERS:

A. All investment advisers. An investment adviser registered or required to be registered under the New Mexico Uniform Securities Act that shall maintain at all times a minimum net worth of $5,000 or such amount as may be required by any other applicable subsection of this rule, whichever requirement is higher.

B. Investment advisers with custody. An investment adviser registered or required to be registered under the Act that has custody of client funds or securities shall maintain at all times a minimum net worth of $2,000,000, or post a surety bond in the amount set by order of the director up to a maximum of $2,000,000.

C. Investment advisers with discretionary authority. An investment adviser registered or required to be registered under the New Mexico Uniform Securities Act that has discretionary authority over client funds or securities but does not have custody of client funds or securities shall maintain at all times a minimum net worth of $10,000, unless the director by order approves a lesser minimum net worth.

D. Net worth less than minimum requirement. Unless otherwise exempted, as a condition of the right to transact business in this state, every investment adviser registered or required to be registered under the New Mexico Uniform Securities Act shall by the close of business on the next business day notify the director if that investment adviser's net worth is less than the minimum required. After transmitting such notice, each investment adviser shall file by the close of business on the next business day a report with the director of its financial condition, including the following:

(1) a trial balance of all ledger accounts;

(2) a statement of all client funds or securities which are not segregated;

(3) a computation of the aggregate amount of client ledger debit balances; and

(4) a statement as to the number of client accounts.

E. Section definition of net worth. For purposes of 12.11.5.23 NMAC, the term "net worth" shall mean an excess of assets over liabilities, as determined by generally accepted accounting principles.

(1) Net worth shall not include the following assets:

(a) prepaid expenses, except as to items properly classified as assets under generally accepted accounting principles;

(b) deferred charges;

(c) goodwill;

(d) franchise rights;

(e) organizational expenses;

(f) patents;

(g) copyrights;

(h) marketing rights;

(i) debt discount and expense; and

(j) all other assets of intangible nature.

(2) In addition, for individuals, net worth shall not include home, home furnishings, automobile(s) and any other personal items not readily marketable.

(3) In addition, for corporations and limited liability companies, net worth shall not include advances or loans to stockholders, officers or members.

(4) In addition, for partnerships, net worth shall not include advances or loans to partners.

F. Appraisal. The director may require that a current appraisal be submitted in order to establish the worth of any asset.

G. Minimum capital requirement for investment advisers with principal place of business out of state. Every registered investment adviser that has its principal place of business in a state other than New Mexico shall maintain only such minimum capital as required by such state, provided the investment adviser is licensed or registered in such state and is in compliance with such state's minimum capital requirement.

[12.11.5.23 NMAC - Rp, 12.11.5.17 NMAC and 12.11.5.18 NMAC, 1-1-2010]

12.11.5.24 USE OF THE INTERNET FOR GENERAL DISSEMINATION OF INFORMATION ON PRODUCTS AND SERVICES:

A. Investment advisers and investment adviser representatives who use the internet to distribute information on available products and services through communications made on the internet directed generally to anyone having access to the internet and transmitted through internet communications shall not be considered to be "transacting business" in this state for purposes of Section 58-13C-403A based solely on that fact, provided that:

(1) the internet communication contains a legend in which it is clearly stated that:

(a) the investment adviser or investment adviser representative in question may only transact business in this state if first registered, excluded, or exempted from state investment adviser or investment adviser representative registration requirements; and

(b) follow-up, individualized responses to persons in this state by the investment adviser or investment adviser representative that involve either effecting or attempting to effect transactions in securities, or rendering of personalized investment advice for compensation, will not be made without compliance with state investment adviser or investment adviser representative registration requirements or an applicable exemption or exclusion;

(2) the internet communication contains a mechanism, which includes but is not limited to, technical "firewalls" or other implemented policies and procedures, designed reasonably to ensure that before any subsequent, direct communication with prospective customers or clients in this state, the investment adviser and investment adviser representative are first registered in this state or qualify for an exemption or exclusion from the registration requirement; nothing in this paragraph shall be construed to relieve a state registered investment adviser or investment adviser representative from any applicable securities registration requirement in this state;

(3) the internet communication is limited to the dissemination of general information on products and services and does not involve either effecting or attempting to effect transactions in securities or rendering personalized investment advice for compensation in this state over the internet; and

(4) in the case of an investment adviser representative:

(a) the affiliation of the investment adviser representative with the investment adviser is prominently disclosed within the internet communication;

(b) the investment adviser with whom the investment adviser representative is associated retains responsibility for reviewing and approving the content of any internet communication by an investment adviser representative;

(c) the investment adviser with whom the investment adviser representative is associated first authorizes the distribution of information on the particular products and services through the internet communication; and

(d) in disseminating information through the internet communication, the investment adviser representative acts within the scope of the authority granted by the investment adviser.

B. This rule extends to state investment adviser and investment adviser representative registration requirements only, and does not excuse compliance with applicable securities registration, antifraud or related provisions.

C. Nothing in this rule shall be construed to affect the activities of any investment adviser or investment adviser representative engaged in business in this state that is not subject to the jurisdiction of the director as a result of the National Securities Markets Improvements Act of 1996, as amended.

[12.11.5.24 NMAC - Rp, 12.11.5.20 NMAC, 1-1-2010]

12.11.5.25 REPORTING REQUIREMENTS:

A. Each investment adviser shall file annually with the director at the time when the renewal report and fee are due, a completed form ADV-E and a financial statement, prepared in accordance with generally accepted accounting principles and certified by an independent certified public accountant, showing the financial condition of such investment adviser as of the most recent practicable date. Investment advisers who do not retain custody of clients' funds or securities may file unaudited financial statements and need not file form ADV-E.

B. Each investment adviser shall file with the director a copy of any complaint related to its business, transactions, or operations naming the investment adviser or any of its partners, officers or investment adviser representatives as defendants in any civil or criminal proceeding, or in any administrative or disciplinary proceeding by any public or private regulatory agency, within 20 days of the date the complaint is served on the investment adviser; a copy of any answer or reply to the complaint filed by the investment adviser within ten days of the date the answer or reply is filed; and a copy of any decision, order or sanction made with respect to any such proceeding within 20 days of the date the decision, order or sanction is rendered.

C. Each investment adviser, using the appropriate schedule to form ADV, shall file with the director a notice of transfer of control or change of name not less than 30 days prior to the date on which the transfer of control or change of name is to become effective, or such shorter period as the director may permit.

[12.11.5.25 NMAC - Rp, 12.11.5.21 NMAC, 1-1-2010]

12.11.5.26 DENIAL, SUSPENSION AND REVOCATION: Any order denying, suspending, revoking, canceling or limiting the registration of, and any order barring, an investment adviser

or investment adviser representative may include such other sanctions as the director finds appropriate.
[12.11.5.26 NMAC - Rp, 12.11.5.22 NMAC, 1-1-2010]

12.11.5.27 WITHDRAWAL OF REGISTRATION:

A. An application for withdrawal of the registration of an investment adviser, registered under the New Mexico Uniform Securities Act, shall be filed by the registrant on form ADV-W and shall include a report on the status of all customer accounts of the registrant in this state and any additional information the director may require.

B. An application for withdrawal of the registration of an investment adviser representative, registered under the New Mexico Uniform Securities Act, shall be filed with the director on form U-5 by the investment adviser within 15 days of the termination of the representative's employment.
[12.11.5.27 NMAC - Rp, 12.11.5.23 NMAC, 1-1-2010]

12.11.5.28 BRANCH OFFICE SUPERVISORY REQUIREMENTS: Every registered investment adviser must employ at its principal office and at each branch office in this state at least one person designated to act in a supervisory capacity who is qualified as an investment adviser representative in this state and has satisfied the principal's examination requirement in 12.11.5.18 NMAC. The designated supervisor must meet the requirements of this section at the time that the principal or branch office located in this state opens for business. The designated supervisor must be physically located in the office that he or she supervises. After a principal or branch office located in this state opens for business, if the designated supervisor no longer meets the requirements of this section, the investment adviser shall have 90 days from the first date of noncompliance to meet the requirements of this section, provided that the investment adviser provides the director with written notice of the event of noncompliance within five days of such event and further sets forth the method of supervision pending the replacement of the designated supervisor.

A. For single-representative offices, this section shall be satisfied if at least one person who meets the requirements of 12.11.5.18 NMAC is employed on a full-time basis by the investment adviser, and the investment adviser shall:

(1) conduct annual on-site field audits, by a person who meets the requirements of 12.11.5.18 NMAC, of each single-representative office, including but not limited to an examination for compliance with books and records requirements, and for compliance with the rules of conduct of 12.11.7 NMAC.

(2) maintain in its principal office the results of all field audits conducted pursuant to Paragraph (1) of Subsection A of this section; and

(3) comply with any additional conditions that the director may by order impose, if the director finds the issuance of such order is necessary or appropriate in the public interest or for the protection of investors.

B. Branch office supervisors who have no supervisory or compliance responsibility for net worth or investment banking functions may substitute the general securities sales supervisor examination (Series 8) for the examination, programs or certifications required in 12.11.5.18 NMAC.
[12.11.5.28 NMAC - Rp, 12.11.5.24 NMAC, 1-1-2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT
SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 6 INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES RECORDS

12.11.6.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.
[12.11.6.1 NMAC - N, 1-1-2010]

12.11.6.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as an investment adviser and their representatives.
[12.11.6.2 NMAC - N, 1-1-2010]

12.11.6.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".
[12.11.6.3 NMAC - N, 1-1-2010]

12.11.6.4 DURATION: Permanent.
[12.11.6.4 NMAC - N, 1-1-2010]

12.11.6.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.
[12.11.6.5 NMAC - N, 1-1-2010]

12.11.6.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.
[12.11.6.6 NMAC - N, 1-1-2010]

12.11.6.7 DEFINITIONS: For purposes of 12.11.6 NMAC:

A. "discretionary power" shall not include discretion as to the price at which or the time when a transaction is or is to be effected if, before the order is given by the investment adviser, the client has directed or approved the purchase or sale of a definite amount of the particular security; and

B. "investment supervisory services" means the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client.
[12.11.6.7 NMAC - N, 1-1-2010]

12.11.6.8 RECORDKEEPING REQUIREMENTS FOR INVESTMENT ADVISERS:

A. Recordkeeping requirements for all investment advisers. Every investment adviser registered or required to be registered under the New Mexico Uniform Securities Act shall make and keep true, accurate and current the following books, ledgers and records:

(1) a journal or journals, including cash receipts and disbursements records, and any other records of original entry forming the basis of entries in any ledger;

(2) general and auxiliary ledgers, or other comparable records, reflecting asset, liability, reserve, capital, income and expense accounts;

(3) a record of the investment adviser's securities transactions in accordance with the requirements of Subsection A of 12.11.6.9 NMAC;

(4) all checkbooks, bank statements, canceled checks and cash reconciliations of the investment adviser;

(5) all bills or statements, or copies of bills or statements, paid or unpaid, relating to the investment adviser's business as an investment adviser;

(6) all trial balances, financial statements prepared in accordance with generally accepted accounting principles and internal audit working papers relating to the investment adviser's business as an investment adviser; for purposes of this paragraph, "financial statements" shall mean a balance sheet prepared in accordance with generally accepted accounting principles, an income statement, a cash flow statement and a net worth computation, if applicable, as

required by 12.11.5.23 NMAC;

(7) records of the investment adviser's written communications in accordance with the requirements of Subsection B of 12.11.6.9 NMAC;

(8) a list or other record of all accounts which identifies the accounts in which the investment adviser is vested with any discretionary power with respect to the funds, securities or transactions of any client;

(9) a copy of all powers of attorney and other evidence of the granting of any discretionary authority by any client to the investment adviser;

(10) a copy in writing of each agreement entered into by the investment adviser with any client and all other written agreements otherwise relating to the investment adviser's business as an investment adviser;

(11) a file containing a copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication including by electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons, other than persons connected with the investment adviser; if the notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication including by electronic media recommends the purchase or sale of a specific security and does not state the reasons for the recommendation, the investment adviser shall retain a memorandum documenting its reasons for the recommendation;

(12) records of transactions in securities in which the investment adviser or an affiliated person has a beneficial ownership interest in accordance with the requirements of Subsection C of 12.11.6.9 NMAC;

(13) a copy of each written statement and each amendment or revision, given or sent to any client or prospective client of the investment adviser in accordance with the provisions of 12.11.5.12 NMAC, and a record of the dates that each written statement and each amendment or revision was given or offered to be given to any client or prospective client who subsequently becomes a client;

(14) all accounts, books, internal working papers and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of all managed accounts or securities recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication including but not limited to distribution by print and electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons, other than persons employed by or contracted with the investment adviser; however, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits and other transactions in a client's account for the period of the statement and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts, shall be deemed to satisfy the requirements of this paragraph;

(15) a file containing a copy of all written communications received or sent regarding any litigation involving the investment adviser or any investment adviser representative or employee and regarding any written customer or client complaint;

(16) written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client;

(17) written procedures to supervise the activities of employees and investment adviser representatives that are reasonably designed to achieve compliance with applicable securities laws and regulations;

(18) a file containing a copy of each document, other than any notices of general dissemination, that was filed with or received from any state or federal agency or self-regulatory organization and that pertains to the registrant or its investment adviser representatives; the file shall at a minimum contain applications, amendments, renewal filings, correspondence and any other applicable state, federal agency or self-regulatory organization documents issued or received by the registrant or its investment adviser representatives; and

(19) a record of the investment adviser's privacy policies, all privacy notices sent to consumers or customers and the date such notices were sent.

B. Additional recordkeeping requirements for investment advisers that have custody of client securities or funds. If an investment adviser subject to Subsection A of 12.11.6.8 NMAC has custody or possession of securities or funds of any client, the records required to be made and retained pursuant to Subsection A of this section shall include:

(1) a journal or other record showing all purchases, sales, receipts and deliveries of securities, including certificate numbers, for all accounts and all other debits and credits to the accounts;

(2) a separate ledger account for each client showing all purchases, sales, receipts and deliveries of securities, the date and price of each purchase and sale, and all debits and credits;

(3) copies of confirmations of all transactions effected by or for the account of any client; and

(4) a record for each security in which any client has a position, which record shall show the name of each client having any interest in each security, the amount or interest of each client and the location of each security.

C. Additional recordkeeping requirements for investment advisers that render investment management services. Every investment adviser subject to Subsection A of this section that renders any investment supervisory or management service to any client shall, with respect to the portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by the investment adviser, make and keep true, accurate and current:

(1) records showing separately for each client the securities purchased and sold, and the date, amount and price of each purchase and sale; and

(2) information from which the investment adviser can promptly furnish the name of each client and the current amount or interest of the client for each security in which any client has a current position.

D. Client codes or designations. Any books or records required by this section may be maintained by the investment adviser in such manner that the identity of any client to whom the investment adviser renders investment supervisory services is indicated by numerical or alphabetical code or some similar designation.

E. Manner of record preservation. Every investment adviser subject to Subsection A of this section shall preserve the following records in the manner prescribed:

(1) all books and records required to be made under the provisions of Subsections A and B and Paragraph (1) of Subsection C of this section, except for books and records required to be made under the provisions of Paragraphs (11) and (14) of Subsection A of this section, shall be maintained and preserved in an easily accessible place for a period of not less than six years from the end of the fiscal year during which the last entry was made on record, the first two years of which shall be in the principal office of the investment adviser;

(2) partnership articles and any amendments, articles of incorporation, charters, minute books and stock certificate books of the investment adviser and of any predecessor shall be maintained in the principal office of the investment adviser and preserved until at least six years after termination of the enterprise;

(3) books and records required to be made under the provisions of Paragraphs (11) and (14) of Subsection A of this section shall be maintained and preserved in an

easily accessible place for a period of not less than six years, the first two years of which shall be in the principal office of the investment adviser, from the end of the fiscal year during which the investment adviser last published or otherwise disseminated, directly or indirectly, the notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication including by print and electronic media;

F. Notwithstanding other recordkeeping requirements of this section, the following records or copies shall be required to be maintained at the business location of the investment adviser from which the customer or client is being provided or has been provided with investment advisory services:

(1) records required to be preserved under Paragraphs (3), (7) through (10), (13), and (15) through (17) of Subsection A and Subsections B and C of this section inclusive; and

(2) records or copies required under the provision of Paragraphs (11) and (14) of Subsection A of this section which records or related records identify the name of the investment adviser representative providing investment advice from that business location, its business locations' physical address, mailing address, electronic mailing address and telephone number.

G. The records shall be maintained for the period described in Paragraphs (1), (2) and (3) of Subsection E of this section.

H. Preservation of records upon cessation. An investment adviser subject to Subsection A of this section, before ceasing to conduct or discontinuing business as an investment adviser, shall arrange for and be responsible for the preservation of the books and records required to be maintained and preserved under this section for the remainder of the period specified in this section and shall notify the administrator in writing of the exact address where the books and records will be maintained during the period.

I. Preservation of records by alternative media.

(1) The records required to be maintained and preserved pursuant to this subsection may be immediately produced by any form of data storage, as provided below, and maintained and preserved for the required time by an investment adviser on:

(a) micrographic media, including microfilm, microfiche or any similar medium; or

(b) electronic storage media, including any digital storage medium or system that meets the terms of this subsection.

(2) The investment adviser must:

(a) arrange and index the records in a way that permits easy location, access and retrieval of any particular record;

(b) provide promptly any of the following that the administrator may request:

(i) a legible, true and complete copy of the record in the medium and format in which it is stored;

(ii) a legible, true and complete printout of the record; and

(iii) means to access, view and print the records.

(c) store separately, for the time required for preservation of the original record, a duplicate copy of the record on any medium allowed by this subsection.

(3) In the case of records on electronic storage media, the investment adviser may maintain and preserve records which, in the ordinary course of the investment adviser's business, are created by the investment adviser on electronic media or are received by the investment adviser solely on electronic media or by electronic data transmission. The investment adviser must establish and maintain procedures to:

(a) maintain and preserve the records so as to reasonably safeguard them from loss, alteration or destruction;

(b) limit access to the records to properly authorized personnel and the administrator, including examiners and other representatives; and

(c) reasonably ensure that any reproduction of a non-electronic original record on electronic storage media is complete, true and legible when retrieved.

[12.11.6.8 NMAC - Rp, 12 NMAC 11.3.6.1-10, 1-1-2010]

12.11.6.9 RECORDKEEPING REQUIREMENTS CONTINUED:

A. Record of the investment adviser's securities transactions required pursuant to Paragraph (3) of Subsection A of 12.11.6.8 NMAC.

(1) The investment adviser shall prepare a memorandum setting forth:

(a) each order given by the investment adviser for the purchase or sale of any security;

(b) any instruction received by the investment adviser from the client concerning the purchase, sale, receipt or delivery of a particular security; and

(c) any modification or cancellation of any such order or instruction.

(2) The memorandum shall:

(a) show the terms and conditions of the order, instruction, modification or cancellation;

(b) identify the person connected with the investment adviser who recommended the transaction to the client and who placed the order;

(c) show the account for which entered, the date of entry and the bank or broker-dealer by or through which executed where appropriate; and

(d) identify orders entered pursuant to the exercise of discretionary power.

B. Records of the investment adviser's written communications required pursuant to Paragraph (7) of Subsection A of 12.11.6.8 NMAC.

(1) The investment adviser shall keep originals of all written communications received and copies of all written communications sent by the investment adviser relating to:

(a) any recommendation made or proposed to be made and any advice given or proposed to be given;

(b) any receipt, disbursement or delivery of funds or securities; and

(c) the placing or execution of any order to purchase or sell any security.

(2) The investment adviser shall not be required to keep any unsolicited market letters and other similar communications or general public distribution not prepared by or for the investment adviser.

(3) If the investment adviser sends any notice, circular, or other advertisement offering any report, analysis, publication or other investment advisory service to more than ten persons, the investment adviser shall not be required to keep a record of the names and addresses of the persons to whom it was sent. However, if the notice, circular or advertisement is distributed to persons named on any list, the investment adviser shall retain, with a copy of the notice, circular or advertisement, a memorandum describing the list and its source.

C. Records of transactions in securities in which the investment adviser or an affiliated person has a beneficial ownership interest required pursuant to Paragraph (12) of Subsection A of 12.11.6.8 NMAC.

(1) For the purposes of this subsection, the following definitions apply:

(a) "**affiliated person**" with respect to another person means any person directly or indirectly controlling, controlled by, or under common control with the other person; any officer, director or partner of the other person; or any spouse or relative, by blood or marriage, of the other person;

(b) "**control**" means the power to direct or influence the management or policies of a company through the ownership of voting securities by contract or otherwise; any person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of a company shall be presumed to control such company; and

(c) "**primarily engaged in a business or businesses other than advising investment advisory clients**" means an investment adviser that, for each of its most

recent three fiscal years or for the period of time since organization, whichever is less, derived, on an unconsolidated basis, more than fifty percent of its total sales and revenues and its income or loss before income taxes and extraordinary items from such other business or businesses.

(2) The investment adviser shall keep a record of every transaction in a security in which the investment adviser, and any person described in Paragraphs (3) or (4) of this subsection, whichever is applicable, has, or by reason of any transaction acquires, any direct or indirect beneficial ownership of such security.

(3) For all investment advisers except those that are primarily engaged in a business or businesses other than advising investment advisory clients, records of transactions shall include records of the transactions of:

(a) any partner, officer or director of the investment adviser;

(b) any employee who participates in any way in the determination of which recommendations are made;

(c) any employee who, in connection with his duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of the recommendations; and

(d) any person in a control relationship to the investment adviser, any affiliated person of a controlling person and any affiliated person of any affiliated person, who obtains information concerning securities recommendation being made by the investment advisor prior to the effective dissemination of the recommendations.

(4) For all investment advisers that are primarily engaged in a business or businesses other than advising investment advisory clients, records of transactions shall include records of the transactions of:

(a) any partner, officer, and director or employee of the investment advisor who participates in any way in the determination of which recommendations are made, or who, in connection with his functions or duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of the recommendations; and

(b) any person in a control relationship to the investment adviser, any affiliated person of a controlling person and any affiliated person of any affiliated person who obtains information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of the recommendations or of information concerning the recommendations.

(5) The investment adviser shall record each transaction no later than ten days after the end of the calendar quarter in which the transaction was effected.

(6) The investment adviser is not required to keep records of transactions:

(a) effected in any account over which neither the investment adviser nor any person described in Paragraphs (3) or (4) of this subsection has any direct or indirect influence or control; and

(b) in securities which are direct obligations of the United States.

(7) The record shall state:

(a) the title and amount of the security involved;

(b) the date and nature of the transaction, such as purchase, sale or other disposition; and

(c) the name of the broker-dealer or bank with or through which the transaction was effected.

(8) An investment adviser shall not be deemed to have violated the provisions of this subsection because of the failure to record securities transactions of any person described in Paragraphs (3) and (4) of this subsection if the investment adviser establishes that it instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded.

[12.11.6.9 NMAC - N, 1-1-2010]

12.11.6.10 DIRECTOR MAY ORDER EXEMPTION: The director may by order exempt any investment adviser from all or part of the requirements of this section, either unconditionally or upon specified conditions, if by reason of the special nature of its business, the director finds that issuance of the order is necessary or appropriate in the public interest or for the protection of investors.

[12.11.6.10 NMAC - Rp, 12 NMAC 11.3.6.11, 1-1-2010]

12.11.6.11 EXEMPTION FOR PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE: Every investment adviser that has its principal place of business in a state other than New Mexico shall be exempt from the requirements of this section, provided the investment adviser is licensed or registered in such state and is in compliance with such state's recordkeeping requirements.

[12.11.6.11 NMAC - Rp, 12 NMAC 11.3.6.12, 1-1-2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT

SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 7 INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES RULES OF CONDUCT AND PROHIBITED BUSINESS PRACTICES

12.11.7.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.

[12.11.7.1 NMAC - Rp, 12.11.7.1 NMAC, 1-1-2010]

12.11.7.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as an investment adviser and their representatives. To the extent that the conduct alleged constitutes fraud or deceit, the provisions of this section also apply to all other persons, in addition to investment advisers and investment adviser representatives, who advise others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing or selling securities or who, for compensation and as part of a regular business, issue or promulgate analyses or reports relating to securities.

[12.11.7.2 NMAC - Rp, 12.11.7.2 NMAC, 1-1-2010]

12.11.7.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701 NMSA 1978, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".

[12.11.7.3 NMAC - Rp, 12.11.7.3 NMAC, 1-1-2010]

12.11.7.4 DURATION: Permanent.

[12.11.7.4 NMAC - Rp, 12.11.7.4 NMAC, 1-1-2010]

12.11.7.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.

[12.11.7.5 NMAC - Rp, 12.11.7.5 NMAC, 1-1-2010]

12.11.7.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.

[12.11.7.6 NMAC - Rp, 12.11.7.6 NMAC, 1-1-2010]

12.11.7.7 DEFINITIONS: [RESERVED]

12.11.7.8 [RESERVED]

12.11.7.9 CONTRACT WAIVING RIGHTS PROHIBITED: An investment adviser shall not enter into any contract with a customer if the contract contains any condition, stipulation or provision binding the customer to waive any rights under the New Mexico Uniform Securities Act, or any rule or order thereunder, or of the Investment Advisers Act of 1940. Any such condition, stipulation or provision is void.

[12.11.7.9 NMAC - Rp, 12 NMAC 11.3.9.2, 1-1-2010]

12.11.7.10 WRITTEN CONTRACT REQUIRED:

A. No registered investment adviser may enter into, extend or renew any investment advisory contract with a customer in this state unless the contract is in writing and a copy of the contract is given to the customer within 15 days after the execution of the contract. Such contract shall disclose, in substance, the services to be provided, the term of the contract, the advisory fee, the formula for computing the fee, the amount of prepaid fee to be returned in the event of contract termination or non-performance, whether the contract grants discretionary power to the adviser and that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract.

B. It is unlawful to enter into, extend or renew any investment advisory contract if the investment advisory contract:

(1) provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client unless such contract complies with rule 205-3 under the Investment Advisors Act of 1940;

(2) fails to provide in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract; or

(3) fails to provide, in substance, that the investment adviser, if a partnership, will notify the other party to the contract of any change in the membership of such partnership within a reasonable time after such change.

C. Paragraph (1) of Subsection B of this section shall not:

(1) be construed to prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date; and

(2) apply to an investment advisory contract with a person who is not a resident of the United States.

D. The director, by rule, upon the director's own motion, or by order upon application, may conditionally or unconditionally exempt any person or transaction, or any class or classes of persons or transactions, from Paragraph (1) of Subsection B of this section, if and to the extent that the exemption relates to an investment advisory contract with any person that the director determines does not need the protections of Paragraph (1) of Subsection B, on the basis of such factors as financial sophistication, net worth, knowledge of and experience in financial matters, amount of assets under management, relationship with a registered investment adviser or investment adviser representative, and such other factors as the director determines are consistent with this section.

[12.11.7.10 NMAC - Rp, 12.11.7.10 NMAC, 1-1-2010]

12.11.7.11 [RESERVED]

12.11.7.12 PROHIBITED BUSINESS PRACTICES BY FEDERAL COVERED ADVISERS: The provisions of 12.11.7.13 and 12.11.7.14 NMAC apply to federal covered advisers to the extent that the conduct alleged is fraudulent, deceptive, or as otherwise permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290). An investment adviser or a federal covered adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser and its clients and the circumstances of each case, an investment adviser or a federal covered adviser shall not engage in any unlawful, unethical or dishonest conduct or practices.

[12.11.7.12 NMAC - Rp, 12.11.7.12 NMAC, 1-1-2010]

12.11.7.13 PROHIBITED BUSINESS PRACTICES BY INVESTMENT ADVISERS: The following are deemed to be unlawful, unethical, or dishonest conduct or practice by an investment adviser or investment adviser representative without limiting those terms to the practices specified herein:

A. recommending to a client to whom investment supervisory, management or consulting services are provided the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known by the investment adviser;

B. exercising any discretionary power in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within ten business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of a specific security shall be executed, or both;

C. inducing trading in a client's account that is excessive in size or frequency in view of the financial resources, investment objectives and character of the account;

D. placing an order to purchase or sell a security for the account of a client without authority to do so;

E. placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party trading authorization from the client;

F. borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment adviser, or a depository institution engaged in the business of loaning funds;

G. loaning money to a client unless the investment adviser is a depository institution engaged in the business of loaning funds or the client is an affiliate of the investment adviser;

H. misrepresenting to any advisory client, or prospective advisory client, the qualifications of the investment adviser or any employee of the investment adviser, or to misrepresent the nature of the advisory services being offered or fees to be charged for such service, or to omit to state a material fact necessary to make the statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading;

I. providing a report or recommendation to any advisory client prepared by someone other than the investment adviser without disclosing that fact; this prohibition does not apply to a situation where the adviser uses published research reports or statistical analyses to render advice or where an adviser orders such a report in the normal course of providing service;

J. charging a client an unreasonable advisory fee;

K. failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the investment adviser or any of its employees which could reasonably be expected to impair the rendering of unbiased and objective advice including:

(1) compensation arrangements connected with advisory services to clients which are in addition to compensation from such clients for such services; and

(2) charging a client an advisory

fee for rendering advice when a commission for executing securities transactions pursuant to such advice will be received by the investment adviser or its employees;

L. guaranteeing a client that a specific result will be achieved (e.g. gain or no loss), with advice which will be rendered;

M. publishing, circulating or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940;

N. disclosing the identity, affairs, or investments of any client unless required by law to do so, or unless consented to by the client;

O. taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment adviser has custody or possession of such securities or funds and the adviser's action does not comply with the requirements of Rule 206(4)-2 under the Investment Advisers Act of 1940;

P. failing to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information contrary to the provisions of Section 204A of the Investment Advisers Act of 1940 or any other practice contrary to the provisions of Section 215 of the Investment Advisers Act of 1940;

Q. engaging in any act, practice or course of business which is fraudulent, deceptive or manipulative, contrary to the provisions of or in violation of the New Mexico Uniform Securities Act or any other rule of the director;

R. engaging in conduct or any act, indirectly or through or by any other person, which would be unlawful for such person to do directly under the provisions of the New Mexico Uniform Securities Act or any rule or regulation thereunder;

S. using in a misleading manner any term or abbreviation that states or implies that a person has special expertise, certification, or training in financial planning, including, but not limited to, the misleading use of a senior-specific certification or designation as set forth in 12.11.17 NMAC;

T. having custody of client funds or securities unless the investment adviser or investment adviser representative complies with the provisions of 12.11.5.22 NMAC;

U. failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information by the investment adviser, or any investment adviser representative or employee, taking into consideration the nature of the investment adviser's business;

V. entering into, extending, or renewing any investment advisory contract that violates the provisions of this subsection;

(1) it is unlawful to enter into, extend or renew any investment advisory contract if the investment advisory contract:

(a) provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client unless such contract complies with rule 205-3 under the Investment Advisors Act of 1940;

(b) fails to provide in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract; or

(c) fails to provide, in substance, that the investment adviser, if a partnership, will notify the other party to the contract of any change in the membership of such partnership within a reasonable time after such change;

(2) Subparagraph (a) of Paragraph (1) of this subsection shall not:

(a) be construed to prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date; and

(b) apply to an investment advisory contract with a person who is not a resident of the United States;

(**3)** the director, by rule, upon the director's own motion, or by order upon application, may conditionally or unconditionally exempt any person or transaction, or any class or classes of persons or transactions, from Subparagraph (a) of Paragraph (1) of this subsection, if and to the extent that the exemption relates to an investment advisory contract with any person that the director determines does not need the protections of Subparagraph (a) of Paragraph (1) of this subsection, on the basis of such factors as financial sophistication, net worth, knowledge of and experience in financial matters, amount of assets under management, relationship with a registered investment adviser or investment adviser representative, and such other factors as the director determines are consistent with this section;

W. failing or refusing to furnish a client, upon reasonable request, information to which the client is entitled, or to respond to a formal written demand or complaint;

X. in connection with the offer, purchase or sale of a security, leading a client to believe that the investment adviser or investment adviser representative is in possession of material, non-public information that would affect the value of the security;

Y. failing to comply with any securities-related arbitration award, unless a proceeding to vacate or modify such award is pending or unless the time limit to commence such a proceeding has not yet expired; and

Z. engaging in conduct or any act, indirectly or through or by any other person, which would be unlawful for an investment adviser or investment adviser representative to do directly under the provisions of the New Mexico Uniform Securities Act, this chapter or any other rule of the director.

[12.11.7.13 NMAC - Rp, 12.11.7.13 NMAC, 1-1-2010]

12.11.7.14 PROHIBITED BUSINESS PRACTICES LISTED ARE NOT EXCLUSIVE: The conduct set forth in 12.11.7.13 NMAC is not exclusive. Engaging in other conduct such as nondisclosure, incomplete disclosure or deceptive practices shall be deemed an unethical business practice. The federal statutory and regulatory provisions referenced herein shall apply to investment advisers and federal covered advisers, to the extent permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290).

[12.11.7.14 NMAC - Rp, 12.11.7.14 NMAC, 1-1-2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT

SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 8 REGISTRATION OF SECURITIES - GENERAL PROVISIONS

12.11.8.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.

[12.11.8.1 NMAC - Rp, 12 NMAC 11.4.1.1, 1-1-2010]

12.11.8.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as a broker-dealer, an investment adviser or an issuer of securities, and their representatives and agents.

[12.11.8.2 NMAC - Rp, 12 NMAC 11.4.1.2, 1-1-2010]

12.11.8.3 STATUTORY AUTHORITY: Section 58-13C-605A authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico

Uniform Securities Act, NMSA 1978, Sections 58-13C-101 to 701, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".
[12.11.8.3 NMAC - Rp, 12 NMAC 11.4.1.3, 1-1-2010]

12.11.8.4 DURATION: Permanent.
[12.11.8.4 NMAC - Rp, 12 NMAC 11.4.1.4, 1-1-2010]

12.11.8.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.
[12 NMAC 11.1.1.3, 12-30-95; 12 NMAC 11.4.1.5, 5-1-99; 12.11.8.5 NMAC - Recompiled, 12 NMAC 11.4.1.5, 1-1-2010]

12.11.8.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.
[12.11.8.6 NMAC - Rp, 12 NMAC 11.4.1.6, 1-1-2010]

12.11.8.7 DEFINITIONS: [RESERVED]

12.11.8.8 GENERAL REGISTRATION PROVISIONS: The following provisions shall apply generally to the registration of securities in New Mexico in addition to any requirements found elsewhere in the New Mexico Uniform Securities Act or these rules.

A. Registration statements.

(1) A registration application will not be considered as filed unless form U-1, uniform application to register securities, has been properly completed and endorsed, is accompanied by a filing fee calculated in accordance with Section 58-13C-305B, and applicable documents specified in form U-1. Checks are to be made payable to the New Mexico securities division. Fees paid upon the filing of the registration statement are not refundable.

(2) Issuers may satisfy filing requirements contained in these rules by filing required documents and fees using an electronic filing system in such a manner as approved by order of the director.

B. Consent to service of process. Applications to register securities shall be accompanied by a properly prepared and endorsed form U-2, uniform consent to service of process, and, in the case of corporations, a form U-2A, uniform corporate resolution. Form U-2 shall specify the director of the New Mexico securities division as the agent to receive service of process.

C. Registration effectiveness.

(1) If a registration application seeks to register only a portion of a larger offering, the application shall be deemed effective only as to the securities specified to be offered in this state.

(2) If it appears that a registration application is incomplete, inaccurate, compromises investor protection, tends to work a fraud on investors or is in any other way in violation of the New Mexico Uniform Securities Act, the division may issue a comment letter. Matters raised in the comment letter may be cause for issuance of a stop order if not resolved.

D. Fees for amendments to increase amount of securities offered.

(1) Pre-effective amendments increasing the amount of securities to be offered and sold are subject to additional fees of 1/10 of 1 percent of the amount of the increase, provided that no additional fee is required if, as a result of the increase, the total amount registered is less than $525,000.

(2) Pursuant to Section 58-13C-305J, post-effective amendments registering additional securities become effective upon filing of the amendment and payment of fees of 3/10 of 1 percent of the incremental amount of increase. Each increase will be subject to a minimum fee of $525.00 and maximum of $2,500 unless the maximum fee of $2,500 was previously paid in connection with such application for registration. If the maximum fee of $2,500 was previously paid, then no further fee shall be required.

E. Confidentiality. Unless a valid claim of privilege or confidentiality is asserted pursuant to Section 58-13C-607B(2) of the New Mexico Uniform Securities Act, information contained in registration applications filed with the division is available for public inspection.

F. Amendments.

(1) Amendments to the application for registration may be made by filing an amended form U-1 plainly marked "Amendment" at the top of the form and accompanied by a letter explaining the change.

(2) The following will require an amended form U-1:

(a) amendments to the name under which the issuer is doing or intends to do business; amended form U-1 must include the former and current names and must be accompanied by a fee of $50.00, an amended form U-2 and, if a corporation, form U-2A;

(b) changes to the location of the issuer's principal business office and, if the issuer is a foreign or territorial person, the name and address of its agent in the United States authorized to receive notice or service of process;

(c) changes to the names and addresses of the underwriters;

(d) changes to the names and addresses of the issuer's correspondents; and

(e) changes to the amount of securities to be registered.

G. Multiple types of securities.

(1) A separate application and fee must be filed for each type of security offered, unless such securities are sold as units.

(2) In the case of warrants and rights, the securities purchasable upon exercise shall be registered together with the warrants and rights. In the case of convertible securities, only the convertible security itself need be registered if no further consideration is required for conversion other than the surrender of the convertible security.

H. Sequential partnerships.

(1) Limited partnerships offered sequentially or simultaneously must be registered individually in the name of each specific partnership and accompanied by the proper fee even if multiple partnerships are registered in a single registration statement with the security and exchange commission. If the issuer wishes to avoid the filing of duplicate exhibits for each partnership within a series, all partnerships to be included within a series must be identified to the division at the time of the initial filing.

(2) As subsequent partnerships are sought to be declared effective, the following must be filed with the division:

(a) form U-1;

(b) a copy of any supplement or any post-effective amendment filed with the security and exchange commission; such supplement or post-effective amendment must detail any material changes in any exhibit previously filed with the division and must include any additional exhibits pertaining to a particular partnership within a series that have not been previously filed;

(c) the appropriate filing fee; and

(d) in the absence of any material changes, subsequent partnerships within a series will be declared effective upon receipt of notice of the offering commencement date.

I. Renewal of permits. Permits authorizing the sale of securities registered by filing, coordination or qualification are effective for one year from date of issuance. In order to extend the permit, a new application must be filed on form U-1 together with the latest amendment to the offering document. All previously filed exhibits may be incorporated by reference. The application must be accompanied by a new filing fee and must be received by the division no later than two weeks prior to the expiration of the current permit.

J. Abandonment and withdrawal of registration statement.

Any registration statement filed by filing, coordination or qualification shall be considered abandoned and withdrawn if there is no communication or activity regarding such filing for a period of six consecutive months. Any registration statement that has been abandoned and withdrawn may be re-filed by filing anew the appropriate documents and filing fee.
[12.11.8.8 NMAC - Rp, 12 NMAC 11.4.1.8, 1-1-2010]

12.11.8.9 RESERVED.

12.11.8.10 REGISTRATION BY COORDINATION: A registration statement under Section 58-13C-303(B) shall be submitted on form U-1, shall contain the following information and be accompanied by the following documents, in addition to the information specified in Section 58-13C-303B and Section 58-13C-305C and the consent to service of process on form U-2 required by Section 58-13C-303B(3):

A. copies of the articles of incorporation and by-laws or equivalents currently in effect, any agreements with or among underwriters of the offering, any instrument governing the issuance of the security to be registered, a specimen of the security and, if the security to be registered is a note, bond, debenture or other evidence of indebtedness, a trust indenture, unless the security is a face-amount certificate registered under the Investment Company Act of 1940 or unless the requirement to furnish a trust indenture relating to the securities is waived by the director for good cause shown; and

B. one copy of any other information or any documents required to be filed under form U-1.
[12.11.8.10 NMAC - Rp, 12 NMAC 11.4.3, 1-1-2010]

12.11.8.11 REGISTRATION BY QUALIFICATION: A registration statement under Section 58-13C-304 shall be submitted on form U-1, shall contain the following information and be accompanied by the following documents, in addition to the information specified in Section 58-13C-304 and the consent to service of process on form U-2 required by Section 58-13C-304B:

A. copies of the articles of incorporation and by-laws or equivalents currently in effect, any agreements with or among underwriters of the offering, any instrument governing the issuance of the security to be registered, a specimen of the security and, if the security to be registered is a note, bond, debenture or other evidence of indebtedness, a trust indenture unless the security is a face amount certificate registered under the Investment Company Act of 1940 or unless the requirement to furnish a trust indenture relating to the securities is waived by the director for good cause shown; and

B. one copy of any other information or any documents required to be filed under form U-1.
[12.11.8.11 NMAC - Rp, 12 NMAC 11.4.4, 1-1-2010]

12.11.8.12 PROSPECTUS REQUIREMENTS:

A. As a condition of registration, a prospectus, offering circular, or similar document meeting the requirements of Subsections B, C and D of 12.11.8.12 NMAC shall be sent or given to each person to whom an offer is made by or for the account of the issuer or any other person on whose behalf the offering is made or by any underwriter or broker-dealer who is offering part of an unsold allotment or subscription as a participant in the distribution. The document shall be sent or given either before or concurrently with the earlier of any of the following:

(1) any written offer made to the person, otherwise than by means of public advertisement;

(2) confirmation of any sale to the person;

(3) payment pursuant to any sale to the person; or

(4) delivery of the security pursuant to any sale to the person.

B. The outside front cover of the prospectus, unless otherwise permitted by the director, shall meet the requirements of any appropriate form under the Securities Act of 1933 or shall contain substantially the following information:

(1) name and location of issuer and its type of organization;

(2) designation of securities offered;

(3) per share or unit and aggregate public offering price, underwriting or selling commissions and discounts and net proceeds to offeror;

(4) name of managing underwriter or broker-dealer or statement that the securities are being offered by the issuer;

(5) a statement describing the anticipated secondary market for the securities being offered, including the identity of anticipated market makers;

(6) date of prospectus;

(7) legends:

(a) the following legend, or its substantial equivalent, shall appear on the cover of the prospectus in boldface type:
THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION OR THE SECURITIES DIVISION OF THE NEW MEXICO DEPARTMENT OF REGULATION AND LICENSING, NOR HAS THE SECURITIES DIVISION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE;

(b) the following information, to the extent appropriate, shall appear on the cover page of any offering document utilized in connection with the offer and sale of securities which are exempt from registration under the Securities Act of 1933 as amended, but subject to a filing requirement under a state securities law:
IN MAKING AN INVESTMENT DECISION, INVESTORS MUST RELY ON THEIR OWN EXAMINATION OF THE ISSUER AND THE TERMS OF THE OFFERING, INCLUDING THE MERITS AND RISK INVOLVED. THESE SECURITIES HAVE NOT BEEN RECOMMENDED BY ANY FEDERAL OR STATE SECURITIES COMMISSION OR REGULATORY AUTHORITY. FURTHERMORE, THE FOREGOING AUTHORITIES HAVE NOT CONFIRMED THE ACCURACY OR DETERMINED THE ADEQUACY OF THIS DOCUMENT. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE;

(8) if the offering is exempt under Section (3)(a)(11) of the Securities Act of 1933, the following statement shall appear in boldface type: THESE SECURITIES ARE OFFERED ONLY TO BONA FIDE RESIDENTS OF THE STATE OF NEW MEXICO; and

(9) such other information as the director may permit or require.

C. The prospectus shall contain a full disclosure of all material facts relating to the issuer and the offering and sale of the registered securities. A prospectus meeting the requirements of form S-1 under the Securities Act of 1933 is deemed to satisfy the requirements of this subsection.

D. Unless otherwise permitted by the director, the body of the prospectus and all notes to financial statements and other tabular data included therein shall be in times new roman type or its substantial equivalent, at least as large and as legible as 10-point modern type, except that financial statements and other tabular data, including tabular data in notes, may be in times new roman type or its substantial equivalent, at least as large and as legible as 8-point modern type. All such type shall be leaded at least two points.

E. At the end of each period of not more than one year from the effectiveness of the registration statement, or in the event of any material change relating to the issuer or the securities subsequent to the filing of a prospectus, an amended prospectus shall be filed reflecting any such changes, and a current disclosure of all material facts relating to the issuer and the securities, including financial statements. No further solicitations or sales of the

securities may be made thereafter until such amended prospectus has been filed with the director.
[12.11.8.12 NMAC - Rp, 12 NMAC 11.4.5, 1-1-2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT
SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 9 STANDARDS APPLICABLE TO REGISTERED OFFERINGS

12.11.9.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.
[12.11.9.1 NMAC - N, 1-1-2010]

12.11.9.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as a broker-dealer, an investment adviser or an issuer of securities, and their representatives and agents.
[12.11.9.2 NMAC - N, 1-1-2010]

12.11.9.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701 NMSA 1978, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".
[12.11.9.3 NMAC - N, 1-1-2010]

12.11.9.4 DURATION: Permanent.
[12.11.9.4 NMAC - N, 1-1-2010]

12.11.9.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.
[12.11.9.5 NMAC - N, 1-1-2010]

12.11.9.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.
[12.11.9.6 NMAC - N, 1-1-2010]

12.11.9.7 DEFINITIONS:

A. General: The definitions in this section apply to issuers and promoters of such issuers, organized as limited liability companies, limited partnerships, limited liability partnerships or other legal entities, as appropriate, even though 12.11.9 NMAC refers only to corporate entities and their promoters.

B. Definitions: The definitions contained in this section apply to the terms used in 12.11.9 NMAC, except as otherwise provided.

(1) "**Adjusted net earnings**" are the issuer's net earnings after charges for interest and dividends, adjusted on a pro forma basis to reflect:

(a) the elimination of any required charges for debt, debt securities or preferred stock that are to be redeemed or retired from the proceeds derived from the public offering of preferred stock;

(b) the effect of any acquisitions or capital expenditures that were made by the issuer after its last fiscal year, or which are proposed or required to be made during the current fiscal year, which materially affect the issuer's net earnings;

(c) the effect of any charges or dividends on debt, debt securities or preferred stock issued after the issuer's last fiscal year;

(d) the effect of any charges or dividends on debt, debt securities or preferred stock that were issued during the issuer's last fiscal year, but which were outstanding for only a portion of such fiscal year, calculated as if charges or dividends, such debt, debt securities or preferred stock had been outstanding for the entire fiscal year; and

(e) the effect of any other material changes to an issuer's future net earnings.

(2) An "**affiliate**" is a person who, directly or indirectly, controls, is controlled by, or is under common control with the person specified herein.

(3) "**Aggregate revenues**" is the aggregate amount of revenues a promotional or development stage company has received within the last three consecutive fiscal years immediately preceding the public offering plus revenues received during the period covered by any interim period financial information included in the prospectus. Revenues from interest and extraordinary items are to be excluded.

(4) An "**associate**", when used to indicate a relationship with a person, includes:

(a) corporations or legal entities, other than the issuer or majority-owned subsidiaries of the issuer, of which a person is an officer, director, partner or a direct or indirect legal or beneficial owner of five percent or more of any class of equity securities;

(b) trusts or other estates in which a person has a substantial beneficial interest or for which a person serves as a trustee or in a similar capacity; and

(c) a person's spouse and relatives, by blood or by marriage, if the person is a promoter of the issuer, its subsidiaries, its affiliates or its parent.

(5) "**Average promotional price**" is the average per share price paid for promotional shares and other shares issued prior to the public offering which are of the same class of shares being offered in the public offering as determined by reference to the audited financial statements of the issuer included in the prospectus.

(6) "**Cash analysis**" is the issuer's net cash provided by operating activities as reflected on the statement of cash flows and presented in conformity with generally accepted accounting principles. If debt securities are to be redeemed or retired from the proceeds from the public offering, a pro forma adjustment for the elimination of the related interest charges, net of applicable income taxes, must be made.

(7) "**Control**" is the power to direct or influence the direction of the management or policies of a person, directly or indirectly, through the ownership of voting securities, by contract or otherwise.

(8) "**Equity securities**" include shares of common stock or similar securities and convertible securities, warrants, options or rights that may be converted into, or exercised to purchase, shares of common stock or similar securities.

(9) An "**escrow agent**" is a financial institution whose principal place of business and domicile are in the United States. It may not be affiliated with the issuer, its promoters or associates. A financial institution may not be disallowed to act as an escrow agent merely because the issuer, its promoters or associates are customers thereof. An escrow agent may also include an attorney or certified public accountant, provided that the attorney or certified public accountant is not affiliated with the issuer, its promoters or associates, is licensed to do business in the state in which they practice and can demonstrate that they are adequately insured or can provide a fidelity bond.

(10) An "**impoundment agent**" is a financial institution that is domiciled and whose principal place of business is located in the United States and whose deposits are insured by the FDIC.

(11) An "**independent director**" is a member of issuer's board of directors who:

(a) is not an officer or employee of the issuer, its subsidiaries or their affiliates or associates and has not been an officer, or employee of the issuer, its subsidiaries, or their affiliates or associates within the last two years;

(b) is not a promoter as defined in Paragraph (15) of Subsection B of this section; and,

(c) does not have a material business or professional relationship with the issuer or any of its subsidiaries, affiliates

or associates; for purposes of determining whether or not a business or professional relationship is material, the gross revenue derived by the independent director from the issuer, its subsidiaries, its affiliates and associates shall be deemed material per se if it exceeds five percent of the independent director's:

(i) annual gross revenue derived from all sources during either of the last two years; or

(ii) net worth, on a fair market value basis.

(12) "**Lock-in agreement**" is an agreement between an issuer and persons who hold promotional shares wherein, those persons agree, as a condition of registration, not to sell, pledge, hypothecate, assign, grant any option for the sale of, or otherwise transfer or dispose of, whether or not for consideration, directly or indirectly, promotional shares and all certificates representing stock dividends, stock splits, recapitalizations and other capital changes, that are granted to or received by the security holder for the period specified in the lock-in agreement.

(13) "**Net earnings**" are the issuer's after-tax earnings that are derived from its normal operations, exclusive of extraordinary and nonrecurring items, determined according to generally accepted accounting principles consistently applied.

(14) A "**person**" is an individual, a corporation, a limited liability company, a partnership, a limited liability partnership, an association, a joint-stock company, a trust, an unincorporated organization, a government or a political subdivision of a government or any other legal entity.

(15) A "**promoter**" may include:

(a) a person who, alone or in conjunction with one or more persons, directly or indirectly, took the initiative in founding or organizing the issuer or controls the issuer;

(b) a person who, directly or indirectly, receives as consideration for services or property rendered, five percent or more of any class of the issuer's equity securities or five percent or more of the proceeds from the sale of any class of the issuer's equity securities;

(c) a person who receives securities or proceeds solely as underwriting compensation, is excluded from the definition of promoter if that person falls outside the definition of Subparagraphs (a), (d) and (e) of this paragraph;

(d) a person who is an officer or director of the issuer or anyone who legally or beneficially owns, directly or indirectly, five percent or more of any class of the issuer's equity securities; and

(e) a person who is an affiliate or an associate of a person specified in Subparagraphs (a), (b) and (d) of this paragraph.

(16) "**Promoters' equity investment**" is the total of cash and tangible assets that has been contributed by the promoters to the issuer, provided that the value of the tangible assets is accepted by the director. Promoters' contributions of intangible assets may be considered as promoters' equity investment provided that the value thereof has been accepted by the director. Promoters' equity investment may be adjusted by the issuer's earned surplus immediately prior to the public offering.

(17) A "**promotional or development stage company**" may include an issuer who is not listed on the New York stock exchange, the American stock exchange or the NASDAQ national market system, and whose annual net earnings for each of the last two consecutive fiscal years or whose average annual net earnings for the last five fiscal years prior to the public offering have been less than five percent of the aggregate public offering.

(18) "**Promotional shares**" are equity securities that are to be issued or were issued:

(a) by an issuer which is a promotional or development stage company, to promoters for cash or other consideration, including services rendered, patents, copyrights and other intangibles (provided that the value thereof has been accepted by the director), that will be or was less than 85 percent of the proposed public offering price; or

(b) within three years prior to the filing of the registration statement to promoters for cash or other consideration, including services rendered, patents, copyrights and other intangibles (provided that the value thereof has been accepted by the director), that will be or was less than 85 percent of the proposed public offering price by a company which is not a promotional or development stage company.

(19) "**Public offering price**" is the per share price at which a promotional or development stage company proposes to offer equity securities to the public.

(20) An "**unaffiliated institutional investor**" is:

(a) an unaffiliated bank or unaffiliated savings and loan company;

(b) an unaffiliated investment company registered under the Investment Company Act of 1940;

(c) an unaffiliated business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940;

(d) an unaffiliated small business investment company licensed by the U.S. small business administration under Section 301 of the Small Business Investment Act of 1958;

(e) an unaffiliated employee benefit plan, within the meaning of Title I of the Employee Retirement Income Security Act of 1974, and state and local government employees retirement and pension plans;

(f) an unaffiliated insurance company;

(g) an unaffiliated trust company;

(h) an unaffiliated private business development company, as defined in Section 202(a)22 of the Investment Advisers Act of 1940, or a comparable business entity that is engaged as a substantial part of its business in the purchase and sale of securities, and which will own less than 20 percent of the issuer's securities upon completion of the public offering; or

(i) an unaffiliated qualified purchaser as defined under the National Securities Markets Improvement Act of 1996.

(21) An "**underwriter**" is any person who has agreed with the issuer or other person on whose behalf a distribution is to be made to:

(a) purchase securities for distribution;

(b) distribute securities for or on behalf of the issuer or other person; or

(c) manage or supervise a distribution of securities for or on behalf of the issuer or other person.

[12.11.9.7 NMAC - Rp, 12 NMAC 11.4.8.1, 1-1-2010]

12.11.9.8 ADOPTION OF NASAA STATEMENTS OF POLICY FOR REGISTRATION OF CERTAIN TYPES OF SECURITIES: In order to promote uniform regulation, the director adopts the following NASAA statements of policy set out in CCH NASAA reports published by commerce clearing house. An offering being registered pursuant to Sections 303 and 304 of the New Mexico Uniform Securities Act must comply with the requirements of said statements of policy or policies as adopted and as revised in subsequent amendments.

A. Asset-backed securities.

B. Cattle feeding programs.

C. Commodity pool programs.

D. Equipment programs.

E. Mortgage programs.

F. Oil and gas programs.

G. Omnibus programs.

H. Real estate investment trusts.

I. Real estate programs.

[12.11.9.8 NMAC - Rp, 12 NMAC 11.4.10, 1-1-2010]

12.11.9.9 IMPOUNDMENT OF PROCEEDS:

A. When an impoundment agreement ("agreement") is necessary, the proceeds from the sale of the securities must

be deposited in an interest bearing escrow or trust account with an impoundment agent. The impoundment agent may not be affiliated with the issuer, its affiliates, its officers or directors, the underwriter or any promoter.

B. The agreement:

(1) a signed copy of the agreement must be filed with the director and shall become part of the registration statement;

(2) the agreement must be signed by an officer of the issuer, an officer of the underwriter (if applicable) and an officer of the impoundment agent; the aforesaid individuals must have the authority to sign such documents;

(3) the agreement shall provide that the impounded proceeds (proceeds) are not subject to claims by creditors of the issuer, affiliates, associates or underwriters until the proceeds have been released to the issuer pursuant to the terms of the agreement;

(4) a summary of the principal terms shall be included in the registration statement; and

(5) the agreement shall provide that the director has the right to inspect and make copies of the records of the impoundment agent at any reasonable time wherever the records are located.

C. The impoundment agent shall notify the director in writing upon the release of the proceeds. If the proceeds are insufficient to meet the minimum requirements within the time prescribed by the agreement:

(1) the impoundment agent must release and return the proceeds directly to the investors; and

(2) the proceeds shall be released and returned to the investors without deduction for expenses including impoundment agent fees and shall include a pro rata share of interest earned.

D. If a person who is an underwriter or an officer, director, promoter, affiliate or an associate of the issuer purchases securities that are a part of the public offering being sold pursuant to the registration statement and if the proceeds from that purchase are used for the purpose of completing the impoundment requirements imposed under this rule, the following conditions shall be met:

(1) the persons are purchasing the securities on the same terms as unaffiliated public investors;

(2) the prospectus contains a disclosure that such persons may purchase securities of the issuer for purposes of completing the impoundment requirements imposed by this rule; and

(3) all securities so purchased will neither be defined as "promotional shares" nor be a part of the calculation of the promotional shares subject to escrow under 12.11.9.13 NMAC; however, all such securities shall be immediately subject to the escrow/lock-up provisions of 12.11.9.13 NMAC.

[12.11.9.9 NMAC - Rp, 12 NMAC 11.4.8.2, 1-1-2010]

12.11.9.10 LOANS AND OTHER MATERIAL AFFILIATED TRANSACTIONS:

A. Where there have been or will be loans and other material affiliated transactions as described in this section, the offer or sale of securities may be disallowed by the director unless the issuer has, and represents in the prospectus or offering document that it will maintain, at least two independent directors on its board of directors.

B. The offer or sale of securities may be disallowed by the director if the issuer or its affiliates will have loans outstanding after the offering or intends to make loans to or loan guarantees on behalf of its promoters, other than:

(1) advances to officers, directors and employees for travel, business expenses and similar ordinary operating expenditures;

(2) loans or loan guarantees made for the purchase of an issuer's securities by its officers, directors and employees, and loans for relocation of officers, directors and employees, provided the loans or loan guarantees that are ongoing were approved by a majority of the independent directors of the issuer's board of directors who did not have an interest in the transactions and who had access, at the issuer's expense, to issuer's or independent legal counsel; or

(3) loans made by an issuer or its affiliates whose primary business is that of making loans, provided that:

(a) the loans will be evidenced by promissory notes naming the lender as payee;

(b) the loans will bear interest at rates which are comparable to those normally charged by other commercial lenders for similar loans made in the lender's locale;

(c) the loans will be repaid pursuant to appropriate amortization schedules and contain default provisions comparable to those normally used by other commercial lenders for similar loans made in the lender's locale;

(d) the loans will be made only if credit reports and financial statements show the loans to be collectible and the borrowers are satisfactory credit risks in light of the nature and terms of the loans and other circumstances;

(e) the loans meet the loan policies normally used by other commercial lenders for similar loans made in the lender's locale;

(f) the purposes of the loans and the disbursements of proceeds will be reviewed and monitored in a manner comparable to that normally used by other commercial lenders for similar loans made in the lender's locale; and

(g) the loans will not violate the requirements of any banking or other financial institutions regulatory authority.

C. Except for loans described in Subsection B of this section, all loans existing at the time of the application for registration shall be repaid in full prior to the offering. The director may waive this requirement if:

(1) repayment of the loans will be made pursuant to appropriate amortization schedules; or

(2) any portion of the offering is made on behalf of a promoter and the promoter undertakes to immediately repay the loans from the proceeds of the offering.

D. The offer or sale of securities may be disallowed by the director if the issuer or its affiliates have engaged in other material transactions with promoters unless the prospectus discloses the terms of the transactions and indicates whether such terms were as favorable to the issuer or its affiliates as those generally available from unaffiliated third parties, and:

(1) the transaction is ratified by a majority of the issuer's independent directors who did not have an interest in the transactions and who had access, at the issuer's expense, to issuer's or independent legal counsel; or

(2) for transactions which were entered into and when there were less than two such disinterested independent directors the prospectus discloses that the issuer lacked sufficient disinterested independent directors to ratify the transactions at the time the transactions were initiated

E. The issuer shall disclose in the prospectus or offering document whether or not it or its affiliates have made or will make loans to, have made or will make loan guarantees on behalf of, or have engaged or will engage in material transactions with promoters, and the terms and details relating thereto. If material affiliated transactions or loans have been made, or may be made, the director may require the following representations to appear in the prospectus or offering document:

(1) all future loans and other material affiliated transactions will be made or entered into on terms that are no less favorable to the issuer than those that can be obtained from unaffiliated third parties; and

(2) all future loans and other material affiliated transactions, and any forgiveness of loans, must be approved by a majority of the issuer's independent directors who do not have an interest in the transactions and who had access, at the issuer's expense, to issuer's or independent legal counsel.

F. The issuer and its officers and directors should consider their

due diligence and other obligations to affirmatively demonstrate a reasonable basis for the representations in Subsections D and E of this section. In particular, they should consider whether the representations in Paragraph (1) of Subsection D and Paragraph (2) of Subsection E of this section should be embodied in the issuer's charter or by-laws.

G. An issuer that engages in loans and other material affiliated transactions covered by Paragraph (2) of Subsection B, Paragraph (1) of Subsection D and Paragraph (2) of Subsection E of this section must have at least two independent directors on its board of directors. In the event the issuer has only two independent directors on its board or directors, both independent directors must be disinterested in and approve loans and other material transactions covered by Paragraph (2) of Subsection B, Paragraph (1) of Subsection D and Paragraph (2) of Subsection E of this section.

[12.11.9.10 NMAC - Rp, 12 NMAC 11.4.8.3, 1-1-2010]

12.11.9.11 OPTIONS AND WARRANTS:

A. Options or warrants may be issued to underwriters as compensation in connection with a public offering provided those options or warrants comply with the requirements of 12.11.9.15 NMAC, underwriting expenses, underwriter's warrants, selling expenses and selling security holders.

B. Options or warrants may be granted to unaffiliated institutional investors in connection with loans if:

(1) the options or warrants are issued contemporaneously with the issuance of the loan;

(2) the options or warrants are granted as the result of bona fide negotiations between the issuer and unaffiliated institutional investor;

(3) the exercise price of the options or warrants is not less than the fair market value of the issuer's shares of common stock underlying the options or warrants on the date that the loan was approved; and

(4) the number of shares issuable upon exercise of the options or warrants multiplied by the exercise price thereof does not exceed the face amount of the loan.

C. Options or warrants may be issued in connection with acquisitions, reorganizations, consolidations or mergers if:

(1) they are issued to persons who are unaffiliated with the issuer; and

(2) the earnings of the issuer at the time of issuance and after giving effect to the acquisition, reorganization, consolidation or merger would not be materially diluted by the exercise of the options or warrants.

D. Options and warrants may not be issued at an exercise price of less than 85 percent of fair market value of the issuer's underlying shares of common stock on the date of grant. The issuer, its officers and directors should consider the advisability of obtaining a concurrent appraisal by a qualified independent appraiser of the value of the shares of common stock at the time of issuance as evidence of the fair market value.

E. The total number of options and warrants issued or reserved for issuance at the date of the public offering, excluding those options and warrants that were issued or reserved for issuance pursuant to Subsections C and D of this section, may not, for one year following the effective date of the offering, exceed fifteen percent of the issuer's shares of common stock outstanding at the date of the public offering plus the number of shares of common stock being offered that are firmly underwritten or, in the case of offerings not firmly underwritten, the number of shares of common stock required to be sold in order to meet the minimum offering amount. In calculating the number of options and warrants, the following are excluded:

(1) options and warrants that were issued or reserved for issuance pursuant to Subsections B, C and D of this section;

(2) options and warrants that were issued, or reserved for issuance, to employees or consultants who are not promoters, in connection with an incentive stock option plan qualified under Section 422 of the Internal Revenue Code; and

(3) options and warrants that are exercisable at or above the public offering price.

F. No options or warrants issued and outstanding at the date of the public offering, excluding those options and warrants issued pursuant to an incentive stock option plan qualified under Section 422 of the Internal Revenue Code, may be exercisable more than five years from the date of the public offering.

G. If the number of options and warrants that are issued and outstanding or reserved for issuance is material, the final offering circular shall disclose the potential dilutive effects of such options and warrants.

[12.11.9.11 NMAC - Rp, 12 NMAC 11.4.8.4, 1-1-2010]

12.11.9.12 PROMOTER'S EQUITY INVESTMENT: A public securities offering by a promotional or development stage company may be disallowed by the director if the promoters' equity investment is less than:

A. ten percent of the first $1,000,000 of the aggregate public offering;

B. seven percent of the next $500,000 of the aggregate public offering;

C. five percent of the next $500,000 of the aggregate public offering; and

D. two and one-half percent of the balance exceeding $2,000,000 of the aggregate public offering, which may include items submitted by the promoter to meet this requirement whose value has been accepted by the director.

[12 NMAC 11.4.12.4, 12-30-95; 12 NMAC 11.4.8.5, 5-1-99; 12.11.9.12 NMAC - Rp, 12 NMAC 11.4.8.5, 1-1-2010]

12.11.9.13 PROMOTIONAL SHARES:

A. Escrow of promotional shares: The director may require that some or all of the promoters deposit some or all of their promotional shares into an escrow account ("escrow") with an escrow agent according to the terms of an escrow agreement ("agreement") as a condition to registering a public offering of equity securities. The promoters, who are required to deposit some or all of their promotional shares into escrow, are hereinafter collectively referred to as depositors. The director may, at his discretion, require a lock-in agreement on substantially the same terms and conditions as an agreement.

B. Release of promotional shares.

(1) The escrow agent shall release the promotional shares in the following manner, if:

(a) the issuer's aggregate revenues are:

(i) $500,000 or more, provided that neither the auditor's report nor any footnote to the issuer's latest audited financial statement contains an opinion or statement regarding the ability of the issuer to continue as a going concern; beginning one year from the date the offering is declared effective, two and one-half percent of promotional shares held in escrow may be released each quarter pro rata among the depositors; all remaining promotional shares shall be released from escrow on the second anniversary from the date the offering is declared effective; or

(ii) less than $500,000; beginning two years from the date the offering is declared effective, two and one-half percent of promotional shares held in escrow may be released each quarter pro rata among the depositors; all remaining promotional shares shall be released from escrow on the third anniversary from the date the offering is declared effective;

(b) the public offering has been terminated and no securities were sold pursuant thereto; or

(c) the public offering has been terminated and all of the gross proceeds that were derived therefrom have been returned to the public investors.

(2) In the event of a dissolution,

liquidation, merger, consolidation, reorganization, sale or exchange of the issuer's assets or securities (including by way of tender offer), or any other transaction or proceeding with a person who is not a promoter which results in the distribution of the issuer's assets or securities ("distribution"), while this agreement remains in effect, the depositors agree that:

(a) all holders of the issuer's equity securities will initially share on a pro rata, per share basis in the distribution, in proportion to the amount of cash or other consideration that they paid per share of equity securities (provided that the director has accepted the value of the other consideration), until the public shareholders have received, or have had irrevocably set aside for them, an amount that is equal to 100 percent of the public offering's price per share times the number of shares of equity securities that they purchased pursuant to the public offering and which they still hold at the time of the distribution, adjusted for stock splits, stock dividends, recapitalizations and the like;

(b) all holders of the issuer's equity securities shall thereafter participate on an equal, per share basis times the number of shares of equity securities they hold at the time of the distribution, adjusted for stock splits, stock dividends, recapitalizations and the like; and

(c) a distribution may proceed on lesser terms and conditions than the terms and conditions stated in Paragraph (1) of this subsection if a majority of the equity securities that are not held by promoters or their associates or affiliates, vote or consent by consent procedure, to approve the lesser terms and conditions at a special meeting called for that specific purpose.

(3) In the event of a dissolution, liquidation, merger, consolidation, reorganization, sale or exchange of the issuer's assets or securities (including by way of tender offer) or any other transaction or proceeding with a person who is a promoter, which results in a distribution while this agreement remains in effect, the depositors' promotional shares shall remain in escrow subject to the terms of the agreement.

(4) In the event securities in the escrow become "covered securities" as defined in the National Securities Markets Improvement Act of 1996, all securities in the escrow shall be released.

C. Documentation regarding the termination of the escrow agreement or the release of promotional shares or both.

(1) A request for the release of any of the promotional shares from escrow shall be in writing and be forwarded to the escrow agent.

(2) The issuer shall provide to the escrow agent the documentation showing that the requirements of Subsection B of this section have been met.

(3) The escrow agent shall terminate the agreement, or release some or all of the promotional shares from escrow, or both, if all the applicable provisions of the agreement have been satisfied. The escrow agent shall maintain all records relating to the agreement for a period of three years following the termination of the agreement. Copies of all records retained by the escrow agent shall be forwarded to the director promptly upon written request.

D. Restrictions on the transfer, sale or disposal of promotional shares.

(1) Promotional shares may be transferred by will, the laws of descent and distribution, operation of law or any court of competent jurisdiction and proper venue.

(a) The promotional shares of a deceased depositor may be hypothecated to pay the expenses of the deceased depositor's estate provided that the hypothecated promotional shares shall remain subject to the terms of the agreement.

(b) No promotional shares may be transferred, sold or disposed of ("transferred") until the escrow agent has received a written statement signed by the proposed transferee ("transferee") which states that the transferee has full knowledge of the terms of the agreement, the transferee accepts the promotional shares subject to the terms of the agreement, and the transferee realizes that the promotional shares shall remain in escrow until they are released pursuant to Subsection B of this section.

(2) With the exception of Subparagraph (a) of Paragraph (1) of this subsection, promotional shares may not be pledged to secure a debt.

(3) Promotional shares may be transferred by gift to the depositor's family members, provided that the promotional shares shall remain subject to the terms of the agreement.

(4) With the exception of Paragraph (1) of this subsection, no promotional shares, any interest therein or any right or title thereto, may be transferred.

(5) In the case of a self-underwritten offering, notwithstanding the provisions of Paragraph (1) of Subsection B of this section, promoters shall be prohibited from selling any of the promotional shares that are not subject to escrow during the time that the issuer is offering its securities to the public.

E. Terms of the escrow.

(1) Except as noted in Subparagraph (c) of Paragraph (2) of Subsection B, depositors shall have the same voting rights as shareholders who purchased equity securities pursuant to the public offering ("public shareholders").

(2) All certificates representing stock dividends and shares resulting from stock splits of escrowed shares, recapitalizations and the like that are granted to or received by depositors while their promotional shares are held in escrow shall be deposited with and held by the escrow agent subject to the terms of the agreement. Any cash dividends that are granted to or received by depositors while their promotional shares are held in escrow, shall be deposited with and held by the escrow agent subject to the terms of the agreement. The escrow agent shall invest such cash dividends as directed by the depositors. The cash dividends and any interest earned thereon will be disbursed in proportion to the number of shares released from the escrow.

(3) Equity securities that are received by depositors as the result of the conversion or exercise of convertible securities, warrants, options or rights to purchase common stock or similar securities, while their promotional shares are in escrow, shall be deposited with and held by the escrow agent subject to the terms of the escrow.

(4) A summary of the agreement shall be included in the prospectus and subsequent amendments thereto, annual reports to shareholders, proxy statements and other disclosure materials that are used to make investment decisions until the public offering has been terminated.

(5) The escrow agent shall be entitled to reasonable compensation from the issuer for its services as set forth in the agreement. If the escrow agent is required to render additional services that are not expressly provided for therein, or if it is made a party to or intervenes in any action, suit or proceeding pertaining to the agreement, it shall be entitled to receive reasonable compensation from the issuer and the depositors. If additional services are provided, the escrow agent, after giving written notice to the depositors and issuer, may deduct reasonable compensation from any cash dividends, interest and other offering proceeds that are being held by it for distribution pursuant to the agreement.

(6) The issuer and the depositors shall hold the escrow agent harmless from, and indemnify it for, any cost or liability regarding any administrative proceeding, investigation, litigation, interpretation, implementation or interpleading relating to the agreement, including the release of promotional shares and the disbursement of dividends, interest or other offering proceeds, unless the cost or the liability arises from the escrow agent's failure to abide by the terms of the agreement.

(7) The agreement shall be binding upon the depositors, their heirs and assignees, and upon the issuer and escrow agent and their successors.

(8) Except for the escrow

agent's compensation and indemnification provisions which shall survive until they are satisfied, the agreement will be terminated when all of the promotional shares have been released or the issuer's equity securities or the assets have been distributed pursuant to the agreement.

[12.11.9.13 NMAC - Rp, 12 NMAC 11.4.8.6, 1-1-2010]

12.11.9.14 SPECIFICITY IN USE OF PROCEEDS:

A. A registration statement not complying with the requirements of this section may be denied registration by the director.

B. The issuer's prospectus shall disclose in a tabular form for both the minimum and maximum amounts proposed, if applicable, the percentages and dollar amounts of the following:

(1) the estimated cash proceeds to be received by the issuer from the offering;

(2) the purposes for which the proceeds are to be used by the issuer;

(3) the amount to be used for each purpose; and

(4) the order or priority in which the proceeds will be used for the purposes stated.

C. Additionally, the issuer's prospectus shall disclose:

(1) the amounts of any funds to be raised from other sources to achieve the purposes stated, whether the sources are firm or contingent and any contingencies;

(2) the sources of any such funds, whether the sources are firm or contingent and any contingencies;

(3) if any part of the proceeds is to be used to acquire any property (including goodwill) other than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons who have received commissions in connection with the acquisition, and the amounts of any such commissions and any other expense in connection with the acquisition (including the cost of borrowing money to finance the acquisition); and

(4) the amount and basis for any proceeds used to pay indebtedness, including unpaid salaries, to promoters.

D. The issuer normally may not reserve more than 15 percent proceeds for working capital or general corporate purposes (or for any other unspecified use). In the event the issuer's business plans require greater flexibility in the use of unspecified proceeds, the issuer must:

(1) disclose all potential uses of such proceeds with qualifying language that such uses may be subject to change; and

(2) indicate the specific circumstances leading to reallocation and the potential areas of reallocation.

E. The issuer must demonstrate that the offering proceeds, together with all other sources of financing currently available to the issuer, are sufficient to sustain the issuer's proposed activities. If such proceeds are insufficient to sustain the issuer's activities for at least 12 months following the offering, the issuer must provide the appropriate risk disclosure in the prospectus.

F. In the event the offering is not firmly underwritten, the issuer must set a minimum amount of proceeds to be raised consistent with the business plan set forth in the prospectus. These proceeds must be impounded until such minimum amount is reached. In the event money is impounded in a non-interest bearing account, the prospectus must disclose this fact to investors. Additionally, the prospectus must disclose if officers, directors or other promoters have the right to purchase shares for the purpose of meeting the impound requirements.

[12.11.9.14 NMAC - Rp, 12 NMAC 11.4.8.7, 1-1-2010]

12.11.9.15 UNDERWRITING EXPENSES, UNDERWRITER'S WARRANTS, SELLING EXPENSES AND SELLING SECURITY HOLDERS:

A. An offer or sale of securities may be disallowed by the director if the underwriting expenses to be incurred exceed 17 percent of the gross proceeds from the public offering.

B. Underwriting expenses include, but are not limited to:

(1) commissions to underwriters or broker-dealers;

(2) non-accountable fees or expenses to be paid to the underwriters or broker-dealers;

(3) underwriter's warrants, which shall be valued using the following formula: .5 *multiplied by* ((165 percent of the offering price) *minus* (the exercise price multiplied by the number of shares offered to the public)) *multiplied by* (the number of shares underlying the warrants divided by the number of shares offered to the public) *equals* Warrant Value; the value may be reduced by 20 percent if the exercise period of the warrants is extended from one year after the public offering to two years after the public offering and by 40 percent if the exercise period of the warrants is extended from one year after the public offering to three years after the public offering; warrants granted to underwriters are subject to the following restrictions:

(a) the underwriter is a managing underwriter;

(b) the public offering is either a firmly underwritten offering or a "minimum-maximum" offering; options or warrants may be issued in a "minimum-maximum" public offering only if:

(i) the options or warrants are issued on a pro rata basis;

(ii) the "minimum" amount of securities has been sold;

(iii) the exercise price of the warrants is at least equal to the public offering price;

(iv) the number of shares covered by underwriter's options or warrants does not exceed ten percent of the shares of common stock actually sold in the public offering;

(v) the life of the options or warrants does not exceed a period of five years from the completion date of the public offering;

(vi) the options or warrants are not exercisable for the first year after the completion date of the public offering; and

(c) options or warrants are not transferred, except:

(i) to partners of the underwriter, if the underwriter is a partnership;

(ii) to officers and employees of the underwriter, who are also shareholders of the underwriter if the underwriter is a corporation; or

(iii) by will, pursuant to the laws of descent and distribution, or by the operation of law;

(d) the warrant agreement does not allow for a reduction in the exercise price of the options or warrants resulting from the subsequent issuance of shares by the issuer except where such issuances are pursuant to a:

(i) stock dividend or stock split; or

(ii) merger, consolidation, reclassification, reorganization, recapitalization or sale of assets;

(4) right of first refusal, which shall be valued at 1 percent of the public offering or the amount payable to the underwriter if the issuer terminates the right of first refusal;

(5) solicitation fees payable to the underwriter, which shall be valued at the lesser of actual cost or one percent of the public offering if the fees are payable within one year of the offering;

(6) financial consulting or financial advisory agreements with an underwriter or any other similar type of agreement or fees, however designated, which shall be valued at actual cost;

(7) underwriter's due diligence expenses;

(8) payments made either six months prior to or required to be made six months following the public offering to investor relations firms designated by the underwriter; and

(9) other underwriting expenses incurred in connection with the public

offering of securities as determined by the director.

C. Underwriting expenses shall not include financial consulting or financial advisory agreements with the underwriter payable at the time the services are rendered, provided that such agreement was entered into at least twelve months before the registration is filed with the SEC.

D. An offer or sale of securities may be disallowed by the director if the direct and indirect selling expenses of the offering exceed 20 percent of the gross proceeds from the public offering.

E. Selling expenses include, but are not limited to:

(1) commissions to underwriters or broker-dealers;

(2) non-accountable fees or expenses to be paid to the underwriters or broker-dealers;

(3) auditors' and accountants' fees;

(4) legal fees;

(5) the cost of printing prospectuses, circulars and other documents required to comply with securities laws and regulations;

(6) charges of transfer agents, registrars, indenture trustees, escrow holders, depositories, engineers, appraisers and other experts;

(7) the cost of authorizing and preparing the securities, including issue taxes and stamps;

(8) financial consulting or financial advisory agreements with an underwriter or any similar type agreement or fees, however designated, which shall be valued at actual cost, excluding financial and consulting agreements which are entered into at least 12 months before the registration is filed with the SEC;

(9) payments made either six months prior to or required to be made six months following the public offering to investor relations firms designated by the underwriter; and

(10) other selling expenses incurred in connection with the public offering of securities as determined by the director.

F. A public offering or sale of securities that includes selling security holders offering in aggregate more than ten percent of the securities to be sold in the public offering may be disallowed by the director unless:

(1) selling security holders offering or selling in aggregate more than 10 percent but less than 50 percent of the securities to be sold in the public offering pay a pro rata share of all selling expenses of the public offering, excluding the legal and accounting expenses of the public offering;

(2) selling security holders offering in aggregate more than 50 percent of the securities to be sold in the offering pay a pro rata share of all selling expenses of the public offering; and

(3) the prospectus or offering document discloses the amount of selling expenses which the selling security holders will pay.

G. With the exception of underwriter's or broker-dealer's compensation, the provisions of Subsection F of this section shall not apply if the selling security holders have a written agreement with the issuer that was entered into in an arms-length transaction, whereby the issuer has agreed to pay all of the selling security holders' selling expenses.

[12.11.9.15 NMAC - Rp, 12 NMAC 11.4.8.8, 1-1-2010]

12.11.9.16 UNEQUAL VOTING RIGHTS: The offer and sale of securities that have less-than-equal voting rights may be deemed to be inconsistent with public investor protection and against public policy by the director unless:

A. the securities are given preferential treatment as to dividends and liquidation or the less than equal voting rights are justified to the satisfaction of the director; and

B. the terms of the voting rights are prominently disclosed on the cover page of the issuer's offering circular or prospectus.

[12.11.9.16 NMAC - Rp, 12 NMAC 11.4.8.9, 1-1-2010]

12.11.9.17 UNSOUND FINANCIAL CONDITION:

A. An issuer shall be deemed to be in unsound financial condition if the financial statements contain:

(1) a footnote to the financial statements or an explanatory paragraph in the independent auditor's report regarding the issuer's ability to continue as a going concern; and

(2) at least one of the following, or a similar fact:

(a) an accumulated deficit;

(b) negative shareholder equity;

(c) an inability to satisfy current obligations as they come due; or

(d) negative cash flow (or revenues not being generated by operations).

B. If the application for registration contains audited financial statements which were issued more than 90 days from the date of application, the accompanying interim unaudited financial statements are subject to the scrutiny of this section.

C. An application for registration by an issuer in unsound financial condition may be denied by the director.

D. An application for registration by an issuer in unsound financial condition may be registered by the director if the chief financial officer of the issuer provides pro forma financial data acceptable to the director that:

(1) demonstrate that the issuer's financial condition will improve either as a direct result of the offering proceeds or as a proximate result of the offering proceeds (as part of a long-term business plan);

(2) demonstrate when profitability is expected to occur; and

(3) are supported with documentation of, and the bases for, any assumptions.

E. In addition to satisfying the requirements of Subsection D of this section, the issuer must:

(1) include prominent disclosure that the issuer is considered to be in unsound financial condition and that persons should not invest unless they can afford to lose their entire investment; and

(2) disclose the following risk factors, as applicable:

(a) the presence of an explanatory paragraph in the independent auditor's report;

(b) if the issuer has not been generating revenues from operations, the means by which the issuer has been financing its operations;

(c) the amount of any accumulated deficit;

(d) the presence and amount of any negative shareholder's equity; and

(e) the need for future financing.

F. Nothing in this section shall prevent the director from imposing net worth standards or limiting the sales of securities to accredited investors in lieu of, or in addition to, the requirements of Subsections D and E of this section. The imposition of these minimal net worth standards does not relieve a dealer from the responsibility of making an independent determination of suitability required under industry standards. Unless the director determines that the risks associated with the offering would require lower standards, public investors shall have the following:

(1) a minimum annual gross income of $70,000 and a minimum net worth of $70,000,exclusive of automobile, home and home furnishings; or

(2) a minimum net worth of $250,000, exclusive of automobile, home and home furnishings.

[12.11.9.17 NMAC - Rp, 12 NMAC 11.4.8.10, 1-1-2010]

12.11.9.18 PREFERRED STOCK:

A. A public offering of preferred stock may be disallowed by the director if the issuer's adjusted net earnings for the last fiscal year or its average adjusted net earnings for the last three fiscal years prior to the public offering were insufficient

to pay its fixed charges and preferred stock dividends, whether or not accrued, and to meet the redemption requirements, if applicable, of the preferred stock being offered.

B. As an alternative to Subsection A of this section, the director may choose to apply a cash analysis. The director may consider the statement of cash flows if the statement demonstrates that the issuer has had positive "net cash provided by operating activities" for its last fiscal year. The director may request that the issuer submit a financial statement demonstrating an average positive "net cash provided by operating activities" for the last three fiscal years prior to the public offering. In either instance there must be sufficient cash to cover the preferred stock dividend whether or not declared.

C. Subsections A and B of this section shall not apply to public offerings of convertible preferred stock that are superior in right to payment of dividends, interest and liquidation proceeds to any convertible debt and preferred stock that are or may be legally or beneficially, directly or indirectly, owned by promoters. The risks of failure to declare or pay dividends and the equity characteristics of the convertible preferred stock must be disclosed in the offering prospectus. An offering of such securities may be reviewed using guidelines for equity offerings.

D. If the issuer's net earnings are subject to cyclical fluctuations or if the director deems it necessary for investor protection, the director may require that the issuer establish redemption requirements.

E. A public offering of equity securities may be disallowed by the director if the issuer's articles of incorporation authorize its board of directors to issue preferred stock in the future without a vote of the common shareholders unless:

(1) the issuer represents in its prospectus or offering document that it will not offer preferred stock to promoters except on the same terms as it is offered to all other existing shareholders or to new shareholders; or

(2) the issuance of preferred stock is approved by a majority of the issuer's independent directors who do not have an interest in the transaction and who have access, at the issuer's expense, to issuer's or independent legal counsel.

[12.11.9.18 NMAC - Rp, 12 NMAC 11.4.8.11, 1-1-2010]

12.11.9.19 DEBT SECURITIES:

A. The following definitions shall apply to this section.

(1) "**Adjusted cash flow**" is the issuer's cash flow adjusted on a pro forma basis to reflect:

(a) the elimination of interest and fees on debt or debt securities and of cash dividends on preferred stock that are to be retired with the proceeds derived from the offering;

(b) the effect of any acquisitions or capital expenditures that were made by the issuer after its last fiscal year, or which are proposed or required for the current fiscal year, which materially affect the issuer's cash flow;

(c) the effect of interest and fees on debt or debt securities or cash dividends paid after the issuer's last fiscal year;

(d) the effect of any interest and fees or debt securities and of cash dividends on preferred stock or common stock that were issued during the issuer's last fiscal year, as if such debt, debt securities, preferred stock or common stock had been outstanding for the entire fiscal year;

(e) the effect of imputed or deferred charges of zero coupon debt or debt securities for the issuer's last fiscal year and any additional charges on such debt or debt securities issued after the issuer's last fiscal year;

(f) except as provided in Subsection C of this section, the effect of accrued dividends on preferred stock for the issuer's last fiscal year and any additional dividends on such preferred stock issued after the issuer's last fiscal year; and

(g) the effect of any other material changes to the issuer's future cash flow.

(2) "**Cash flow**" is the issuer's after-tax earnings that are derived from its normal operations, exclusive of extraordinary and nonrecurring items, less interest and dividends, plus certain noncash charges against earnings such as depreciation, depletion and amortization, determined according to generally accepted accounting principles consistently applied.

(3) A "**promoter**" may include:

(a) a person who, alone or in conjunction with one or more persons, directly or indirectly, founded or organized the issuer or controls the issuer;

(b) a person who, directly or indirectly, receives as consideration for services or property rendered, five percent or more of any class of the issuer's equity securities or five percent or more of the proceeds from the sale of any class of the issuer's equity securities;

(c) a person who receives securities or proceeds solely as underwriting compensation is excluded from the definition of promoter if that person falls outside of the definitions of Subparagraphs (a), (d) and (e) of Paragraph (3) of this subsection;

(d) a person who is an officer or director of the issuer;

(e) a person who legally or beneficially, directly or indirectly, owns five percent or more of any class of the issuer's equity securities ("five percent shareholder") if that person was in control of the issuer at the time of acquiring five percent of any class of the issuer's equity securities or if that person is in control of the issuer at the time of public offering of the issuer's equity securities; or

(f) a person who is an affiliate or an associate of a person specified in Subparagraphs (a), (b), (c) or (d) of Paragraph (3) of this subsection.

B. A public offering of debt securities may be disallowed by the director if the issuer's adjusted cash flow for the last fiscal year or its average adjusted cash flow for the last three fiscal years prior to the public offering was insufficient to cover its fixed charges, meet its debt obligations as they became due, and service the debt securities being offered.

C. Notwithstanding Subparagraph (f) of Paragraph (1) of Subsection A of this section, accrued dividends of cumulative preferred stock having a stated interest rate may be excluded from adjusted cash flow at the discretion of the director.

D. The director, in the director's sole discretion, may choose not to apply Subsection B of this section to a public offering of convertible securities that are superior in right of payment of interest and liquidation proceeds to any convertible debt that is or may be legally or beneficially, directly or indirectly, owned by promoters. The risks of failure to meet debt service obligations and the equity characteristics of such securities must be disclosed in the prospectus. An offering of such securities may be reviewed using guidelines for equity offerings.

E. Unless the director permits otherwise, public offerings of debt securities shall be offered and sold pursuant to a trust indenture ("indenture") which adequately protects the rights of the purchasers. Some of these protections are:

(1) the indenture shall comply with the provisions of the Trust Indenture Act of 1939; this shall be disclosed in the offering document;

(2) the events of default of the indenture shall be disclosed in the offering document;

(3) the trustee shall be provided with adequate reports, including any compliance reports from independent auditors, to allow the trustee to ensure compliance with the indenture;

(4) neither the trustee nor the promoters may be major creditors of the issuer or its affiliates;

(5) the indenture shall provide that upon any consolidation, merger, recapitalization, reorganization, pledge foreclosure, equity or share exchange, conveyance or transfer of the properties and assets of the issuer substantially as an

entirety, or any other transaction having a substantially equivalent effect, the successor person shall expressly assume the payment obligations on the debt securities and the duty to perform the covenants of the indenture;

(6) the indenture shall provide that interest will accrue and be paid to the date(s) of redemption or conversion of the debt securities.

F. If the issuer's cash flow is subject to cyclical fluctuations or if the director deems it necessary for investor protection, the director may require that the issuer establish a sinking fund or redemption requirements.

[12.11.9.19 NMAC - Rp, 12 NMAC 11.4.8.12, 1-1-2010]

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NEW MEXICO REGULATION AND LICENSING DEPARTMENT

SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 10 SMALL COMPANY OFFERING REGISTRATION (SCOR)

12.11.10.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.

[12.11.10.1 NMAC - N, 1-1-2010]

12.11.10.2 SCOPE: All persons, whether natural or legal entities, that transact business in the state of New Mexico as a broker-dealer, an investment adviser, or an issuer of securities, and their representatives and agents.

[12.11.10.2 NMAC - N, 1-1-2010]

12.11.10.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701 NMSA 1978, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".

[12.11.10.3 NMAC - N, 1-1-2010]

12.11.10.4 DURATION: Permanent.

[12.11.10.4 NMAC - N, 1-1-2010]

12.11.10.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.

[12.11.10.5 NMAC - N, 1-1-2010]

12.11.10.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.

[12.11.10.6 NMAC - N, 1-1-2010]

12.11.10.7 DEFINITIONS: [RESERVED]

12.11.10.8 QUALIFICATIONS FOR USE OF SCOR: SCOR is intended to allow small companies to conduct limited offerings of securities. The requirements contained in this subpart shall apply to registrations that utilize form U-7 for registration and are exempt from federal registration under Rule 504 of Regulation D or that utilize model A of form 1-A for offerings that are exempt under Regulation A of the Securities Act of 1933.

A. The issuer must be a corporation or centrally managed limited liability company organized under the laws of the United States or Canada, or any state, province, or territory or possession thereof, or the District of Columbia and have its principal place of business in one of the foregoing jurisdictions.

B. The securities may be offered and sold only on behalf of the company. Form U-7 may not be used by any selling security holder (including purchasing underwriters in a firm commitment underwriting) to register his securities for resale.

C. The offering price for common stock (and the exercise price, if the securities offered are options, warrants or rights for common stock; or the conversion price if the securities are convertible into common stock) or membership interest in a limited liability company or limited liability partnership must be equal to or greater than $1.00 per share or unit of interest.

D. By filing for SCOR registration in this state, the registrant agrees with the director that the registrant will not split its common stock, or declare a stock dividend, for two years after the effectiveness of the registration if such action has the effect of lowering the price below $1.00.

[12.11.10.8 NMAC - Rp, 12 NMAC 11.4.6.1, 1-1-2010]

12.11.10.9 INELIGIBLE ISSUERS: The following issuers are ineligible to use SCOR:

A. investment companies subject to the Investment Company Act of 1940;

B. companies subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934;

C. companies engaged in or which propose to engage in petroleum exploration and production, mining, or other extractive industries;

D. development stage companies that either have no specific business plan or purpose or have indicated that their business plan is to engage in a merger or acquisition with an identified company or companies or other entity or person;

E. holding companies or companies whose principal purpose is owning stock in, or supervising the management of, other companies; and

F. issuers disqualified under 12.11.10.21 NMAC.

[12.11.10.9 NMAC - Rp, 12 NMAC 11.4.6.2, 1-1-2010]

12.11.10.10 REGISTRATION:

A. A corporation issuing securities that are exempt from registration with the SEC under Rule 504 of Regulation D of the Securities Act of 1933 shall use registration form U-7, small company offering registration form, when registering such securities in this state.

B. Use of SCOR is available to any offering of securities by a company relying upon an exemption from registration pursuant to Regulation A or Rule 504 of Regulation D of the Securities Act of 1933. The aggregate offering under Regulation A, within and outside this state, shall not exceed $5,000,000. The aggregate offering under Rule 504, within and outside this state, shall not exceed $1,000,000, less the aggregate offering price of all securities sold within the previous twelve months in reliance on Rule 504.

C. Any reference in this rule to form U-7 means the small company offering registration form (form U-7) as adopted by NASAA, on April 29, 1989, as amended, which is incorporated herein by reference. Copies of form U-7 are available from the division and from NASAA.

D. Securities issued under this Part 10 shall be registered by qualification under Section 58-13B-23.

[12.11.10.10 NMAC - Rp, 12 NMAC 11.4.6.3, 1-1-2010]

12.11.10.11 APPLICATION:

A. In addition to filing a properly completed and signed form U-7 or model A of form 1-A, a company must file with the director an executed form U-1, uniform application to register securities, and a signed original form U-2, consent to service of process. References in form U-1 to SEC registration and effectiveness and questions 6 and 8(a) of form U-1 should be disregarded. Form U-1 should set forth the amount of securities being registered in this state. Once registration is effective in this state, the effective date should be noted at the bottom of the cover page of the form U-7

or model A of form 1-A. Any changed or revised disclosure document must also be signed. A company that intends to conduct a SCOR offering in two or more states should contact the states to determine if the offering can be filed for regional review. In filing for regional review, the company will, in most cases, confer with a lead state that will coordinate the review and comments of all states in which the offering is to be made. Upon completion, the offering will become effective in all these states.

B. A response shall be provided to each question in each paragraph of form U-7 or model A of form 1-A. If the question or series of questions is inapplicable, so indicate. Each answer should be clearly and concisely stated in the space provided; however, notwithstanding the specificity of the questions, responses should not involve nominal, immaterial or insignificant information. If the provided space is insufficient, additional space should be created by adding more lines. No cover other than that provided in these forms may be used.

C. The disclosure document on form U-7 or model A of form 1-A constitutes the offering circular or prospectus and either of these forms, once filled out, filed and declared effective, may be reproduced by the company by copy machine or otherwise for dissemination to potential investors. Care should be taken to assure that whichever form is used, if reproduced, is accurate, readable, and complete. Small size type, script or italic style type should not be used.

D. There must be submitted to the director an opinion of an attorney licensed to practice in a state or territory of the United States that the securities to be sold in the offering have been duly authorized and, when issued upon payment of the offering price, will be legally and validly issued, fully paid and nonassessable and binding on the company in accordance with their terms.

[12.11.10.11 NMAC - Rp, 12 NMAC 11.4.6.4, 1-1-2010]

12.11.10.12 EXHIBITS: In addition to filing a properly completed form U-7, applicants for SCOR registration shall file, to the extent applicable, the following documents with the director:

A. form of selling agency agreement;

B. the issuer's articles of incorporation or other charter documents and all amendments thereto;

C. the issuer's bylaws, as amended to date;

D. copy of any resolutions by directors setting forth terms and provisions of capital stock to be issued;

E. any indenture, form of note or other contractual provision containing terms of notes or other debt, or of options, warrants, or rights to be offered;

F. specimen of security to be offered (including any legend restricting resale);

G. form U-2, uniform consent to service of process, accompanied by an appropriate form U-2A, uniform corporate resolution;

H. copy of all advertising or other materials directed to or to be furnished investors in the offering;

I. form of escrow agreement for escrow of proceeds;

J. consent to inclusion in disclosure document of accountant's report;

K. consent to inclusion in disclosure document of tax advisor's opinion or description of tax consequences;

L. consent to inclusion in disclosure document of any evaluation of litigation or administrative action by counsel;

M. form of any subscription agreement for the purchase of securities in this offering;

N. schedule of residential addresses of officers, directors, principal stockholders, and limited liability company and limited liability partnership members; and

O. work sheets showing computations of responses to questions 33, 36(a), 40(a), 41, 68(a) and 68(b) of form U-7.

[12.11.10.12 NMAC - Rp, 12 NMAC 11.4.6.5, 1-1-2010]

12.11.10.13 REGISTRATION FEE: An application for registration under this regulation shall be accompanied by a non-refundable fee as provided in Section 58-13C-305B. Checks shall be made payable to the New Mexico securities division.

[12.11.10.13 NMAC - Rp, 12 NMAC 11.4.6.6, 1-1-2010]

12.11.10.14 EFFECTIVENESS:

A. The company should expect that the director may have comments and questions concerning the answers set forth on form U-7 and that changes may be required to be made to the answers before the registration is declared effective. Comments and questions may either be included in a letter or made by telephone communication initiated by the director in response to the filing. Comments may include requests for disclosure of additional information or may also require that certain terms of the offering be modified to comply with the state's substantive fairness criteria. Failure to resolve outstanding comments may lead to denial of registration.

B. No offers or sales may be made in this state until the registration has been declared effective by the director. To make offers or sales before the registration is effective could lead to a stop order or other proceeding which would preclude use of SCOR in this or any other state and could give rise to a right of rescission by investors enforceable against management, principal stockholders and the selling agents, as well as the company. When the registration has been declared effective in this state, offers and sales may be made in this state even though registration in other states has not been declared effective. The registration statement will be effective only for the time period specified by the director, which may be different for different states; however, no registration statement shall remain effective for a period greater than one year unless an extension is granted by the director.

C. After the registration has been declared effective and while the offering is still in progress, if any portion of the form U-7 should need to be changed or revised because of a material event concerning the company or the offering to make it accurate and complete, it shall be so changed, revised, or supplemented. If changed, revised or supplemented (including an addition on the cover page of another state in which the offering has been registered) the form U-7 as so changed, revised or supplemented, clearly marked to show changes from the previously filed version, should be filed and cleared with the director before use. If any of the changes or revisions are of such significance that they are material to the making of an investment decision by an investor, the disclosure document on this form as so changed, revised or supplemented should be recirculated to persons in this state that have previously subscribed and who should be given the opportunity to rescind or reconfirm their investment.

D. Options, warrants and similar rights to purchase securities constitute a continuous offering of the underlying securities during the exercise period and require the securities to be registered and the disclosure document to be kept continuously current throughout the exercise period through the use of the amendment procedure set forth in Subsection C of this section or by means of a supplement, as appropriate. Upon any change, revision or supplement to the disclosure document, a copy must be promptly furnished to the holders of options, warrants and similar rights.

[12.11.10.14 NMAC - Rp, 12 NMAC 11.4.6.7, 1-1-2010]

12.11.10.15 DELIVERY OF DISCLOSURE DOCUMENT: The disclosure document and any supplements thereto must be delivered to each investor before the earliest of any of the following events: (a) any order is accepted; (b) any subscription agreement is signed; or (c) any

part of the purchase price is received. The foregoing information shall not be delivered to any investor prior to the effective date of the registration.
[12.11.10.15 NMAC - Rp, 12 NMAC 11.4.6.8, 1-1-2010]

12.11.10.16 REPORTING:

A. Within 30 days after the expiration date of the registration, the completion of the offering, or the termination of the offering, whichever occurs first, the issuer shall deliver to the director a report setting forth the application of proceeds, the total number of purchasers, the number of purchasers residing in this state, the total dollar amount sold, the dollar amount sold to residents of this state and any other information the director, in his discretion, may require. Annually thereafter, the issuer shall file reports with the director setting forth, in reasonable detail, the application of the offering proceeds until all proceeds are expended.

B. The director has discretion to require that additional information be provided and may specify the forms necessary to fulfill the reporting requirements of Subsection A of this section.
[12.11.10.16 NMAC - Rp, 12 NMAC 11.4.6.9, 1-1-2010]

12.11.10.17 OTHER REQUIREMENTS: The following standards apply to registration of SCOR equity securities:

A. 12.11.9.9 NMAC, Impoundment of Proceeds; if the proposed business of the company requires a minimum amount of proceeds to commence or continue the business in the manner proposed, the company shall establish an escrow provided that the escrow agent shall be a bank, savings and loan association, or other similar depository institution, or an independent escrow agent approved by the director in accordance with Subsection H of 58-13B-24;

B. 12.11.9.10 NMAC, Loans and Other Material Affiliated Transactions;

C. 12.11.9.11 NMAC, Options and Warrants;

D. 12.11.9.12 NMAC, Promoter's Equity Investment, provided that the amounts set forth therein may be reduced at the discretion of the director for good cause shown;

E. 12.11.9.13 NMAC, Promotional Shares;

F. 12.11.9.15 NMAC, Underwriting Expenses, Underwriter's Warrants, Selling Expenses and Selling Security Holders; and

G. 12.11.9.19 NMAC, Debt Securities.
[12.11.10.17 NMAC - Rp,, 12 NMAC 11.4.6.10, 1-1-2010]

12.11.10.18 FINANCIAL STATEMENTS: Financial statements shall be prepared in accordance with either U.S. or Canadian generally accepted accounting principles. If appropriate, a reconciliation note should be provided. If the company has not conducted significant operations, statements of receipts and disbursements shall be included in lieu of statements of income. Interim financial statements may be unaudited. All other financial statements shall be audited by independent certified public accountants; provided, however, that if each of the following four conditions are met, such financial statements, in lieu of being audited, may be reviewed by independent certified public accountants in accordance with the *accounting and review service standards* promulgated by the American institute of certified public accountants or the Canadian equivalent:

A. the company shall not have previously sold securities through an offering involving the general solicitation of prospective investors by means of advertising, mass mailings, public meetings, "cold call" telephone solicitation, or any other method directed toward the public;

B. the company has not been previously required under federal, state, provincial or territorial securities laws to provide audited financial statements in connection with any sale of its securities;

C. the aggregate amount of all previous sales of securities by the company (exclusive of debt financing with banks and similar commercial lenders) shall not exceed $1,000,000; and

D. **t**he amount of the present offering does not exceed $1,000,000.
[12.11.10.18 NMAC - Rp, 12 NMAC 11.4.6.11, 1-1-2010]

12.11.10.19 SELLING AGENTS:

A. The company may engage broker-dealers or issuer representatives to sell the securities. Commissions, fees, or other remuneration for soliciting any prospective purchaser in this state in connection with this offering may only be paid to persons who, if required to be registered, the company reasonably believes are appropriately registered in this state.

B. 12.11.2.16 NMAC provides an exemption from registration for persons representing a SCOR issuer who do not receive compensation for sales.
[12.11.10.19 NMAC - Rp, 12 NMAC 11.4.6.12, 1-1-2010]

12.11.10.20 ADVERTISING: All selling literature or advertisements announcing the offering shall be filed with the director prior to publication or circulation. An announcement containing no more than the following need not be filed with the director:

A. the name of the company;

B. characterization of the company as indicated on the cover page of the disclosure document;

C. address and telephone number of the company;

D. a brief indication in ten words or less of the company's business or proposed business;

E. the number and type of securities offered and the offering price per security;

F. the name, address, and telephone number of any selling agent authorized to sell the securities;

G. a statement that the announcement does not constitute an offer to sell or solicitation of an offer to purchase and that any such offer must be made by official disclosure document;

H. how a copy of the disclosure document may be obtained;

I. the company's logo; and

J. clip and return coupons, requesting a copy of the disclosure document, used in printed announcements.
[12.11.10.20 NMAC - Rp, 12 NMAC 11.4.6.13, 1-1-2010]

12.11.10.21 DISQUALIFICATION: SCOR shall not be available for the securities of any company if the company or any of its officers, directors, 10 percent stockholders or members, promoters or any selling agents of the securities to be offered, or any officer, director or partner of such selling agent:

A. has filed a registration statement which is the subject of a currently effective registration stop order entered pursuant to any federal or state securities law within five years prior to the filing of the application for registration hereunder;

B. has been convicted within five years prior to the filing of the application for registration hereunder of any felony or misdemeanor in connection with the offer, purchase, or sale of any security or any felony involving fraud or deceit, including, but not limited to, forgery, embezzlement, obtaining money under false pretenses, larceny, or conspiracy to defraud;

C. is currently subject to any federal or state administrative enforcement order or judgment entered within five years prior to the filing of the application for registration hereunder or is subject to any federal or state administrative enforcement order or judgment in which fraud or deceit, including, but not limited to, making untrue statements of material facts and omitting to state material facts, was found and the order or judgment was entered

within five years prior to the filing of the application for registration hereunder;

D. is subject to any federal or state enforcement order or judgment which prohibits, denies, or revokes the use of any exemption from registration in connection with the offer, purchase, or sale of securities;

E. is currently subject to any order, judgment or decree of any court of competent jurisdiction temporarily, preliminarily or permanently restraining or enjoining such party from engaging in or continuing to engage in any conduct or practice involving fraud or deceit in connection with the purchase or sale of any security or involving the making of any false filing with any state entered within five years prior to the filing of the application for registration hereunder;

F. the prohibitions of Subsections A, B, C and D of this section shall not apply if the person subject to the disqualification is duly licensed or registered to conduct securities related business in the jurisdiction in which the administrative order or judgment was entered against such person or if the broker-dealer employing such party is registered in this state and the form BD filed with this state discloses the order, conviction, judgment, or decree relating to such person; no person disqualified under this section may act in a capacity other than that for which the person is licensed or registered;

G. any disqualification caused by this section is automatically waived if the securities administrator or agency which created the basis for disqualification determines upon a showing of good cause that it is not necessary under the circumstances that registration be denied; or

H. if any of the circumstances in Subsections B, C or E of this section have occurred more than five years from the date of the application for registration hereunder, these circumstances must be described in response to question 118 of form U-7, Other Material Factor.

[12.11.10.21 NMAC - Rp, 12 NMAC 11.4.6.14, 1-1-2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT
SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 11 EXEMPT SECURITIES

12.11.11.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.

[12.11.11.1 NMAC - Rp, 12 NMAC 11.4.1.1, 1-1-2010]

12.11.11.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as a broker-dealer, an investment adviser or an issuer of securities, and their representatives and agents.

[12.11.11.2 NMAC - Rp, 12 NMAC 11.4.1.2, 1-1-2010]

12.11.11.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701 NMSA 1978, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".

[12.11.11.3 NMAC - Rp, 12 NMAC 11.4.1.3, 1-1-2010]

12.11.11.4 DURATION: Permanent.

[12.11.11.4 NMAC - Rp, 12 NMAC 11.4.1.4, 1-1-2010]

12.11.11.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.

[12.11.11.5 NMAC - Rp, 12 NMAC 11.4.1.5, 1-1-2010]

12.11.11.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.

[12.11.11.6 NMAC - Rp, 12 NMAC 11.4.1.6, 1-1-2010]

12.11.11.7 DEFINITIONS: [RESERVED]

12.11.11.8 NEW MEXICO MUNICIPAL AND INDUSTRIAL REVENUE BONDS NOT FEDERAL COVERED: Municipal securities exempt under Section 3(a)(2) of the Securities Act of 1933 are covered securities under Section 18(b)(4)(C) of that act, except offers and sales of such securities in states in which issuers of such municipal securities are located. New Mexico municipal and other industrial revenue bonds that are not covered securities may still qualify for the exemption from registration pursuant to Section 58-13C-201A of the New Mexico Uniform Securities Act and no filing notice or filling fee shall be due except that if the requirements of Section 58-13C-201A are not met, such securities shall be registered pursuant to Section 58-13C-301 of the New Mexico Uniform Securities Act.

[12.11.11.8 NMAC - Rp, 12 NMAC 11.4.7.1.3, 1-1-2010]

12.11.11.9 EXCHANGE LISTED EXEMPTION:

A. The following are additional securities markets designated by the director pursuant to Section 58-13C-201F:

(1) Chicago stock exchange (tier I only); and

(2) Pacific stock exchange (tiers I and II only).

B. The exemption provided by Section 58-13C-201F shall include any other security of the same issuer which is of senior or substantially equal rank; any security called for by subscription rights or warrants so listed or approved; or any warrant or right to purchase any of the foregoing.

[12.11.11.9 NMAC - Rp, 12 NMAC 11.4.7.1.4, 1-1-2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT
SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 12 EXEMPT TRANSACTIONS

12.11.12.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.

[12.11.12.1 NMAC - Rp, 12.11.12.1 NMAC, 1-1-2010]

12.11.12.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as a broker-dealer, an investment adviser or an issuer of securities, and their representatives and agents.

[12.11.12.2 NMAC - Rp, 12.11.12.2 NMAC, 1-1-2010]

12.11.12.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701 NMSA 1978, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".

[12.11.12.3 NMAC - Rp, 12.11.12.3 NMAC, 1-1-2010]

12.11.12.4 DURATION: Permanent.

[12.11.12.4 NMAC - Rp, 12.11.12.4 NMAC,

1-1-2010]

12.11.12.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.
[12.11.12.5 NMAC - Rp, 12.11.12.5 NMAC, 1-1-2010]

12.11.12.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.
[12.11.12.6 NMAC - Rp, 12.11.12.6 NMAC, 1-1-2010]

12.11.12.7 DEFINITIONS: [RESERVED]

12.11.12.8 SECTION 58-13C-202A - ISOLATED NON-ISSUER TRANSACTIONS:

A. An "isolated non-issuer transaction" pursuant to Section 58-13C-202A shall mean an offer or sale of a security that meets both of the following conditions:

(1) no 12-month period in which the date of the sale can be included contains more than three sales of the security in New Mexico by the seller or affiliates, and

(2) no person offers or sells the security by means of a general solicitation, except as permitted under Subsection C of this section.

B. For purposes of this section, a husband and wife shall be considered as one purchaser. A corporation, partnership, limited liability company, association, joint stock company, trust or unincorporated organization shall be considered as one purchaser unless the entity was organized for the purpose of acquiring the purchased securities**.** If the entity was organized for the purpose of acquiring the purchased securities, each beneficial owner of equity interest or equity securities in the entity shall be considered a separate purchaser.

C. For purposes of this section, if an offer or sale is conducted through an issuer-controlled trading system maintained in an electronic form or another form for the purpose of facilitating trades of that issuer's securities between nonissuers, the offer or sale shall not be considered to have been made by general solicitation.
[12.11.12.8 NMAC - Rp, 12.11.12.8 NMAC, 1-1-2010]

12.11.12.9 SECTION 58-13C-202B(4) - MANUAL OR ELECTRONICALLY AVAILABLE INFORMATION EXEMPTION:

A. For purposes of the registration exemption in Section 58-13C-202B, any Standard & Poor's, Mergent or Fitch securities manual that contains, in whatever format, the information specified in Section 58.202B4(a) to (d) is designated as a "nationally recognized securities manual" under Section 58-202B(4)(a) to (d).

B. All information provided pursuant to Section 58-202B4(a) to (d) must be current. The time for determining whether the entries are current is at the date of the particular sale, not the date the manual listings are published. If a manual listing is not continually updated, the exemption would not be available once the published balance sheet becomes more than 18 months old or the list of officers and directors is not reasonably current.
[12.11.12.9 NMAC - Rp, 12.11.12.10 NMAC, 1-1-2010]

12.11.12.10 SECTION 58-13C-202K - TRANSACTIONS IN SECURED DEBT INSTRUMENTS:

A. The exemption provided in Section 58-13C-202K is not available for any transaction in which the evidence of indebtedness, regardless of form, is offered or sold to more than one investor. Transactions fractionalizing, serializing, or forming partnerships, corporations, or other associations solely for the purpose of acquiring evidence of indebtedness will not qualify for the exemption.

B. For purposes of Subsection A of this section:

(1) a husband, wife and minor children of either spouse, or any two or more of them, residing in the same household shall count as one investor; and

(2) a limited partnership, limited liability company, trust, corporation or limited liability partnership shall count as one investor if it was not formed for the purpose of investing or trading in the securities of the issuer claiming this exemption and such entity has substantial other business or investments; an industrial revenue bond that is sold to an affiliate of the entity on whose behalf the bond was issued shall count as one investor provided that such affiliate is wholly owned, directly or indirectly, by the entity on whose behalf the bond was issued or its parent company.
[12.11.12.10 NMAC - Rp, 12.11.12.12 NMAC, 1-1-2010]

12.11.12.11 SECTION 58-13C-202X - SMALL OFFERINGS BY ISSUERS WITH LOCAL OPERATIONS:

A. Pursuant to Section 58-13C-202X, notification must be given on the securities division's form X and filed with the division ten business days prior to any offer of securities.

B. No commission, fee or other remuneration shall be paid or given, directly or indirectly, to any person for soliciting any prospective purchaser in this state unless such person is appropriately registered in this state.

C. No exemption shall be available under Section 58-13C-202X for the securities of any issuer if any of the persons described in the Securities Act of 1933, Regulation A, Rule 230.262 (a), (b) or (c):

(1) has filed a registration statement which is the subject of a currently effective registration stop order entered pursuant to any state's securities law within five years prior to the filing of the notice required under this exemption;

(2) has been convicted within five years prior to the filing of the notice required under this exemption of any felony or misdemeanor in connection with the offer, purchase or sale of any security or any felony involving fraud or deceit including but not limited to forgery, embezzlement, obtaining money under false pretenses, larceny or conspiracy to defraud;

(3) is currently subject to any administrative enforcement order or judgment entered by any state's securities administrator within five years prior to the filing of the notice required under this exemption or is subject to any state's administrative enforcement order or judgment, in which fraud or deceit including but not limited to making untrue statements of material facts and omitting to state material facts, was found and the order or judgment was entered within five years prior to the filing of the notice required under this exemption;

(4) is subject to any state's administrative enforcement order or judgment which prohibits, denies or revokes the use of any exemption from registration in connection with the offer, purchase or sale of securities; or

(5) is currently subject to any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminarily or permanently restraining or enjoining such party from engaging in or continuing to engage in any conduct or practice involving fraud or deceit in connection with the purchase or sale of any security or involving the making of any false filing with any state entered within five years prior to the filing of the notice required under this exemption.

D. The requirements set forth in Subsection C of this section may be waived by the director if the director determines upon a showing of good cause that it is not necessary under the circumstances that the exemption be denied.

E. At a minimum, the following information shall be disclosed to potential investors in offerings claiming the exemption provided in Section

58-13C-202X:

(1) a general description of the offering and the business activity to be engaged in including:

(a) the general nature of the securities being offered;

(b) the maximum aggregate amount of the offering;

(c) the subscription price;

(d) the period of the offering;

(e) the maximum amount of any sales or underwriting commission to be paid and the nature of any sharing arrangement and fees;

(f) the federal exemption under the Securities Act of 1933 on which the issue is being offered;

(g) the specific purposes for which the registrant intends to employ its funds in the event that the minimum capital is received; and

(h) the estimated amount to be paid during the first 12 months following commencement of operations for administrative and similar services;

(2) for corporate offerings, a statement of dilution;

(3) for partnership offerings, suitability requirements for investors;

(4) the business experience of the sponsors and affiliates, particularly with regard to the business of the offeror;

(5) all compensation, direct or indirect, which is to be paid to the sponsor, officers, directors or control persons;

(6) a statement of the purposes for which the net proceeds of the offering are intended to be used and the approximate amount and percentages intended to be used for each such purpose;

(7) for partnership offerings, a statement prominently set forth as to whether additional assessments are provided for and, if so, the method of assessment and the penalty for default;

(8) a description of the proposed business activity including, where applicable, prior business history;

(9) a full description of any transactions and the dollar amount thereof which may be entered into between the offeror and the sponsor or control persons or affiliates, including a full description of the material terms of any agreement and dollar amount thereof between the offeror and the sponsor or control persons or affiliates;

(10) where the sponsor originates or promotes other offerings, a full description of the equitable principles which will apply in resolving any conflict between the offerings;

(11) in the case where the offeror has been in existence, a full description of all transactions and contracts of the offeror with the sponsor or any affiliate during the period of such existence;

(12) all conflicts set forth in one section entitled "Conflict of Interest and Transactions with Affiliates";

(13) in the case of offerings of direct participation programs as defined in Paragraph 2310(a)(4) of the FINRA manual, an opinion of counsel complying with American bar association opinion 346 as to the material tax consequences; and

(14) a brief description of any pending legal proceedings which might materially affect the venture.

F. Notice to prospective investors of material changes in the condition of the issuer occurring after the effective date of offering or when new information is substituted for that contained in the prospectus shall be effected through an amendment. Such amendments will not become effective until the director so orders and a corrected offering document will be sent to present stockholders including stockholders who may already have sold their shares. Post-effective amendments to change the price of securities will not be permitted. Post-effective amendments to lower the minimum amount of the offering will not be permitted. Amendments to increase the minimum amount of the offering, however, will be permitted.

G. Unless extended by the director, an offering shall be completed no later than one year from the date of acknowledgment by the director of the claim of exemption.

H. No offering document is required for sales of securities by a professional corporation or association to persons duly licensed in the corporation's area of business.

[12.11.12.11 NMAC - Rp, 12.11.12.13 NMAC, 1-1-2010]

12.11.12.12 SECTION 58-13C-202Y - LIMITED OFFERING EXEMPTION: For exemptions provided in Section 58-13C-202Y, a notice filing on the securities division's form Y shall be completed by issuers that are not organized or incorporated in New Mexico to give notice of intent to claim the exemption afforded by Section 58-13C-202Y for offerings of issuers that result in there being no more than 25 security holders. Form 202Y is optional for issuers organized or incorporated in New Mexico. No fee is required for these exemptions.

[12.11.12.12 NMAC - Rp, 12.11.12.14 NMAC, 1-1-2010]

12.11.12.13 SECTION 58-13C-202O - EXISTING SECURITY HOLDERS EXEMPTION:

A. The exemption contained in Subsection O of Section 58-13C-202 shall only be available for the offer and sale of equity securities where an offer is made pro rata to all such security holders of record who are residents of this state.

B. As used in Subsection O of Section 58-13C-202:

(1) the term "security holder" shall not include persons who are holders of equity securities issued in violation of or without compliance with the New Mexico Uniform Securities Act and the rules and regulations adopted thereunder; and

(2) the term "standby commission" shall mean the commission payable to a broker-dealer registered under the New Mexico Uniform Securities Act for its firm commitment to purchase all securities offered to existing security holders which are not purchased by such security holders.

[12.11.12.13 NMAC - Rp, 12.11.12.15 NMAC, 1-1-2010]

12.11.12.14 SECTION 58-13C-202N - SALES TO TEN OR FEWER PURCHASERS:

A. Filings required. To claim the exemption provided by Section 58-13C-202N, a completed form 202N must be filed with the director no less than five business days before the first sale of securities in this state.

B. Counting purchasers and security holders. The following rules apply in counting the number of purchasers pursuant to Section 58-13C-202N(1) and the number of beneficial owners pursuant to Section 58-13C-202N(3)(b):

(1) a husband, wife and minor children of either spouse, or any two or more of them, residing in the same household shall count as one purchaser or beneficial owner; and

(2) a limited partnership, limited liability company, trust, corporation or limited liability partnership shall count as one purchaser or beneficial owner if it was not formed for the purpose of investing or trading in the securities of the issuer claiming this exemption and such entity has substantial other business or investments.

C. Reasonable belief of purchase for investment. An issuer will be presumed to have a reasonable belief that all of the purchasers of its securities in this state are purchasing for investment pursuant to Section 58-13C-202N(3)(a) if:

(1) the issuer, prior to a sale of its securities to a purchaser, obtains from that purchaser a signed statement that the purchaser is acquiring the securities for its own account and does not intend to resell the securities within twelve months of the purchase date;

(2) the issuer maintains a record of all statements obtained pursuant to Paragraph (1) of this subsection;

(3) written disclosure is provided to each purchaser prior to sale that the securities have not been registered under the New Mexico Uniform Securities Act and

cannot be resold unless the securities are so registered or can qualify for an exemption from registration; and

(4) a legend is placed on the certificate or other document that evidences the security stating that the securities have not been registered under the New Mexico Uniform Securities Act and cannot be resold unless the securities are so registered or can qualify for an exemption from registration.

D. Reasonable belief of fifty or fewer beneficial owners. An issuer will be presumed to have a reasonable belief that its securities are held by fifty or fewer beneficial owners pursuant to Section 58-13C-202N(3)(b) if:

(1) the issuer or the issuer's transfer agent maintains an adequate record of security holders and requires security holders to notify the issuer or the issuer's transfer agent of its intent to sell or otherwise dispose of securities of the issuer; and

(2) a legend is placed on the certificate or other document that evidences the security stating that the securities have not been registered under the New Mexico Uniform Securities Act and cannot be resold unless the securities are so registered or can qualify for an exemption from registration.

[12.11.12.13 NMAC - Rp, 12.11.12.16 NMAC, 1-1-2010]

12.11.12.15 SECTION 58-13C-202U - EMPLOYEE BENEFIT PLANS:

A. For purposes of the exemption provided in Section 58-13C-202U, employee benefit plans that require advance cash contributions from employees may be denied the benefit of this exemption where employee money is used to purchase securities of the employer or its affiliates unless:

(1) the formula price at which employees may purchase shares is calculated at least annually and is not less than 85 percent of the fair market value of the stock at the beginning of the one-year purchase period or the end of the purchase period, whichever is lower, and shares purchased are fully paid for at the end of each period, stock certificates are issued and no fractional shares are issued;

(2) the issuer delivers to all participating employees copies of the issuer's annual financial statements;

(3) a participating employee has the right to withdraw from the plan at any time without penalty;

(4) if there is no adequate public market for the issuer's shares, the issuer offers to repurchase the shares at a price determined by the same formula pursuant to which the shares were purchased by the employee under the issuer's plan, upon the happening of either of the following events:

(a) the employee ceases to be employed by the issuer (or a subsidiary) and a written request for repurchase is received by the issuer within 180 days after termination of employment; or

(b) the employee experiences severe financial hardship due to illness or death in the immediate family, major uninsured casualty loss or other unforeseen events, and delivers to the issuer a written irrevocable election to have the issuer repurchase the shares, including a statement in reasonable detail as to the nature of the employee's financial hardship, and within 20 days the issuer's board of directors does not determine that no severe financial hardship exists;

(5) all funds contributed to the plan for the purchase of shares are protected from claims of creditors of the issuer;

(6) any withholding from an employee's compensation is limited to not more than ten percent of the compensation each pay period;

(7) all shares issued under the plan have voting, dividend and liquidation rights; and

(8) if the securities to be purchased under the plan are not registered under the Securities Act of 1933, the issuer has a satisfactory opinion of counsel as to its exempt status under that act.

B. The following transactions are exempted pursuant to Section 58-13C-203: offers or sales of a security by an issuer pursuant to a written compensatory benefit plan including, without limitation, a purchase, savings, option, bonus, stock appreciation, profit-sharing, thrift, incentive, pension or similar plan, and interests in any such plan, provided that the offers and sales qualify for use of the registration exemption in Rule 230.701 under Section 28 of the Securities Act of 1933.

[12.11.12.15 NMAC - Rp, 12.11.11.9 NMAC, 1-1-2010]

12.11.12.16 SECTION 58-13C-202CC - TRANSACTIONS INVOLVING INTERESTS IN OIL, GAS AND MINING RIGHTS:

A. Sponsors and persons selling programs and claiming therefor the exemption provided in Section 58-13C-202CC shall make every reasonable effort to assure that the investment is suitable for the persons being offered or sold interests, taking into consideration each person's financial situation, investment objectives and business acumen.

B. For purposes of determining suitability, sponsors and persons offering or selling the investment shall ensure that the investors meet one of the following financial criteria:

(1) a minimum net worth of $100,000 (exclusive of home, furnishings and automobiles); or

(2) a minimum net worth of $50,000 (exclusive of home, furnishings and automobiles) and an annual income of $50,000.

C. An offer or sale claiming the exemption provided in Section 58-13C-202CC must require a total minimum investment of $5,000 and a minimum initial investment of $2,500.

D. At a minimum, the following information shall be disclosed to potential investors in programs claiming the exemption provided in Section 58-13C-202CC:

(1) a general description of the program and the business activity to be engaged in including: the general nature of the units being offered; the maximum aggregate amount of the offering; subscription price; the period of the offering; the maximum amount of any sales or underwriting commissions to be paid or the nature of any sharing arrangement and fees; and, the estimated amount to be paid during the first 12 months following commencement of operations for administrative and similar services;

(2) a carefully organized series of concise paragraphs, under subcaptions where appropriate, describing the risk factors to be considered before making an investment in the program;

(3) suitability requirements for investors;

(4) the business experience of the sponsors and affiliates, particularly with regard to the oil, gas or mining business;

(5) all compensation, direct or indirect, which is to be paid to the sponsor;

(6) a statement of the purposes for which the net proceeds to the program are intended to be used and the approximate amount and percentages intended to be used for each such purpose;

(7) a statement prominently set forth as to whether additional assessments are provided for and, if so, the method of assessment and the penalty for default;

(8) a statement describing the location and general character of all materially important oil, gas or mining interests now held or presently intended to be acquired by the program;

(9) a full description of any transactions and the dollar amount thereof which may be entered into between the program and sponsor or any affiliate, including a full description of the material terms of any agreement and the dollar amount thereof between the program and the sponsor or any affiliate; where the sponsor originates or promotes other programs, describe the equitable principles which will apply in resolving any conflict among the programs; in the case where the program has been in existence, include all transactions and contracts of the program with the

sponsor or any affiliate during the period of such existence; all conflicts shall be set forth in one section and shall be entitled "Conflicts of Interest and Transactions with Affiliates"; and

(10) a brief description of any pending legal proceedings which may materially affect the venture.

E. For the purposes of Section 58-13C-202CC, "principally operating in New Mexico" includes a limited liability company organized under the laws of this state or a limited liability company in which a majority in interest of the members are residents of this state.

[12.11.12.16 NMAC - Rp, 12.11.11.17 NMAC, 1-1-2010]

12.11.12.17 SECTION 58-13C-203 - TRANSACTIONS INVOLVING SECURITIES OF AN INVESTMENT CLUB: By authority delegated to the director in Section 58-13C-203 to promulgate rules, the issuance of securities by an investment club shall be exempt from Section 58-13C-301 provided that:

A. the membership is limited to not more than 75 members and provided that a husband and wife may be counted as one member;

B. periodic contributions are equal;

C. if a licensed or registered broker-dealer or investment adviser or employee of such broker-dealer or investment adviser is an organizer or member, such relationship is fully disclosed to the director;

D. the management of the funds of the club is not in the hands of a licensed or registered broker-dealer or investment adviser or employee of such broker-dealer or investment adviser;

E. securities in which the club invests are not bought on margin nor is any money borrowed or assets pledged;

F. unanimous consent of the members is required for any major investment policy change;

G. no member receives any fee or remuneration for services in the operation of the club except for administrative services; the members of the board of directors may be given token remuneration for their services on the board provided that such remuneration has been approved by majority vote of the membership;

H. the books of the club shall be open for inspection by members at any reasonable time;

I. memberships in the club are nontransferable;

J. the articles of incorporation or other organizational documents provide that club members may withdraw from the club and that, upon such withdrawal, the club will pay a pro rata share of the club's net asset value to such member; memberships that have been forfeited, repurchased by or otherwise returned to the club shall not be subject to resale;

K. the monthly payment by each member is not in excess of $50.00 dollars per month; and

L. the initial payment for entry into the club does not exceed $250.00 per membership.

[12.11.12.17 NMAC - Rp, 12.11.11.18 NMAC, 1-1-2010]

12.11.12.18 SECTION 58-13C-203 - WORLD-CLASS SECURITIES EXEMPTION:

A. In addition to the transactions exempt from registration pursuant to Section 58-13C-202W, pursuant to the authority delegated to the director by Section 58-13C-202W and Section 58-13C-203 of the New Mexico Uniform Securities Act, transactions meeting the following criteria are exempted from Sections 58-13C-301 and 58-13C-504:

(1) any transaction by a licensed or registered broker-dealer in a security (or an American depositary receipt representing such a security) of an issuer domiciled in a foreign country with which the United States currently maintains diplomatic relations, of a class that has been outstanding in the hands of the public for not less than 180 days, if at the time of the transaction, either Moody's investor service, *Moody's international manual* or Standard & Poor's corporation records, or any other securities manual designated by rule or order of the director, contains a description of the issuer's business or operations, the names of the issuer's officers and directors or their corporate equivalents in the issuer's country of domicile, an audited balance sheet of the issuer as of a date within 18 months and audited profit and loss statements for each of the issuer's two fiscal years immediately preceding that date and all of the following criteria are met:

(a) the security is traded on or through the facilities of one of the following foreign securities exchanges or foreign securities markets, which are hereby designated by the director pursuant to Section 58-13C-202W: Helsinki, Mexico, Oslo, Alberta, Istanbul, Eurobond Market, Amsterdam, Australia, Brussels, Frankfurt, Hong Kong, London Stock Exchange, Johannesburg, Luxembourg, Milan, Montreal, Paris, Stockholm, Tokyo, Zurich, or such other foreign securities exchange or foreign securities market designated by the director by rule or order;

(b) the issuer of the security, including any predecessor(s), has been in continuous operation for at least five years and is a going concern actually engaged in business and neither in the organizational stage nor in bankruptcy or receivership;

(c) the issuer has net tangible assets as reflected in the manual of at least $100,000,000; and

(d) the issuer had an average annual income after taxes, as reflected in the manual, of at least $10,000,000 cumulative for the most recent two years of operation with a minimum annual income after taxes of $2,000,000 for either of the two years;

(2) the exemption provided in Paragraph (1) of Subsection A of this section shall not be available for any security unless:

(a) the security is sold at a price reasonably related to the current market price of such security at the time of the transaction; and

(b) the security does not constitute the whole or part of an unsold allotment to, or subscription or participation by, the broker-dealer as an underwriter of such security.

B. The director may by rule or order deny, suspend or revoke this exemption with respect to any specific transaction, security or broker-dealer upon a finding that such action is necessary for the protection of the public.

C. The director may by rule or order exempt any security of an issuer domiciled in a foreign country upon a finding that such an exemption is in the public interest.

[12.11.12.18 NMAC - Rp, 12.11.11.19 NMAC, 1-1-2010]

12.11.12.19 SECTION 58-13C-203 - ACCREDITED INVESTOR EXEMPTION: By authority delegated to the director in Section 58-13C-203, any offer or sale of a security by an issuer in a transaction that meets the requirements of this section is exempt from the registration requirements of Section 58-13C-301.

A. Sales of securities shall be made only to persons who are, or the issuer reasonably believes are, accredited investors. "Accredited investor" is defined in Rule 501, Regulation D, of the Securities Act of 1933.

B. The exemption is not available to an issuer that is in the developmental stage that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person.

C. The issuer reasonably believes that all purchasers are purchasing for investment and not with the view to or for sale in connection with a distribution of the security. Any resale of a security sold in reliance on this exemption within 12 months of sale shall be presumed to be with a view to distribution and not for investment, except

a resale pursuant to a registration statement effective under Sections 58-13C-303 and 58-13C-304 or to an accredited investor pursuant to an exemption available under the New Mexico Uniform Securities Act.

D. The exemption is not available to an issuer if the issuer, any of the issuer's predecessors, any affiliated issuer, any of the issuer's directors, officers, general partners, beneficial owners of ten percent or more of any class of its equity securities, and of the issuer's promoters presently connected with the issuer in any capacity, any underwriter of the securities to be offered, or any partner, director or officer of such underwriter:

(1) within the last five years, has filed a registration statement which is the subject of a currently effective registration stop order entered by any state securities administrator or the SEC;

(2) within the last five years, has been convicted of any criminal offense in connection with the offering, purchase or sale of any security involving fraud or deceit;

(3) is currently subject to any state or federal administrative enforcement order or judgment entered within the last five years, finding fraud or deceit in connection with the purchase or sale of any security; or

(4) is currently subject to any order, judgment or decree of any court of competent jurisdiction temporarily, preliminarily or permanently restraining or enjoining such party from engaging in or continuing to engage in any conduct or practice involving fraud or deceit in connection with the purchase or sale of any security or involving the making of any false filing with any state entered within five years prior to the filing of the notice required under this exemption.

E. Paragraph (1) of Subsection D of this section shall not apply if:

(1) the party subject to the disqualification is licensed or registered to conduct securities-related business in the state in which the order, judgment or decree creating the disqualification was entered against such party;

(2) before the first offer under this exemption, the state securities administrator, or the court or regulatory authority that entered the order, judgment or decree, waives the disqualification; or

(3) the issuer establishes that it did not know and, in the exercise of reasonable care based on a factual inquiry, could not have known that a disqualification existed under Paragraph (1) of Subsection D of this section.

F. A general announcement of the proposed offering may be made by any means, but shall include only the following information, unless additional information is specifically permitted by the director:

(1) the name, address and telephone number of the issuer of the securities;

(2) the name, a brief description and price (if known) of any security to be issued;

(3) a brief description of the business of the issuer in 25 words or less;

(4) the type, number and aggregate amount of securities being offered;

(5) the name, address and telephone number of the person to contact for additional information; and

(6) a statement that:

(a) sales will only be made to accredited investors;

(b) no money or other consideration is being solicited or will be accepted by way of this general announcement; and

(c) the securities have not been registered with or approved by any state securities agency or the SEC and are being offered and sold pursuant to an exemption from registration.

G. The issuer, in connection with an offer, may provide information in addition to the general announcement under Paragraph (6) of Subsection F of this section if such information:

(1) is delivered through an electronic database that is restricted to persons who have been prequalified as accredited investors; or

(2) is delivered after the issuer reasonably believes that the prospective purchaser is an accredited investor.

H. No telephone solicitation shall be permitted unless, prior to placing the call, the issuer reasonably believes that the prospective purchaser to be solicited is an accredited investor.

I. Dissemination of the general announcement of the proposed offering to persons who are not accredited investors shall not disqualify the issuer from claiming the exemption under this rule.

J. The issuer shall file with the division a New Mexico uniform notice of transaction; form U-2, uniform consent to service of process; a copy of the general announcement; and, a fee of $350.00 within 15 days after the first sale in this state.

[12.11.12.19 NMAC - Rp, 12.11.11.20 NMAC, 1-1-2010]

12.11.12.20 USE OF ADVERTISEMENT OR PUBLIC SOLICITATION: No claim of exemption may be made under Subsections A, N, Z, Y or CC of Section 58-13C-202 for any transaction in which use is made of advertisement or public solicitation.

[12.11.12.20 NMAC - Rp, 12.11.11.21 NMAC, 1-1-2010]

12.11.12.21 CONFIRMATION OF FILING: Any person filing a claim of exemption may receive confirmation that the claim has been received by the securities division by sending a copy of the claim or letter and a stamped, self-addressed envelope with the original notice or letter to the division. Any person not following the foregoing procedures will not receive a confirmation of receipt of the claim by the division. Confirmation of receipt of the claim by the division does not constitute a determination on the availability or appropriateness of the exemption.

[12.11.12.21 NMAC - Rp, 12.11.11.22 NMAC, 1-1-2010]

12.11.12.22 SECTION 58-13C-203 - OFFERS OF SECURITIES ON THE INTERNET:

A. Pursuant to Section 58-13C-203, offers made by, or on behalf of, issuers on or through the internet shall be exempt from Sections 58-13C-301 and 58-13C-504 if the following conditions are met:

(1) the internet offer indicates, directly or indirectly, that the securities are not being offered to residents of this state;

(2) the internet offer is not specifically directed to any person in this state by, or on behalf of, the issuer of the securities; and

(3) no sales of the issuer's securities are made in this state until such time as the securities being offered have been registered or an exemption perfected under the applicable provisions of the New Mexico Uniform Securities Act and, to the extent required, a final prospectus or form U-7 is delivered to New Mexico investors prior to such sales.

B. Nothing in this section shall preclude an issuer or a person acting on behalf of an issuer which offers securities on the internet or effects sales to New Mexico residents following such an offering from relying upon any other applicable exemption pursuant to the provisions of the New Mexico Uniform Securities Act, nor shall this section otherwise relieve such persons from liability under the New Mexico Uniform Securities Act.

[12.11.12.22 NMAC - Rp, 12.11.11.23 NMAC, 1-1-2010]

12.11.12.23 SECTION 58-13C-203 - OFFERS AND SALES OF SECURITIES BY EXEMPT CANADIAN BROKER-DEALERS AND AGENTS: Any offer or sale of a security effected by a Canadian broker-dealer or agent of such broker-dealer exempted from registration pursuant to 12.11.2.17 NMAC is exempted from the securities registration requirements of Section 58-13C-301 and the filing requirements of Section 58-13C-504 provided that such offer or sale meets the requirements in Subsection D of 12.11.2.17 NMAC.

[12.11.12.23 NMAC - Rp, 12.11.12.24 NMAC, 1-1-2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT
SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 13 UNIFORM LIMITED OFFERING EXEMPTION

12.11.13.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.
[12.11.13.1 NMAC - 12 NMAC 11.4.1.1, 1-1-2010]

12.11.13.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as a broker-dealer, an investment adviser or an issuer of securities, and their representatives or agents.
[12.11.13.2 NMAC - 12 NMAC 11.4.1.2, 1-1-2010]

12.11.13.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to -701 NMSA 1978, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".
[12.11.13.3 NMAC - 12 NMAC 11.4.1.3, 1-1-2010]

12.11.13.4 DURATION: Permanent.
[12.11.13.4 NMAC - 12 NMAC 11.4.1.4, 1-1-2010]

12.11.13.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.
[12.11.13.5 NMAC - 12 NMAC 11.4.1.5, 1-1-2010]

12.11.13.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.
[12.11.13.6 NMAC - 12 NMAC 11.4.1.6, 1-1-2010]

12.11.13.7 DEFINITIONS: [RESERVED]

12.11.13.8 UNIFORM LIMITED OFFERING EXEMPTION: By authority delegated to the director in Section 58-13C-203, any offer or sale of securities is exempt from the registration provisions of the New Mexico Uniform Securities Act if such securities are offered or sold in compliance with the Securities Act of 1933, Regulation D. Rules 230.501 to 230.503, 230.505, 230.507 and 230.508 and the conditions and limitations set forth in this section.

A. No commission, fee or other remuneration shall be paid or given, directly or indirectly, to any person for soliciting any prospective purchaser in this state unless such person is appropriately registered in this state.

B. No exemption under this rule shall be available for the securities of any issuer if any of the parties described in the Securities Act of 1933, Regulation A, Rule 230.262, sections (a), (b), or (c):

(1) has filed a registration statement which is the subject of a currently effective registration stop order entered pursuant to any state's securities law within five years prior to the filing of the notice required under this exemption;

(2) has been convicted within five years prior to the filing of the notice required under this exemption of any felony or misdemeanor in connection with the offer, purchase or sale of any security or any felony involving fraud or deceit, including but not limited to, forgery, embezzlement, obtaining money under false pretenses, larceny or conspiracy to defraud;

(3) is currently subject to any administrative enforcement order or judgment entered by that state's securities administrator within five years prior to the filing of the notice required under this exemption or is subject to any state's administrative enforcement order or judgment in which fraud or deceit including, but not limited to, making untrue statements of material facts and omitting to state material facts was found and the order or judgment was entered within five years prior to the filing of the notice required under this exemption;

(4) is subject to any state's administrative enforcement order or judgment which prohibits, denies or revokes the use of any exemption from registration in connection with the offer, purchase or sale of securities; or

(5) is currently subject to any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminarily or permanently restraining or enjoining such party from engaging in or continuing to engage in any conduct or practice involving fraud or deceit in connection with the purchase or sale of any security or involving the making of any false filing with any state entered within five years prior to the filing of the notice required under this exemption.

C. The prohibitions of Paragraphs (1) to (3) and (5) of Subsection B of this section shall not apply if the person subject to the disqualification is duly licensed or registered to conduct securities related business in the state in which the administrative order or judgment was entered against such person or if such person is registered in this state and the form BD or form U-4 filed with this state discloses the order, conviction, judgment or decree relating to such person. No person disqualified under this subsection may act in a capacity other than that for which the person is licensed or registered.

D. Any disqualification caused by Subsection B of this section is automatically waived if the state securities administrator or agency of the state which created the basis for disqualification determines upon a showing of good cause that it is not necessary under the circumstances that the exemption be denied.
[12.11.13.8 NMAC - Rp, 12 NMAC 11.4.7.2.11.1, 1-1-2010]

12.11.13.9 NOTICE:

A. The issuer shall file with the director a notice on form D (17 C.F.R. 239.500):

(1) five days prior to making any offer in this state and at such other times and in the form required under Regulation D, Rule 230.503 of the Securities Act of 1933 to be filed with the SEC;

(2) including with or in the notice a consent to service of process, unless otherwise available; and

(3) a filing fee of $350.00.

B. The notice shall contain the information furnished by the issuer to offerees. In the case of offerings of direct participation programs as defined in Paragraph 2310(a)(4) of the FINRA manual, delivery of a disclosure document containing the information required by Rule 502(b)(2) of Regulation D to individuals covered by Subsections (5), (6), and (7) of Rule 501(a) of Regulation D is required.
[12.11.13.9 NMAC - Rp, 12 NMAC 11.4.7.2.11.2, 1-1-2010]

12.11.13.10 SUITABILITY: The exemption provided for in this section is available for sales to non-accredited investors in this state provided that the issuer, and any person acting on the issuer's behalf, after having made reasonable inquiry, reasonably believes that one of the following conditions is satisfied:

A. the investment is suitable for the purchaser upon the basis of the facts, if any, disclosed by the purchaser as to his other security holdings and as to his financial situation and needs; for the purpose of this condition only, it may be presumed that, if the investment does not exceed ten

percent of the investor's net worth, it is suitable; or

B. the purchaser either alone or with the purchaser's representative(s) has such knowledge and experience in financial and business matters that the purchaser is capable of evaluating the merits and risks of the prospective investment.

[12.11.13.10 NMAC - Rp, 12 NMAC 11.4.7.2.11.3, 1-1-2010]

12.11.13.11 ADEQUATE DISCLOSURE: Nothing in this exemption is intended to or should be construed as in any way relieving issuers or persons acting on behalf of issuers from providing disclosure to prospective investors adequate to satisfy Section 58-13C-501 of the New Mexico Uniform Securities Act.

[12.11.13.11 NMAC - Rp,12 NMAC 11.4.7.2.11.4.1, 1-1-2010]

12.11.13.12 EXEMPTION NOT AVAILABLE: In view of the objective of this rule and the purposes and policies underlying the New Mexico Uniform Securities Act, the exemption is not available to any issuer with respect to any transaction which, although in technical compliance with this rule, is part of a plan or scheme to evade registration or the conditions or limitations explicitly stated in this rule.

[12.11.13.12 NMAC - Rp, 12 NMAC 11.4.7.2.11.4.2, 1-1-2010]

12.11.13.13 KNOW-YOUR-CUSTOMER STANDARDS: Nothing in this rule is intended to relieve registered broker-dealers or agents from the due diligence, suitability, or know-your-customer standards or any other requirements of law otherwise applicable to such registered persons.

[12.11.13.13 NMAC - Rp, 12 NMAC 11.4.7.2.11.4.3, 1-1-2010]

12.11.13.14 EXEMPTION AVAILABLE ONLY TO ISSUERS: The exemption provided by 12.11.13 NMAC is available only to the issuer of the securities and not to any affiliate of that issuer or to any other person from resales of the issuer's securities. 12.11.13 NMAC provides an exemption only for the transactions in which the securities are offered or sold by the issuer, not for the securities themselves.

[12.11.13.14 NMAC - Rp, 12 NMAC 11.4.7.2.11.4.4, 1-1-2010]

12.11.13.15 AVAILABILITY OF OTHER EXEMPTIONS: Transactions that are exempt under this rule may not be combined with offers and sales exempt under any other rule or section of the New Mexico Uniform Securities Act. However, nothing in this limitation shall act as an election. Should for any reason, the offer and sale fail to comply with all of the conditions for this exemption, the issuer may claim the availability of any other applicable exemption.

[12.11.13.15 NMAC - Rp, 12 NMAC 11.4.7.2.11.4.5, 1-1-2010]

12.11.13.16 DIRECTOR'S DISCRETION: The director may, by rule or order, increase the number of purchasers or waive any other conditions of this exemption.

[12.11.13.16 NMAC - Rp, 12 NMAC 11.4.7.2.11.4.6, 1-1-2010]

12.11.13.17 CITATION: The exemption authorized by 12.11.13 NMAC shall be known and may be cited as the "Uniform Limited Offering Exemption".

[12.11.13.17 NMAC - Rp, 12 NMAC 11.4.7.2.11.4.7, 1-1-2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT

SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 14 NOTICE FILINGS FOR OFFERINGS OF COVERED SECURITIES

12.11.14.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.

[12.11.14.1 NMAC - N, 1-1-2010]

12.11.14.2 SCOPE: All persons, whether natural or legal entities, that transact business in the state of New Mexico as a broker-dealer, an investment adviser, or an issuer of securities, and their representatives and agents.

[12.11.14.2 NMAC - N, 1-1-2010]

12.11.14.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701 NMSA 1978, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".

[12.11.14.3 NMAC - N, 1-1-2010]

12.11.14.4 DURATION: Permanent.

[12.11.14.4 NMAC - N, 1-1-2010]

12.11.14.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.

[12.11.14.6 NMAC - N, 1-1-2010]

12.11.14.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.

[12.11.14.6 NMAC - N, 1-1-2010]

12.11.14.7 DEFINITIONS: [RESERVED]

12.11.14.8 NOTICE FILINGS FOR OFFERINGS OF INVESTMENT COMPANY SECURITIES:

A. Forms and fees. Uniform investment company notice filing (form NF), accompanied by uniform consent to service of process (form U-2) for initial filings, shall be used to notify the securities division of the intent to sell securities as required by Section 58-13C-302A(1). The issuer or person filing a notice filing on behalf of the issuer shall pay a filing fee of $525 as authorized under Section 58-13C-302A(1). A separate form NF, accompanied by appropriate fee, shall be filed for each portfolio or class of securities and shall be deemed to cover an indefinite amount of securities.

B. Federal registration documents need not be filed. No document which is part of a federal registration statement filed with the securities and exchange commission or part of an amendment to such federal registration statement need be filed to complete a notice filings either prior to the initial offer or after the initial offer in this state unless requested by the director. The division will not require filing of annual or periodic reports of the value of investment company securities sold or offered in this state, unless the fund or trust is specifically requested to submit such reports.

C. Term of notice filing. Notice filings will be made effective upon receipt by the director of the filing and payment of fees and will expire one year from such date. The term of the notice filing will not be based on the SEC effectiveness date.

D. Permits. The director will acknowledge the effectiveness of the initial notice filing by returning a date stamped copy of form NF or through electronic process. The director will assign a new file number to each portfolio or class of securities. A notice filing will not be considered as filed unless form NF has been properly completed and is accompanied by a filing fee as discussed in Subsection A of this section.

E. Completion of form NF. Item 4 of form NF must identify, on the separate lines provided, the name of the fund

or trust. Do not repeat the name of the trust or fund on the space provided for portfolio name; do not repeat the name of the trust, fund, or portfolio in the space provided for class(es).

F. Renewals. A notice filing may be renewed by filing two copies of form NF, or electronically, with the director no earlier than 90 days prior to or less than 14 business days prior to the expiration date of the notice currently in effect. The notice must be accompanied by applicable filing fee in accordance with Section 58-13C-302B. The division may suspend fund or trust sales for failure to pay fees and may assess penalties or impose other available remedies for late or underpaid fees. The renewal will be effective for one year from the date of the expiration of the previous notice filing. A person who has filed a form U-2 in connection with a previous registration or notice filing need not file another.

G. Amendments. Amendments to notice filings may be made by filing form NF marked "amendment" in the appropriate box. The change should be explained under item 3, "other". Amendments to the name of the fund, trust, portfolio, or class must include the former name under item 3 of form NF in the line reserved for that purpose and must be accompanied by a fee of $50. A change in the name of the trust or fund must be accompanied by an amended form U-2. Withdrawal or termination of a notice filing may be made by filing form NF or providing the director with other notice of the withdrawal or termination and shall be effective upon receipt by the director of such notice.

H. Other amendments. Amendments to the name and address of the contact person (item 6) must be submitted on an amended form NF.

[12.11.14.8 NMAC - Rp, 12 NMAC 11.4.11.1, 1-1-2010]

12.11.14.9 NOTICE FILING PROCEDURES FOR RULE 506 OFFERINGS: Pursuant to Section 58-13C-302C, an issuer offering a security that is a covered security under Section 18(b)(4)(D) of the Securities Act of 1933 shall file with the director no later than 15 days after the first sale of such federal covered security in this state the following: a notice on SEC form D; form U-2, consent to service of process; and a fee of $350. For purposes of this rule, the securities and exchange commission "form D" is defined as the document, as adopted by the securities and exchange commission and in effect on September 1, 1996, as may be amended by the securities and exchange commission from time to time, entitled "form D: notice of sale of securities pursuant to Regulation D, Section 4(6), and/or uniform limited offering exemption," including part E and the appendix. A notice filing shall be considered filed with the New Mexico securities division as of the date on which it is received by the New Mexico securities division.

[12.11.14.9 NMAC - Rp, 12 NMAC 11.4.11.2, 1-1-2010]

12.11.14.10 INDUSTRIAL REVENUE BONDS: Municipal securities which are covered securities pursuant to Section 18(b)(4)(C) of the Securities Act of 1933 shall file a notice prior to any offer or sale of such security in this state on form U-1, uniform application to register securities, unless the securities meet the requirements of the exemption pursuant to Section 58-13C-201A. The form U-1 shall be stamped "notice filing" and shall be accompanied by the appropriate fee calculated pursuant to Section 58-13C-305B, which shall be based on the amount estimated to be sold in this state.

[12.11.14.10 NMAC - Rp, 12 NMAC 11.4.11.3, 1-1-2010]

12.11.14.11 NON-ISSUER TRANSACTIONS BY BROKER DEALERS IN VOLUNTARY REGISTERED COMPANIES SECURITIES: A security will not be considered to be a federal covered security pursuant to Section 18(b)(4)(A) of the Securities Act of 1933, unless the issuer is current in its reporting pursuant to Section 13 and 15(d) of the Securities Exchange Act of 1934.

[12.11.14.11 NMAC - Rp, 12 NMAC 11.4.11.5, 1-1-2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT

SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 15 FRAUDULENT PRACTICES

12.11.15.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.

[12.11.15.1 NMAC - Rp, 12 NMAC 11.5.1.1, 1-1-2010]

12.11.15.2 SCOPE: All persons that transact business in New Mexico as a broker-dealer, an investment adviser or an issuer of securities, and their agents and representatives.

12.11.15.2 NMAC - Rp, 12 NMAC 11.15.1.2, 1-1-2010]

12.11.15.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701 NMSA 1978, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".

[12.11.15.3 NMAC - Rp, 12 NMAC 11.15.1.3, 1-1-2010]

12.11.15.4 DURATION: Permanent.

[12.11.15.4 NMAC - Rp, 12 NMAC 11.15.1.4, 1-1-2010]

12.11.15.5 EFFECTIVE DATE: January 1, 2010, unless a later dated is cited at the end of a section.

[12.11.15.5 NMAC - Rp, 12 NMAC 11.15.5, 1-1-2010]

12.11.15.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.

[12.11.15.6 NMAC - Rp, 12 NMAC 11.15.1.6, 1-1-2010]

12.11.15.7 DEFINITIONS: [RESERVED]

12.11.15.8 APPLICATION OF PROCEEDS: An issuer of securities or any person who is an officer, director or controlling person of the issuer is deemed to employ a "device, scheme or artifice to defraud" the purchasers of the securities within the meaning of Section 58-13C-501A of the New Mexico Uniform Securities Act if the person applies, authorizes or causes to be applied any material part of the proceeds from the sale of the securities in any material way contrary to the purposes specified in the prospectus used in the offering of the securities and not reasonably related to the business of the issuer as described in the prospectus.

[12.11.15.8 NMAC - Rp, 12 NMAC 11.15.2, 1-1-2010]

12.11.15.9 STOCK DISTRIBUTION: A person authorizing or causing the distribution of securities as a stock dividend by a corporation other than the issuer, without registration of the securities under the New Mexico Uniform Securities Act or the federal Securities Act of 1933, is deemed to employ a "device, scheme or artifice to defraud" the purchasers of the securities in broker-dealer transactions, within the meaning of Section 58-13C-501A of the New Mexico Uniform Securities Act, if:

A. the issuer of the securities was organized or the securities were acquired for the purpose of distribution or in connection therewith, either by the distributing corporation or by any person in control of, controlled by, or under common control with, the distributing corporation; or

B. the issuer has nominal assets or income at the time of the distribution and the person has reason to believe that the distribution will be followed by transactions in securities effected by broker-dealers.

[12.11.15.9 NMAC - Rp, 12 NMAC 11.15.3, 1-1-2010]

12.11.15.10 SECURITIES TRANSFERS: An issuer of outstanding securities, registered under the New Mexico Uniform Securities Act or exempt from registration, or any controlling person of the issuer, is deemed to employ a "device, scheme or artifice to defraud" the purchasers of the securities within the meaning of Section 58-13C-501A if the issuer fails to provide adequate facilities for the transfer and delivery of the securities to the purchasers thereof without unreasonable delay, either directly or through its transfer agent for the securities.

[12.11.15.10 NMAC - Rp, 12 NMAC 11.15.4, 1-1-2010]

12.11.15.11 BROKER-DEALER ACTIVITIES: The terms "device, scheme or artifice to defraud" within the meaning of Subsection A of Section 58-13C-501 of the New Mexico Uniform Securities Act and "an act, practice or course of business that operates or would operate as a fraud or deceit upon another person" within the meaning of Section 58-13C-501C are defined to include the failure to comply with the requirements of 17 C.F.R. 240.15(g), as well as the activities described in 17 C.F.R. 240.15(c)1-1 through 240.15(c)1-9.

[12.11.11.15.11 NMAC - Rp, 12 NMAC 11.15.5, 1-1-2010]

12.11.15.12 MARKET MANIPULATION: Without limiting the general applicability of Section 58-13C-501 of the New Mexico Uniform Securities Act, a person is deemed to employ a "device, scheme or artifice to defraud" within the meaning of Section 58-13C-501A or "an act, practice or course of business that operates or would operate as a fraud or deceit upon another person" within the meaning of Section 58-13C-501C if the person directly or indirectly:

A. quotes a fictitious price with respect to a security;

B. effects a transaction in a security which involves no change in the beneficial ownership of the security for the purpose of creating a false or misleading appearance of active trading in a security or with respect to the market for the security;

C. enters an order for the purchase of a security with the knowledge that an order of substantially the same size and at substantially the same time and price for the sale of the security has been or will be entered by or for the same or affiliated person for the purpose of creating a false or misleading appearance of active trading in a security or with respect to the market for the security;

D. enters an order for the sale of a security with knowledge that an order of substantially the same size and at substantially the same time and price for the purchase of the security has been or will be entered by or for the same or affiliated person for the purpose of creating a false or misleading appearance of active trading in a security or with respect to the market for the security;

E. effects, alone or with one or more other persons, a series of transactions in a security to:

(1) create active trading, actual or apparent, in that security; or

(2) raise or depress the price of the security, in each case for the purpose of inducing the purchase or sale of that security or of other securities of the same or another issuer by others; or

F. employs any other deceptive or fraudulent device, scheme or artifice to manipulate the market in a security.

[12.11.15.12 NMAC - Rp, 12 NMAC 11.15.6, 1-1-2010]

12.11.15.13 INSIDE INFORMATION:

A. An issuer or any person who is an officer, director or affiliate of an issuer or any other person whose relationship to the issuer gives him access, directly or indirectly, to material information about the issuer not generally available to the public is deemed to employ a "device, scheme or artifice to defraud" within the meaning of Section 58-13C-501A or "an act, practice or course of business that operates or would operate as a fraud or deceit upon another person" within the meaning of Section 58-13C-501C, who purchases or sells any security of the issuer in this state at a time when he knows material information about the issuer gained from such relationship, which information:

(1) would significantly affect the market price of that security;

(2) is not generally available to the public; and

(3) is not intended to be available to the public unless he has reason to believe and believes that the person selling to or buying from him is also in possession of the information.

B. Notwithstanding Subsection A of this section, activities permitted under the Securities Exchange Act of 1934, its rules and regulations shall not constitute a violation of this section.

[12.11.15.13 NMAC - N, 1-1-2010]

12.11.15.14 APPLICATION OF PART NOT EXCLUSIVE: Nothing in this part shall limit the director's authority to enforce existing provisions of law.

[12.11.15.14 NMAC - N, 1-1-2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT

SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 16 FORMS

12.11.16.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.

[12.11.16.1 NMAC - Rp, 12.11.16.1 NMAC, 1-1-2010]

12.11.16.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as a broker-dealer, an investment adviser or an issuer of securities, and their representatives and agents.

[12.11.16.2 NMAC - Rp, 12.11.16.2 NMAC, 1-1-2010]

12.11.16.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701 NMSA 1978, hereinafter referred to in this Chapter 11 as the "New Mexico Uniform Securities Act".

[12.11.16.3 NMAC - Rp, 12.11.16.3 NMAC, 1-1-2010]

12.11.16.4 DURATION: Permanent.

[12.11.16.4 NMAC - Rp, 12.11.16.4 NMAC, 1-1-2010]

12.11.16.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.

[12.11.16.5 NMAC - Rp, 12.11.16.5 NMAC, 1-1-2010]

12.11.16.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the

securities markets.
[12.11.16.6 NMAC - Rp, 12.11.16.6 NMAC, 1-1-2010]

12.11.16.7 DEFINITIONS: [RESERVED]

12.11.16.8 FORMS RELATING TO REGISTRATION OF SECURITIES: The forms set forth in this part 16 are prescribed for registration or exemption matters under the New Mexico Uniform Securities Act. For exemptions where no form is prescribed, a letter setting forth details and claiming the exemption is acceptable.

A. Form U-1, uniform application to register securities, shall be used for registrations by filing, coordination and qualification.

B. Form U-2, uniform consent to service of process, shall be used for all securities registrations.

C. Form U-2A, uniform corporate resolution, shall be used for all corporate securities registrations.

D. Form U-7, small company offerings registration, may be used for all registrations of securities from small corporate offerings.

E. Security escrow agreement may be used in connection with escrow of promotional shares as set forth in 12.11.9.13 NMAC.
[12.11.16.8 NMAC - Rp, 12.11.16.8 NMAC, 1-1-2010]

12.11.16.9 FORMS RELATING TO EXEMPTION FROM REGISTRATION OF SECURITIES:

A. Form 202X, notice of claim of exemption pursuant to Section 58-13C-202X, shall be used to give notice of intent to claim the exemption afforded by Section 58-13C-202X for offerings of issuers seeking no more than $2,500,000 from the sale of securities and shall include the following:

(1) general information regarding the company claiming the exemption including:

(a) name and mailing address of company;

(b) type of entity (corporation, limited partnership, limited liability company, limited liability partnership or other);

(c) date and place of creation (incorporation, organization, filing or date of partnership agreement);

(d) term of the entity (if applicable);

(e) purpose or objective of business;

(f) address where books and records, stock certificates or capital accounts are kept and by whom;

(g) name, address and telephone number of person who should be contacted about the notice of claim of exemption;

(2) information about the offering including:

(a) type of security, number of shares or units to be offered;

(b) offering price per share or unit;

(c) aggregate offering price;

(d) name and address of, and compensation to be received by, each person who will be effecting or attempting to effect sales of securities;

(e) if monies from sales of securities are to be escrowed until a certain amount is raised, a copy of the escrow agreement showing name and address of the escrow bank;

(f) general description of use of proceeds;

(g) general description of property, including location, in which such proceeds are to be invested;

(h) a statement as to whether the issuer, underwriter, or their affiliates, is subject to disqualification pursuant to Subsection C of 12.11.12.11 NMAC;

(i) a copy of the prospectus or offering memorandum describing the offering which will be utilized to offer the securities and comply with the disclosure requirements set forth in Subsection E of 12.11.12.11 NMAC and copies of all advertising or promotional literature;

(3) governing instruments including a copy of the articles of incorporation,, articles of organization, certificate of limited partnership or other instruments of creation of the issuer, including all amendments; and

(4) the signature and title of the person authorized to execute the notice of claim of exemption and the date of execution of the notice.

B. Form 202Y, notice of claim of exemption under Section 58-13C-202Y, described in this subsection, shall be used by issuers that are not organized or incorporated in New Mexico to give notice of intent to claim the exemption afforded by Section 58-13C-202Y for offerings of issuers that result in there being no more than 25 security holders. Form 202Y is optional for issuers organized or incorporated in New Mexico. Form 202Y shall include the following:

(1) general information regarding the company claiming the exemption including:

(a) name and mailing address of company;

(b) type of entity (corporation, limited partnership, limited liability company, limited liability partnership or other);

(c) date and place of creation (incorporation, organization, filing or date of partnership agreement);

(d) term of the entity (if applicable);

(e) purpose or objective of business;

(f) address where books and records, stock certificates or capital accounts are kept and by whom;

(g) estimated number of persons to whom offers will be made;

(h) number of current security holders;

(i) name and address of each person who will be effecting or attempting to effect sales of securities;

(2) copies of governing instruments including the articles of incorporation, articles of organization, certificate of limited partnership or other instruments of creation of the issuer, including all amendments;

(3) representations by the signator authorized to file the notice of claim of exemption that:

(a) the number of security holders will not in consequence of any sale made under the exemption afforded by Section 58-13C-202Y exceed 25;

(b) sales have been and will be made only to buyers believed to be purchasing for investment;

(c) no commissions or other remunerations have been, are being, or will be paid or given, directly or indirectly, for soliciting prospective buyers except to broker-dealers and agents registered pursuant to the New Mexico Uniform Securities Act;

(d) no news releases, advertisements in newspapers, radio, television nor any other form of public advertising will be used in any manner to contact prospective buyers;

(e) the issuer understands that acceptance of the issuer's notice filing does not constitute approval or recommendation by the director of the securities division of the securities to be issued and sold;

(f) the promoters and persons listed in the notice pursuant to Subparagraph (i) of Paragraph (1) of Subsection B of this section understand the provisions of Section 58-13C-501 of the New Mexico Uniform Securities Act which states that it is unlawful for a person, in connection with the offer to sell, sale, offer to purchase or purchase of a security, directly or indirectly, to employ a device or artifice to defraud; make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in light of the circumstances pursuant to which it is made, not misleading; or to engage in an act, practice or course of business that operates or would operate as a fraud or deceit upon another person;

(4) the signature and title of the person authorized to execute the notice of claim of exemption and the date of execution of the notice.

C. Form D, notice of sale of securities pursuant to Regulation D, shall be used for offerings made in compliance with Rules 504, 505 and 506 of Regulation D of the 1933 Securities Act.

D. Form 202N, notice of claim of exemption under Section 58-13C-202N, shall be used to give notice of intent to claim the exemption afforded by Section 58-13C-202N and shall include the following:

(1) general information regarding the company claiming the exemption with respect to offers and sales of its securities including:

(a) name and mailing address of company;

(b) type of entity (corporation, limited partnership, limited liability company, limited liability partnership or other);

(c) date and place of creation (incorporation, organization, filing or date of partnership agreement);

(d) term of the entity (if applicable);

(e) purpose or objective of business;

(f) address where books and records, stock certificates or capital accounts are kept and by whom;

(2) information regarding number of purchasers including:

(a) estimated number of persons to whom offers will be made in New Mexico;

(b) number of current security holders in New Mexico;

(c) date(s) securities acquired by security holders in New Mexico;

(d) total number of security holders inside and outside of New Mexico;

(e) date of issuer's last sale of securities;

(3) information about offering including:

(a) name and address of each person who will be effecting or attempting to effect sales of securities;

(b) aggregate amount of offering, type of security ((debt, equity (common); equity (preferred), partnership interests, membership interests));

(c) minimum investment that will be accepted from any individual security purchaser;

(4) copies of governing instruments including the articles of incorporation, articles of organization, certificate of limited partnership or other instruments of creation of the issuer, including all amendments;

(5) representations by the signator authorized to file the notice of claim of exemption that:

(a) the number of security holders in New Mexico will not in consequence of any sale made under the exemption afforded by Section 58-13C-202N exceed ten during any twelve months;

(b) sales have been and will be made only to buyers believed to be purchasing for investment or the issuer reasonably believes that the securities of the issuer will be held by fifty or fewer investors following the offering and the aggregate offering does not exceed $1,000,000 during any twelve consecutive months, and specifying which alternative;

(c) no commissions or other remunerations have been, are being, or will be paid or given, directly or indirectly, for soliciting prospective buyer except to broker-dealers and agents registered pursuant to the New Mexico Uniform Securities Act;

(d) no news releases, advertisements in newspapers, radio, television nor any other form of public advertising will be used in any manner to contact prospective buyers;

(e) no commissions or other remunerations have been, are being, or will be paid or given, directly or indirectly, for soliciting prospective buyers except to broker-dealers and agents registered pursuant to the New Mexico Uniform Securities Act;

(f) the issuer understands that acceptance of the issuer's notice filing does not constitute approval or recommendation by the director of the securities division of the securities to be issued and sold;

(g) the promoters and persons listed in the notice pursuant to Subparagraph (i) of Paragraph (1) of Subsection B of this section understand the provisions of Section 58-13C-501 of the New Mexico Uniform Securities Act which states that it is unlawful for a person, in connection with the offer to sell, sale, offer to purchase or purchase of a security, directly or indirectly, to employ a device or artifice to defraud; make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in light of the circumstances pursuant to which it is made, not misleading; or to engage in an act, practice or course of business that operates or would operate as a fraud or deceit upon another person;

(6) the signature and title of the person authorized to execute the notice of claim of exemption and the date of execution of the notice.

E. Notice of transaction, accredited investor exemption, shall be used for offerings of issuers which meet the criteria of 12.11.12.19 NMAC and shall include the following:

(1) general information regarding the company claiming the exemption including:

(a) name, mailing address, web site address and telephone number of company;

(b) type of entity (corporation, limited partnership, limited liability company, limited liability partnership or other);

(c) date and place of creation (incorporation, organization, filing or date of partnership agreement);

(d) identity of officers and directors, managing members or other individuals acting in a similar capacity, including names addresses and telephone numbers of each;

(e) purpose or objective of business;

(f) address where books and records, stock certificates or capital accounts are kept and by whom;

(g) name, address and telephone number of person who should be contacted about the notice of claim of exemption;

(2) information about the offering including:

(a) description of security ((debt, equity (common); equity (preferred), convertible, partnership interests, membership interests, other (specify));

(b) price per security;

(c) number of securities to be offered or sold;

(d) aggregate dollar amount of offering.

(3) description of business and business address;

(4) name of broker-dealer who has solicited or intends to solicit purchasers in New Mexico;

(5) representations by issuer that:

(a) sales of securities shall be made only to accredited investors as defined in 17 C.F.R. 230.501(a);

(b) the issuer is not an issuer in the development stage that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person;

(c) the issuer reasonably believes that all purchasers are purchasing for investment and not with the view to or for sale in connection with a distribution of the security; any resale of a security sold in reliance on this exemption within 12 months of sale, except a resale to an accredited investor or pursuant to a registration statement effective under applicable state securities laws, shall be presumed to be with a view to distribution and not for investment; securities issued under this exemption may only be resold pursuant to registration or an exemption under applicable state securities laws;

(d) the issuer is familiar with the conditions that must be satisfied to be entitled to the accredited investor exemption in New Mexico and understands that the issuer claiming the availability of this exemption has the burden of establishing that these conditions have been satisfied;

(e) the signator for the issuer has read this notification and knows the contents

to be true and is duly authorized by the issuer to sign on the issuer's behalf; and

(6) the signature and title of the person authorized to execute the notice of claim of exemption and the date of execution of the notice.

F. Form NF, uniform investment company notice filing, shall be used by investment companies which are required to file notice under the New Mexico Uniform Securities Act.

[12.11.16.9 NMAC - Rp, 12.11.16.9 NMAC, 1-1-2010]

12.11.16.10 FORMS RELATING TO REGISTRATION, REPORTING AND RENEWALS OF BROKER-DEALERS, AGENTS, INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES:

A. Form BD, uniform application for broker-dealer registration, shall be used for initial registration and periodic reporting by broker-dealers.

B. Form BDW, uniform request for broker-dealer withdrawal, shall be used for withdrawal from registration by broker-dealers.

C. Form U-2, uniform consent to service of process, shall be used for initial registration by broker-dealers and investment advisers.

D. Form U-4, uniform application for securities industry registration or transfer, shall be used for initial registration and periodic reporting by broker-dealer agents, investment adviser representatives and issuer sales representatives.

E. Form U-5, uniform termination notice for securities industry registration, shall be used to report termination of employment of broker-dealer agents and investment adviser representatives.

F. Form ADV, uniform application for investment adviser registration, shall be used for initial registration and periodic reporting of investment advisers required to be registered under the New Mexico Uniform Securities Act and for notice filings of federal covered advisers.

G. Form ADV-W, notice of withdrawal from registration as investment advisor, shall be used for withdrawal from registration by investment advisers.

H. Form ADV-E, certificate of accounting of client securities and funds in the possession or custody of an investment adviser, shall be used annually for filing with the renewal report by investment advisers who retain custody of client funds or securities.

I. BF-2, securities registrant's blanket bond, or its substantial equivalent, shall be used for initial registration of investment advisers that are not federal covered advisers, that have custody of clients' funds or securities, for initial registration of issuer agents, and for initial registration of broker-dealers that are not registered under the Securities Exchange Act of 1934. This bond shall be signed by the registrant and the surety, dated, verified and acknowledged; and contain the following terms and conditions:

(1) that the registrant, as principal, and the named surety, as surety, are bound unto the state of New Mexico in the penal sum of (*setting forth the specific dollar amount required by 12.11 NMAC and the director*) for the payment of which the registrant and the surety bind themselves;

(2) that the conditions of this obligation is such that whereas the above-named principal (name of registrant) has applied to the director of the New Mexico securities division for registration as a (*insert type of registration sought*);

(3) that the if the named principal and those registrants employed by him and registered as provided by law shall strictly comply with the duties and obligations imposed upon such registrants by the New Mexico Uniform Securities Act and shall satisfy any loss or damages suffered by a purchaser injured by a sale or contract for sale made in violation of the New Mexico Uniform Securities Act or of any order issued by the director of the New Mexico securities division under any provision of the New Mexico Uniform Securities Act, then this obligation shall be void, otherwise it shall remain in full force and effect; provided further that any such purchaser having a cause of action shall have the right to bring an action on this bond except, however, no action may be maintained to enforce any liability on the bond unless such action is brought within five years after the sale or other act on which such action is based;

(4) that the surety shall have the right to terminate its obligation under this bond by filing written notice with the director of the New Mexico securities division 30 days prior to the effective date of such termination;

(5) that, in no event shall the liability of the surety exceed the penal sum of (*insert same dollar amount set forth in Paragraph (1) of this subsection*); and

(6) setting forth the bond number and attaching a power of attorney authorizing the signator to execute bonds for the surety for any signator for the surety who is not a corporate officer of the surety.

J. Affidavit of no sales, shall be used for initial registration by broker-dealers. This affidavit shall be a sworn written statement, dated, signed, verified and acknowledged, under oath by an official of the broker-dealer firm on whose behalf the affidavit is made who is authorized to make the affidavit on behalf of the broker-dealer. The affidavit shall contain the following representations and recitals by the affiant:

(1) the affiant is an official of the broker-dealer firm on whose behalf the affidavit is made and identifying the broker-dealer firm by name;

(2) the broker-dealer has not transacted business as a broker-dealer in New Mexico;

(3) the broker-dealer agrees to comply with the New Mexico Uniform Securities Act and to refrain from transacting business as a broker-dealer in New Mexico until such time as both the broker-dealer and an agent thereof are duly registered by the New Mexico securities division;

(4) the affiant executed the affidavit on behalf of the broker-dealer after reading and understanding the contents thereof, and with knowledge that the representations contained in the affidavit will be verified with the broker-dealer's clearing broker(s); and

(5) that all information contained in the affidavit is true, current and complete, to the best of the affiant's knowledge and belief.

[12.11.16.10 NMAC - Rp, 12.11.16.10 NMAC, 1-1-2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT
SECURITIES DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 17 USE OF SENIOR-SPECIFIC CERTIFICATIONS AND PROFESSIONAL DESIGNATIONS

12.11.17.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.

[12.11.17.1 NMAC - Rp, 12.11.17.1 NMAC, 1-1-2010]

12.11.17.2 SCOPE: All persons that engage in providing advice as to value of or the advisability of investing in, purchasing or selling securities.

[12.11.17.2 NMAC - Rp, 12.11.17.2 NMAC, 1-1-2010]

12.11.17.3 STATUTORY AUTHORITY Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701 NMSA 1978, hereinafter referred to in this Chapter 11 as

the "New Mexico Uniform Securities Act".
[12.11.17.3 NMAC - Rp, 12.11.17.3 NMAC, 1-1-2010]

12.11.17.4 DURATION: Permanent.
[12.11.17.4 NMAC - Rp, 12.11.17.4 NMAC, 1-1-2010]

12.11.17.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.
[12.11.17.5 NMAC - Rp, 12.11.17.5 NMAC, 1-1-2010]

12.11.17.6 OBJECTIVE: To prohibit use of certifications and professional designations in such a way as to mislead investors regarding whether the user has special expertise in advising or serving senior citizens or retirees in connection with the offer and sale of securities.
[12.11.17.6 NMAC - Rp, 12.11.17.6 NMAC, 1-1-2010]

12.11.17.7 DEFINITIONS: [RESERVED]
[12.11.17.7 NMAC - Rp, 12.11.17.7 NMAC, 1-1-2010]

12.11.17.8 USE OF SENIOR-SPECIFIC CERTIFICATIONS AND PROFESSIONAL DESIGNATIONS: The use of a senior-specific certification or designation by any person in connection with the offer, sale, or purchase of securities, or the provision of advice as to the value of or the advisability of investing in, purchasing, or selling securities, either directly or indirectly or through publications or writings, or by issuing or promulgating analyses or reports relating to securities, that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees, in such a way as to mislead any person is prohibited and, in addition, shall be a dishonest and unethical practice in the securities, commodities, investment, franchise, banking, finance, or insurance business within the meaning of Section 58-13C-412C(13). The prohibited use of such certifications or professional designations includes, but is not limited to, the following:

A. use of a certification or professional designation by a person who has not actually earned or is otherwise ineligible to use such certification or designation;

B. use of a non-existent or self-conferred certification or professional designation;

C. use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training or experience that the person using the certification or designation does not have; and

D. use of a certification or professional designation that was obtained from a designating or certifying organization that:

(1) is primarily engaged in the business of instruction in sales or marketing;

(2) does not have reasonable standards or procedures for assuring the competency of its designees or certificants;

(3) does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct; or

(4) does not have reasonable continuing education requirements for its designees or certificants in order to maintain the designation or certificate.
[12.11.17.8 NMAC - Rp, 12.11.17.8 NMAC, 1-1-2010]
[The text of this rule is consistent with the model rule on use of senior-specific certifications and professional designations adopted by NASAA on 3-20-2008.]

12.11.17.9 DESIGNATIONS AWARDED BY RECOGNIZED DESIGNATED OR CERTIFYING ORGANIZATIONS: There is a rebuttable presumption that a designating or certifying organization is not disqualified solely for purposes of Subsection D of 12.11.17.8 NMAC when the organization has been accredited by:

A. the American national standards institute; or

B. the national commission for certifying agencies; or

C. an organization that is on the United States department of education's list entitled *accrediting agencies recognized for Title IV purpose*s and the designation or credential issued therefrom does not primarily apply to sales or marketing.
[12.11.17.9 NMAC - Rp, 12.11.17.9 NMAC, 1-1-2010]

12.11.17.10 FACTORS TO BE CONSIDERED TO DETERMINE WHETHER A TERM IS A SENIOR-SPECIFIC CERTIFICATION OR PROFESSIONAL DESIGNATION: In determining whether a combination of words (or an acronym standing for a combination of words) constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or servicing senior citizens or retirees, factors to be considered shall include:

A. use of one or more words such as "senior," "retirement," "elder," or like words, combined with one or more words such as "certified," "registered," "chartered," "adviser." "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation; and

B. the manner in which those words are combined.
[12.11.17.10 NMAC - Rp, 12.11.17.10 NMAC, 1-1-2010]

12.11.17.11 EXCEPTION FOR CERTAIN JOB TITLES: For purposes of this section, financial services regulatory agency includes, but is not limited to, an agency that regulates broker-dealers, investment advisers, or investment companies as defined under the Investment Company Act of 1940. For purposes of this part, a certification or professional designation does not include a job title within an organization that is licensed or registered by a state or federal financial services regulatory agency, when that job title:

A. indicates seniority or standing within the organization; or

B. specifies an individual's area of specialization within the organization.
[12.11.17.11 NMAC - Rp, 12.11.17.11 NMAC, 1-1-2010]

12.11.17.12 APPLICATION OF PART NOT EXCLUSIVE: Nothing in this part shall limit the director's authority to enforce existing provisions of law.
[12.11.17.12 NMAC - Rp, 12.11.17.12 NMAC, 1-1-2010]

NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION

This is an amendment to 11.4.7 NMAC, Sections 7 through 12, effective 12-31-09.

11.4.7.7 DEFINITIONS: For the purposes of these rules, the following definitions apply to the provision of all services:

A. "ASA relative value guide" means a document published by the American society of anesthesiologists which includes basic relative unit values for each procedure code listed in the edition of the American medical association's c*urrent procedural terminology* adopted in the director's annual order and unit values for anesthesia modifiers and qualifying circumstances. The current calendar year edition of the ASA relative value guide applies to these rules.

B. "Authorized health care provider (HCP)" means the health care provider selected in accordance with the act and the rules of the WCA.

C. "Average wholesale price (AWP)" means the average national price paid by pharmacies for pharmaceutical products, as determined and published at

least monthly by any nationally recognized pricing guide.

D. "Balance billing" means submitting a bill to any party for the difference between the usual and customary charges and the maximum amount of reimbursement allowed for compensable health care services or items.

E. "Bill review" means the review of medical bills [~~and/or~~] or associated medical records by a workers' compensation payer or its representative on behalf of the payer.

F. "By report (BR)" means a maximum amount for a service has not been established in the WCA [~~statutory physicians' fee schedule~~] healthcare provider fee schedule.

G. "Business day" means any day on which the WCA is open for business.

H. "Caregiver" means any provider of health care services not defined and specified in NMSA 1978, Section 52-4-1.

I. "Case management" means the on-going coordination of health care services provided to an injured or disabled worker including, but not limited to:

(1) developing a treatment plan to provide appropriate health care service to an injured or disabled worker;

(2) systematically monitoring the treatment rendered and the medical progress of the injured or disabled worker;

(3) assessing whether alternate health care services are appropriate and delivered in a cost-effective manner based upon acceptable medical standards;

(4) ensuring that the injured or disabled worker is following the prescribed health care plan; and,

(5) formulating a plan for the return to work.

J. "Complaint" means a written request for workers' compensation benefits or any relief under the act, filed on a mandatory form with the clerk of the WCA by a worker, employer, insurance carrier.

K. "Completion of form letter to health care provider" means all acts necessary to fully complete this form including, but not limited to, writing [~~and/or~~] or dictating, transcription, research, and consultation but excluding the conduct of a physical examination or the taking of a medical history.

L. "Contractor" means any organization that has a legal services agreement currently in effect with the workers' compensation administration (WCA) for the provision of utilization review or case management or peer review services.

M. "*Current procedural terminology* ("CPT")" means a systematic listing and coding of procedures and services performed by HCPs of the American medical association, adopted in the director's annual order. Each procedure or service is identified with a numeric or alphanumeric code (CPT code). This was developed and copyrighted by the American medical association. The five character codes included in the rules governing the healthcare provider fee schedule are obtained from current procedural terminology (CPT®), copyright 2008 by the American medical association (AMA). CPT is developed by the AMA as a listing of descriptive terms and five character identifying codes and modifiers for reporting medical services and procedures performed by physicians. The responsibility for the content of the rules governing the healthcare provider fee schedule is with WCA and no endorsement by the AMA is intended or should be implied. The AMA disclaims responsibility for any consequences or liability attributable or related to any use, nonuse or interpretation of information contained in rules governing the healthcare provider fee schedule. Fee schedules, relative value units, conversion factors or related components are not assigned by the AMA, are not part of CPT, and AMA is not recommending their use. The AMA does not directly or indirectly practice medicine or dispense medical services. The AMA assumes no liability for data contained or not contained herein. Any use of CPT outside of rules governing the healthcare provider fee schedule should refer to the most recent current procedural terminology which contains the complete and most current listing of CPT codes and descriptive terms. Applicable FARS/DRARS apply. CPT is a registered trademark of the American medical association.

N. "Deposition" means any deposition ordered by a judge under the act.

O. "Diagnostic statistical manual for mental disorders (DSM)" means the current edition of the manual, which lists and describes the scientifically diagnosed mental disorders and is commonly referred to as "DSM".

P. "Director" means director of the workers' compensation administration (WCA).

Q. "Durable medical equipment (DME)" means supplies and equipment that are rented, leased, or permanently supplied to a patient and which have been prescribed to aid the recovery or improve the function of an injured or disabled worker.

R. "Descriptor" means the definition of a service that is represented in the *current procedural terminology* issued by the American medical association.

S. "Employer" means, collectively: an employer subject to the act; a self-insured entity, group or pool; a workers' compensation insurance carrier or its representative; or any authorized agent of an employer or insurance carrier, including any individual owner, chief executive officer or proprietor of any entity employing workers.

T. "Failed appointment" means an appointment with a health care provider or caregiver for which the patient fails to show or arrives too late to be treated on the same day.

U. "Forms" means a bill for services that is rendered by a health care provider, caregiver, or supplier submitted on one of the following forms as mandated in these rules:

(1) CMS-1500 (12-90) effective until June 1, 2007, CMS-1500 (08/05) effective June 1, 2007

(2) UB04, effective June 1, 2007.

V. "Freestanding ambulatory surgical center (FASC)" means a separate facility that is licensed by the New Mexico department of health as an ambulatory surgical center.

W. "Health care provider (HCP)" means any person, entity, or facility authorized to furnish health care to an injured or disabled worker pursuant to NMSA 1978, Section 52-4-1, including any provider designated pursuant to NMSA 1978, Section 52-1-49, and may include a provider licensed in another state if approved by the director, as required by the act. The director has determined that certified registered nurse anesthetists (CRNAs) and certified nurse specialists (CNSs) who are licensed in the state of New Mexico are automatically approved as health care providers pursuant to NMSA 1978, Section 52-4-1(P).

X. "Hospital" means any place currently licensed as a hospital by the department of health pursuant to NMSA 1978, Section 52-4-1(A), where services are rendered within a permanent structure erected upon the same contiguous geographic location as are all other facilities billed under the same name.

Y. "Implants, instrumentation and hardware" means:

(1) surgical implants are defined as any single-use item that is surgically inserted, deemed to be medically necessary and approved by the payer which the physician does not specify to be removed in less than six weeks, such as bone, cartilage, tendon or other anatomical material obtained from a source other than the patient; plates, screws, pins, cages; internal fixators; joint replacements; anchors; permanent neurostimulators; and pain pumps;

(2) disposable instrumentation includes ports, single-use temporary pain pumps, external fixators and temporary neurostimulators and other single-use items intended to be removed from the body in less than 6 weeks.

Z. "Independent medical examination (IME)" means a specifically requested evaluation of an injured or disabled worker's medical condition performed by an HCP, other than the treating provider, as provided by NMSA 1978, Section 52-1-51.

AA. "International classification of diseases (ICD-9-CM)" means a set of numerical diagnostic codes, 9th revision, that is commonly referred to as ICD-9.

BB. "Materials supplied by health care provider (CPT Code 99070)" means supplies and materials over and above those usually included with the HCP's or caregiver's services and which are not governed by the durable medical equipment paragraph of these rules. Examples include sterile trays, unit doses of drugs, bandages, elastic wraps, initial casting, splinting and strapping materials, removable splints, slings, etc.

CC. "Maximum allowable amount" means the maximum amount reimbursed for any outpatient services, not including emergency department visits, outpatient surgery visits, or New Mexico gross receipts tax.

DD. "Maximum amount of reimbursement due" means the maximum payment for any service that is the lesser of the contract amount or the amount appropriately calculated by one of the following official methods:

(1) the assigned ratio discount method which is the hospital's established usual and customary charge for compensable services multiplied by the assigned ratio, plus any applicable New Mexico gross receipts tax; or,

(2) the maximum allowable amount method which is the lesser of the usual and customary fee, the contract amount or the amount prescribed by the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule, plus any applicable New Mexico gross receipts tax; or,

(3) the pharmacy maximum allowable payment (Pharm MAP) which is the maximum payment that a pharmacy or authorized HCP may receive for any prescription drug, plus any applicable New Mexico gross receipts tax; or,

(4) the contract amount which is a contractually negotiated fee between the practitioner and the payer that does not exceed the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule or the assigned ratio for the service.

EE. "Medical records" means:

(1) all records, reports, letters, and bills produced or prepared by an HCP or caregiver relating to the care and treatment rendered to the worker;

(2) all other documents generally kept by the HCP or caregiver in the normal course of business relating to the worker, including, but not limited to, clinical, nurses' and intake notes, notes evidencing the patient's history of injury, subjective and objective complaints, diagnosis, prognosis [~~and/or~~] or restrictions, reports of diagnostic testing, hospital records, logs and bills, physical therapy records, and bills for services rendered, but does not include any documents that would otherwise be inadmissible pursuant to NMSA 1978, Section 52-1-51(C).

FF. "NPI" means national provider identifier: a standard unique health identifier for health care providers (effective 6/01/2007).

GG. "New Mexico gross receipts tax (NMGRT)" means the gross receipts tax or compensating tax as defined in Chapter 7, Article 9 of the New Mexico Statutes Annotated 1978 (the "Gross Receipts and Compensating Tax Act"). This tax is collected by the New Mexico taxation and revenue department.

HH. "New patient" means a patient who is new to the HCP, group practice, or caregiver [~~and/or~~] whose medical and administrative records need to be established. A patient shall also be considered a new patient if seen for a new injury or disability or when a lapse of three (3) or more years from the most recent prior visit has occurred.

II. "Outpatient hospital services" means any diagnostic test or procedure, therapeutic treatment/procedure, drugs, supplies, durable medical equipment, [~~and/or~~] or other services and items provided to a worker not involving an inpatient stay, emergency department visit or outpatient surgery.

JJ. "Outpatient surgery visit" means a visit, not involving an overnight stay (less than 24 hours), to a hospital owned and operated treatment center or a freestanding ambulatory surgery center.

KK. "Peer review" means an individual case by case review of services for medical necessity and appropriateness conducted by an HCP licensed in the same profession as the HCP whose services are being reviewed.

LL. "Peer review opinion" means referral by the WCA, or its contractor, if any, upon approval and agreement to pay by the payer, for peer review services to answer specific questions concerning issues arising in the course of the contractor's services.

MM. "Physical impairment ratings (PIR)" means an evaluation performed by an MD, DO, or DC to determine the degree of anatomical or functional abnormality existing after an injured or disabled worker has reached maximum medical improvement. The impairment is assumed to be permanent and is expressed as a percent figure of either the body part or whole body, as appropriate, in accordance with the provisions of the Workers' Compensation Act and the most current edition of the American medical association's *guides to the evaluation of permanent impairment* (AMA guide).

NN. "Practitioner" as used throughout this rule means any HCP, pharmacy, supplier, caregiver, or freestanding ambulatory surgical center -- individually or in combination -- as appropriate to the context of the paragraph in which it is used.

OO. "Prescription drug" means any drug, generic or brand name, which requires a written order from an authorized HCP for dispensing by a licensed pharmacist or authorized HCP.

PP. "Ratio report worksheet definitions":

(1) "Adjusted net revenues" means patient revenues plus other operating revenues minus authorized deductions indicated on the worksheet.

(2) "Adjusted operating expenses" means the sum of hospital operating expenses, as recorded on an accrual basis, including non-physician salaries and wages, non-physician employee benefits, non-physician professional fees, supplies, utilities, depreciation, amortization, interest paid, state and local taxes paid, administrative and facility overhead expenses and related organizational expenses. All income tax paid or due is excluded from adjusted operating expenses. Physician expenses, as defined in this section, are subtracted from operating expenses to derive adjusted operating expenses.

(3) "Contractual allowances" means gross patient charges at established rates minus the amounts received or to be received.

(4) "Generally accepted accounting principles (GAAP)" means accounting principles that encompass the conventions, rules, and procedures necessary to define accepted accounting practice at a particular time as published by the governmental accounting standards board.

(5) "Medicaid/medicare contractual allowances" means gross patient charges at established rates minus the amounts received or to be received from the patient or the program under the agreement or contract between the participating hospital or freestanding ambulatory care center and the United States department of health and human services.

(6) "New hospital" means a hospital, as defined in NMSA 1978, Section 52-4-1, which has not completed its first full fiscal year.

(7) "Other allowances" means gross patient charges at the hospital's

established usual and customary rates minus the amounts received or to be received under contractual agreements with non-governmental third party payers or courtesy discounts.

(8) "Other governmental contractual allowances" means unreimbursed charges for contractual allowances including, but not limited to, governmental entities like CHAMPUS and the veterans' administration.

(9) "Other operating revenues" means revenues received from patients for non-patient care. Grants, gifts, and investment income are not included.

(10) "Physician expenses" means salaries, benefits, contractual fees, educational expenses, and travel expenses paid to or on behalf of physicians by a hospital or freestanding ambulatory surgical center.

(11) "Physician professional fees" means fees for professional services provided by a physician and billed by a hospital or freestanding ambulatory surgical center.

(12) "Related organizational expenses" means expenses applicable to services, facilities, and supplies furnished to the hospital or freestanding ambulatory surgical center by organizations related to the hospital or ambulatory surgical center by a common ownership or control.

QQ. "Referral" means the sending of a patient by the authorized HCP to another practitioner for evaluation or treatment of the patient and it is a continuation of the care provided by the authorized HCP.

RR. "Rules of the WCA" means rules enacted by the WCA and cited as 11.4 NMAC.

(1) These rules are organized by title, chapter, part, section, paragraph, and subparagraph.

(2) For ease of use, these rules may be referred to in writing and speech by part, section, paragraph, and subparagraph.

SS. "Services" means health care services, the scheduling of the date and time of the provision of those services, procedures, drugs, products or items provided to a worker by an HCP, pharmacy, supplier, caregiver, or freestanding ambulatory surgical center which are reasonable and necessary for the evaluation and treatment of a worker with an injury or occupational disease covered under the New Mexico Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law.

TT. "Service component modifiers (radiology and pathology/laboratory)" means the designation of radiology and pathology or laboratory procedures that are divided into professional and technical components for billing purposes.

(1) "Professional component (modifier code "-26")" means that portion of a diagnostic or therapeutic procedure which consists of the physician's professional services (an examination of the patient, the performance or supervision of the procedure, and an interpretation and written report of the procedure findings) and must be coded with the modifier-26.

(2) "Technical component (modifier code "-27")" means that portion of a diagnostic or therapeutic procedure which includes the provision of personnel, materials, space, equipment, etc., necessary to perform the procedure must be coded with the modifier -27).

UU. "Special report" means a practitioner's preparation of a written response to a request for information or records, requiring the creation of a new document or the previously unperformed analysis of existing data.

VV. "Surgical modifiers" means:

(1) "bilateral procedure suffix code "-50"" used for the second procedure when performed during the same operative session;

(2) "multiple procedures suffix code "-51"" used when secondary or lesser surgical procedures are performed during the same operative session as the primary or major surgical procedure;

(3) "assistant surgeon suffix code "-80"" used to identify services performed by an assistant surgeon during a surgical procedure.

WW. "Unbundling" means coding and billing separately for procedures that do not warrant separate identification because they are an integral part of a service for which a corresponding CPT code exists.

XX. "Unlisted service or procedure" means a service performed by an HCP or caregiver which is not listed in the edition of the American medical association's *current procedural terminology* referenced in the director's annual order or has not otherwise been designated by these rules.

YY. "Usual and customary fee" means the monetary fee that a practitioner normally charges for any given health care service. It shall be presumed that the charge billed by the practitioner is that practitioner's usual and customary charge for that service unless it exceeds the practitioner's charges to self-paying patients or non-governmental third party payers for the same services and procedures.

ZZ. "Utilization review" means the evaluation of the necessity, appropriateness, efficiency, and quality of health care services provided to an injured or disabled worker.

AAA. "Worker" means an injured or disabled employee.

[4-1-91, 12-30-91, 12-31-91, 2-24-92, 10-30-92, 1-15-93, 3-18-94, 1-31-95, 8-1-96, 8-15-97, 10-01-98; 11.4.7.7 NMAC - Rn, 11 NMAC 4.7.7, 8-30-02; A, 10-25-02; A, 1-14-04; A, 1-14-05; A, 1-1-07; A, 12-31-07; A, 12-31-08; A, 12-31-09]

11.4.7.8 GENERAL PROVISIONS

A. These rules apply to all charges and payments for medical, other health care treatment, and related non-clinical services covered by the New Mexico Workers' Compensation Act and the New Mexico Occupational Disease Disablement Law.

B. These rules shall be interpreted to the greatest extent possible in a manner consistent with all other rules promulgated by the workers' compensation administration (WCA). In the event of an irreconcilable conflict between these rules and any other rules, the more specific set of rules shall control.

C. Nothing in these rules shall preclude the separate negotiation of fees between a practitioner and a payer within the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule for any health care service as set forth in these rules.

D. These rules and the director's annual order adopting the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule utilize the edition of the c*urrent procedural terminology* referenced in the director's annual order, issued pursuant to Subparagraph (c) of Paragraph (1)[~~(c)~~] of Subsection B, 11.4.7.9 NMAC. All references to specific CPT code provisions in these rules shall be modified to the extent required for consistency with the director's annual order.

E. A carrier who subcontracts the bill review services remains fully responsible for compliance with these rules.

F. Employers are responsible for timely good faith payment as defined in Subsection A of 11.4.7.11 NMAC for all reasonable and necessary health care services for work-related injuries and diseases.

G. Employers are required to inform a worker of the identity and source of their coverage for the injury or disablement.

H. The provision of services gives rise to an obligation of the employer to pay for those services. Accordingly, all services are controlled by the rules in effect on the date the services were provided.

I. Fees and payments for all physician professional services, regardless of where those services are provided, are

reimbursed within the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule.

J. Diagnostic coding shall be consistent with the *international classification of diseases, 9th edition, clinical modification* (ICD-9-CM) or *diagnostic and statistical manual of mental disorders* guidelines as appropriate.

[12-31-91, 1-15-93, 10-28-93, 3-14-94, 12-2-94, 8-1-96, 8-15-97, 10-01-98; 11.4.7.8 NMAC - Rn & A, 11 NMAC 4.7.8, 8-07-02; A, 10-25-02; A, 1-14-04; A, 12-31-07; A, 12-31-09]

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11.4.7.9 PROCEDURES FOR ESTABLISHING THE MAXIMUM AMOUNT OF REIMBURSEMENT DUE

A. All hospitals shall be reimbursed at the hospital ratio itemized in the official WCA listing that becomes effective on December 31, [~~2008~~] 2009, for all services rendered from December 31, [~~2008~~] 2009 to December 31, [~~2009~~] 2010, except as provided in Subsection B of this temporary rule. Any new hospital shall be assigned a ratio of 67%.

(1) The assigned ratio is applied toward all charges for compensable services provided during a hospital inpatient stay, emergency department visit and outpatient hospital surgery.

(2) This ratio does not include procedures that are performed in support of surgery, even if performed on the same day and at the same surgical site as the surgery.

(3) Appeal of assigned ratio by hospitals:

(a) A written appeal may be filed with the director within thirty (30) days of the assignment of the ratio. The administration will review the appeal and respond with a written determination. The administration may require the hospital to provide additional information prior to a determination.

(b) If the hospital is not satisfied with the administration's written determination, within ten (10) calendar days of the date of the determination, the hospital may request that a formal hearing be set and conducted by the director. The director's rulings in all such formal hearings shall be final.

B. The following services and items will be reimbursed as specified:

(1) Implants, hardware and instrumentation implanted or installed during surgery in the setting of a hospital shall be reimbursed at invoice cost times 1.25 plus shipping and handling for the implant or hardware and NMGRT.

(2) The professional and technical charges for radiology and pathology/laboratory services provided in a hospital shall be paid at rates equivalent to those set forth in the most current version of the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule. The hospital shall provide a detailed billing breakdown of the professional and technical components of the services provided, and shall be paid pursuant to the procedures set forth at Paragraph (7) of Subsection G of 11.4.7.9 NMAC of these rules.

C. All hospitals shall provide to the WCA:

(1) the most recent full year filing of their HCFA/CMS 2552 G-2 worksheet prepared on behalf of the organization, by February 1, [~~2009~~] 2010;

(2) any hospital may specifically designate this worksheet as proprietary and confidential; any worksheet specifically designated as proprietary and confidential in good faith shall be deemed confidential pursuant to NMSA 1978, Section 52-5-21 and the rules promulgated pursuant to that provision.

(3) Failure to comply may result in fines and penalties.

D. All provisions of 11.4.7 NMAC contrary to the provisions set forth in this temporary rule are deemed void and inoperative during the effective period of this rule.

E. Method of payment for FASCs:

(1) All FASCs will provide global billing by CPT code on a CMS-1500 and shall be paid by the assigned centers for medicare and medicaid services (CMS) ambulatory payment classification (APC) base payment rate times 1.3 effective for services from December 31, [~~2008~~] 2009, to December 31, [~~2009~~] 2010. See http://www.cms.hhs.gov/HospitalOutpatientPPS/AU, under Addendum B, October [~~2008~~] 2009. No adjusted conversion factors or index values are to be applied. Payment will be made in accordance with the APC base payment rate assigned for that service in Addendum B dated October [~~2008~~] 2009. Absent an assigned APC base payment rate, services shall be paid BR.

(a) Bilateral procedure "-50"

(i) When performed during the same operative session, the first or major procedure shall be coded with the appropriate CPT code without a modifier and shall be paid at the lesser of billed charges or the APC base payment rate times 1.3.

(ii) The second procedure shall be coded with the same CPT code plus the "-50" modifier code and shall be paid at no more than 50% of the APC base payment rate times 1.3.

(b) Multiple procedures "-51"

(i) The primary or major surgical procedure shall be coded with the appropriate CPT code without a modifier and shall be paid at the lesser of the billed charges or the APC base payment rate times 1.3.

(ii) The second and third procedure shall be coded with the respective CPT code plus the "-51" modifier code and shall be paid at 50% of the APC base payment rate times 1.3.

(iii) The fourth and subsequent procedures will be paid BR.

(2) Implants, hardware and instrumentation implanted or installed during surgery in the setting of a FASC shall be reimbursed at invoice cost times 1.25 plus shipping and handling for the implant or hardware and NMGRT.

(3) The professional and technical charges for radiology and pathology/laboratory services provided in a FASC shall be paid at rates equivalent to those set forth in the most current version of the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule. The FASC shall provide a detailed billing breakdown of the professional and technical components of the services provided, and shall be paid pursuant to the procedures set forth at Paragraph (7) of Subsection G of 11.4.7.9 NMAC of these rules.

F. Subsections A-E of 11.4.7.9 NMAC, inclusive, shall be repealed effective 11:59 P.M. December 31, [~~2009~~] 2010, and shall be of no force or effect with respect to any services provided thereafter.

G. Maximum allowable amount method

(1) Basic provisions

(a) These rules apply to all charges for medical and other health care treatment provided on an outpatient basis, including procedures that are performed in support of ambulatory surgery, even on the same day and at the same site as the surgery.

(b) The [~~statutory physicians' fee schedule~~] healthcare provider fee schedule is procedure-specific and provider-neutral. Any code listed in the edition of the *current procedural terminology* adopted in the director's annual order may be used to designate the services rendered by any qualified practitioner within the parameters set by that practitioner's licensing regulatory agencies combined with applicable state laws, rules, and regulations.

(c) For purposes of NMSA 1978, Section 52-4-5(A) (1990), the director shall issue an order not less than once per annum setting the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule for medical services. The order shall contain the revised fee schedule, a brief description of the technique used for derivation of the fee schedule and a reasonable identification of the data upon which the fee schedule was based. The fee schedule shall be released to the public not less than 30 days prior to the date upon which it is adopted and public comments will be accepted during the 30

days immediately following release. After consideration of the public comments the director shall issue a final order adopting a fee schedule, which shall state the date upon which it is effective. The final fee schedule order shall be available at the WCA clerk's office not less than ten days prior to its effective date.

(2) Evaluation and management (E/M) services:

(a) The definition for "new patient" is unique to New Mexico, differing from the definition presented in the *current procedural terminology*. (See Subsection HH of 11.4.7.7 NMAC)

(b) E/M CPT codes shall not be pro-rated.

(3) Independent medical examinations

(a) All IMEs and their fees must be authorized by the claims payer prior to the IME scheduling and service, regardless of which party initiates the request for an IME. In the event of an IME ordered by a judge, the judge will set the fee.

(b) In the event a worker fails to provide 48 hours' notice of cancellation of an IME appointment, the HCP may be reimbursed either 60% of the pre-approved fee or up to 60% of the HCP's usual and customary fee if a fee was not pre-approved. "Missed IME" should be written next to the code.

(4) Physical impairment ratings

(a) All PIRs and their fees shall be authorized by the claims payer prior to their scheduling and performance regardless of which party initiated the request for a PIR. The PIR is inclusive of any evaluation and management code.

(b) Impairment ratings performed for primary and secondary mental impairments shall be billed using CPT code 90899 [~~(unlisted psychiatric service/procedure)~~] and shall conform to the guidelines, whenever possible, presented in the most current edition of the AMA guides to the evaluation of permanent impairment.

(c) A PIR is frequently performed as an inherent component of an IME. Whenever this occurs, the PIR may not be unbundled from the IME. The HCP may only bill for the IME at the appropriate level.

(d) In the event that a PIR with a specific HCP is ordered by a judge and the HCP and claims payer are unable to agree on a fee for the PIR, the judge may set the fee or take other action to resolve the fee dispute.

(5) Physical medicine and rehabilitation services

(a) It shall be the responsibility of the physical medicine/rehabilitation provider to notify the claims payer of a referral prior to commencing treatment.

(b) The appropriate CPT code must be used for billing by practitioners.

(c) Services provided by caregivers (e.g., technicians, exercise physiologists) must be pre-authorized and paid pursuant to Paragraph (13) of Subsection G of 11.4.7.9 NMAC.

(d) In the event a worker fails to provide 48 hours notice of cancellation of an FCE appointment, the practitioner may be reimbursed up to 60% of the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule for a four-hour appointment.

(6) Materials supplied under CPT code 99070

(a) Supplies and materials must be itemized.

(b) Supplies and materials are reimbursed at the practitioner's invoice cost plus 25%, plus tax, shipping and handling charges.

(c) A copy of the invoice shall be provided either at the time of billing or upon the payer's request.

(7) Service component modifiers -- radiology and pathology/laboratory

(a) Use of the technical and professional component modifier codes is required for the billing of all radiology and pathology/laboratory procedures. The CPT code followed by "TC" is the appropriate billing code for the technical component.

(b) The dollar value listed in the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule for a specific radiology or pathology/laboratory procedure represents the combined maximum allowable amount for both the technical and professional components of that procedure:

(i) The entity billing for the technical component shall be paid at no more than 60% of the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule for the procedure when the service is provided on an inpatient or outpatient basis.

(ii) The entity billing for the professional component shall be paid at no more than 40% of the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule for the billed procedure, whether the service was provided on an inpatient or an outpatient basis.

(8) Surgical modifiers

(a) Bilateral procedure "-50"

(i) When performed during the same operative session, the first or major procedure shall be coded with the appropriate CPT code without a modifier and shall be paid at the lesser of billed charges or the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule.

(ii) The second procedure shall be coded with the same CPT code plus the "-50" modifier code and shall be paid at no more than 50% of the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule.

(b) Multiple procedures "-51"

(i) The primary or major surgical procedure shall be coded with the appropriate CPT code without a modifier and shall be paid at the lesser of the billed charges or the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule.

(ii) The second and third procedure shall be coded with the respective CPT code plus the "-51" modifier code and shall be paid at 50% of the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule.

(iii) The fourth and subsequent procedures will be paid BR.

(c) Assistant surgeon "-80"

(i) The attending surgeon shall bill using the appropriate CPT code(s) and modifiers, if applicable, for the procedure(s) performed and shall be paid at the lesser of the billed charges or the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule, subject to the percentages for modifiers in this section.

(ii) The assistant surgeon shall bill using the appropriate CPT codes(s) plus the modifier for the procedures performed and shall be paid at no more than 25% of the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule.

(9) Unlisted services or procedures are billable and payable on a BR basis.

(10) Performance of BR services.

(a) The fee for the performance of any BR service is negotiated between the practitioner and the payer prior to delivery of the service. Payers should ensure that a CPT code with an established fee schedule amount is not available.

(b) Performance of any BR service requires that the practitioner submit a written report with the billing to the payer.

(i) The report shall substantiate the rationale for not using an established CPT code.

(ii) The report shall include pertinent information regarding the nature, extent, and special circumstances requiring the performance of that service and an explanation of the time, effort, personnel, and equipment necessary to provide the service.

(iii) Information provided in the medical record(s) may be submitted in lieu of a separate report if that information satisfies the requirements of Paragraph (1) of Subsection D of 11.4.7.10 NMAC.

(iv) No separate charge is allowed for the report.

(v) In the event a dispute arises regarding the reasonableness of the fee for a BR service, the practitioner shall make a prima facie showing that the fee is reasonable. In that event, the burden of proof shall shift to the payer to show why the proposed fee is not reasonable.

(vi) Any disputes shall

be submitted pursuant to Section 13 of this rule.

(11) Special reports shall be billed with CPT code "99080" and the descriptor "special report". The form letter to health care provider is a special report. The allowable amount is $45.

(12) The use of global fees is encouraged, however global fee shall not be used unless payer and provider agree. Agreement for use of a global fee may be sought and obtained before, during or after provision of services. All services not covered by the global fee shall be coded and paid separately, to the extent substantiated by medical records. Agreement to use a global fee creates a presumption that the HCP will be allowed to continue care throughout the global fee period.

(13) Caregiver services are subject to the payer's pre-authorization prior to the scheduling and performance of any service. All services provided by caregivers are paid BR.

(14) Durable medical equipment (DME) shall be pre-authorized by the payer. However, reasonable and necessary prosthetic/orthotics training [~~and/or~~] or adjusting is excluded from the cost of the DME and may be billed separately.

(a) Rental of DME shall not exceed 90 days unless it is determined by the payer to be more cost efficient to do so.

(b) Rental fees shall not exceed the cost of purchase established in the Subparagraph, below. Rental fees paid for the first 30 days of rent may be applied against the purchase price. Subsequent rental fees may not be applied against the purchase price. The decision to purchase should be made within the first 30 days of rental.

(c) Purchases of DME are paid at the practitioner's invoice cost plus 25% plus taxes, shipping and handling charges.

(d) A copy of the invoice shall be provided either at the time of billing or upon the payer's request.

(15) Prorating

(a) The prorating of the practitioner's fees for time spent providing a service, as documented in the provider's treatment notes, is not prohibited by these rules; provided however, that EOB -- 13 is sent to the practitioner. (See item (iii) of Subparagraph (e) of Paragraph (4) of Subsection C of 11.4.7.11 NMAC).

(b) The practitioner's fees should not be prorated to exclude time spent in pre- and post-treatment activity, such as equipment setup, cleaning, disassembly, etc., if it is directly incidental to the treatment provided and is adequately documented.

(16) Referrals

(a) If a referral is made within the initial sixty (60) day care period as identified by NMSA 1978, Section 52-1-49(B), the period is not enlarged by the referral.

(i) When referring the care of a patient to another provider, the referring provider shall submit complete medical records for that patient, upon request of the referral provider, at no charge to the patient, referral provider or payer.

(ii) When transferring the care of a patient to another provider, the transferring provider shall submit complete medical records for that patient to the subsequent provider at no charge to the patient, subsequent provider or payer.

(b) If, subsequent to the completion of a consultation, a referral is made to the consultant for the assumption of responsibility for the management of a portion or all of the patient's condition(s), the following procedures apply:

(i) Follow up consultation codes shall not be used.

(ii) Evaluation and management codes shall be used.

(iii) Only established patient codes shall be used.

(c) If a practitioner who has been requested to examine a patient assumes responsibility immediately for primary provision of the patient's care, it shall be considered a referral and not a consultation.

(i) Consultation codes shall not be used.

(ii) Evaluation and management codes shall be used.

(iii) For the first visit only, a new patient code may be used.

(iv) HCPs and caregivers may negotiate with the payer, prior to performing the service, regarding the use of consultation codes in appropriate circumstances.

(17) Physical therapy

(a) New Mexico specific codes are no longer in use. Please consult the fee schedule currently in use for specific codes. Evaluation and management codes are not appropriate for this purpose.

(b) Physical therapy bills may include all codes which are reasonable and necessary for the evaluation and treatment of a worker in a single day.

(c) An initial failed appointment, without providing 48 hours' notice to the physical therapist, may be billed at 60% of the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule.

(18) Failed appointments

(a) An initial failed appointment, when the new patient fails to provide 48 hours notice to the HCP, may be billed at the level of a new outpatient/expanded problem focused H&E/low to moderate severity/straightforward medical decision making/evaluation and management service, using CPT code 99202 and annotated as "FAILED INITIAL APPOINTMENT/NEW PATIENT"

(b) A failed appointment by an established patient may not be billed.

(19) Facility fees

(a) Charges for the use of a room for other than an emergency room visit or operating and recovery rooms for inpatient or outpatient hospital surgery are prohibited by these rules.

(b) For instances of outpatient services, where two or more HCPs combine in delivery of the service, the maximum total payment is based on the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule for the specific service. The HCPs may allocate the payment among themselves.

(20) Charges for copies of radiographic film (X-rays) may be billed to the requestor by the X-ray facility following by report (BR) procedures.

(21) Second medical opinions requested by a party are deemed medically reasonable and necessary for payment purposes.

H. Pharmacy maximum allowable payment (Pharm MAP) is based upon the maximum payment that a pharmacy or authorized HCP is allowed to receive for any prescription drug, not including NMGRT.

(1) Basic provisions

(a) Pharmacies and authorized HCPs must include patient identification and information. No specific form is required.

(i) Pharmacies shall not dispense more than a 30-day supply of medication unless authorized by the payer.

(ii) Only generic equivalent medications shall be dispensed unless a generic does not exist and unless specifically ordered by the HCP.

(iii) Compounded medication prepared by pharmacists shall be paid on a by report (BR) basis.

(b) Any medications dispensed and administered in excess of a 24-hour supply to a registered emergency room patient shall be paid according to the hospital ratio.

(c) Health care provider dispensed medications shall not exceed a 10 day supply for new prescriptions only. The payment for health care provider dispensed medications shall not exceed the cost of a generic equivalent.

(d) Any bill that is submitted without an NDC number will be paid at the lowest AWP available for the month in which the drugs were dispensed.

(e) The HCP formula for billing generic and brand name prescription drugs is:

($)AWP x .90 with no dispensing fee included.

(2) Average wholesale price (AWP)

(a) Any nationally recognized monthly or weekly publication that lists the

AWP may be used to determine the AWP.

(b) The date that shall be used to determine the AWP and calculation of the Pharm MAP shall be the date on which the drugs were dispensed, regardless of AWP changes during the month.

(c) Use of a prorated calculation of AWP will often be necessary in the formulas. For each drug dispensed, the prorated AWP shall be based on the AWP for the "100s ea" quantity of the specific strength of the drug, as listed in a nationally recognized publication, with the following exceptions:

(i) If an AWP listed in the publication is based on the exact quantity of the drug dispensed, e.g., #15, #60, 15 ml, 3.5 gm, etc., the AWP for the exact quantity shall be used with no prorating calculation made.

(ii) If the drug is dispensed as a quantity based on volume (grams, ounces, milliliters, etc.) rather than single units ("ea"), the prorated AWP shall be calculated in accordance with the highest quantity (volume) listed for the specific strength of drug.

(iii) In cases of a conflict between referenced publications, the lower price shall prevail.

(3) The formula for billing generic and brand name prescription drugs is:

Pharm MAP($) = ($)AWP x .90 + $5.00.

I. Qualification of out of state health care providers

(1) An HCP that is not licensed in the state of New Mexico must be approved by the director to qualify as an HCP under the act.

(2) No party shall have recourse to the billing and payment dispute resolution provisions of these rules with respect to the services of an HCP who is not licensed in New Mexico or approved by the director.

(3) The director's approval may be obtained by submitting a written motion and order, supported by an original affidavit of the HCP seeking approval, on forms acceptable to the director. Nothing in this rule shall prevent the director from entering into agreements with any party or HCP to provide for simplified and expeditious qualification of HCPs in individual cases, provided, however, that all such agreements shall be considered public records.

(4) The director's approval of a health care provider in a particular case, pursuant to the provisions of Section 52-4-1, will be deemed given when an out of state health care provider provides services to that injured worker and the employer/insurer pays for those services. The approval obtained by this method will not apply to the provision of health care by that provider to any other worker, except by obtaining separate approval as provided in these rules. [01-24-91, 4-1-91, 12-30-91, 12-31-91, 1-18-92, 10-30-92, 1-15-93, 10-28-93, 2-23-94, 3-14-94, 12-2-94, 1-31-95, 8-1-96, 9-1-96, 8-15-97, 4-30-98, 10-01-98, 6-30-99; 11.4.7.9 NMAC - Rn & A, 11.4.7.9 NMAC, 8-07-02; A, 10-25-02; A, 1-14-04; A, 1-14-05; A, 12-30-05; A, 12-31-06; A, 1-1-07; A, 12-31-07; A, 12-31-08; A, 12-31-09]

11.4.7.10 BILLING PROVISIONS AND PROCEDURES

A. Basic provisions

(1) Balance billing is prohibited.

(2) Unbundling is prohibited.

(a) If a service that is ordinarily a component of a larger service is performed alone for a specific purpose it may be considered a separate procedure for coding, billing, and payment purposes.

(b) Documentation in the medical records must justify the reasonableness and necessity for providing such services alone.

(3) The patient/worker shall not be billed for health care services provided by an authorized HCP as treatment for a valid workers' compensation claim except as provided in Subparagraphs (a) or (b) of Paragraph (2) of Subsection A of 11.4.7.13 NMAC.

(4) All reasonable and necessary services provided to a patient/worker with a valid workers' compensation claim shall be paid by the employer or the employer's representative on behalf of the employer.

(5) If a service has been pre-authorized or is provided pursuant to a treatment plan that has been pre-authorized by an agent of the payer, it shall be rebuttably presumed that the service provided was reasonable and necessary. The presumption may be overcome by competent evidence that the payer, in the exercise of due diligence, did not know that the compensability of the claim was in doubt at the time that the authorization was given.

(6) Timeliness

(a) Initial billing of outpatient services by practitioners, other than hospitals and FASC's, shall be postmarked no later than 30 calendar days from the date of service.

(b) Initial billing of outpatient services by hospitals and FASCs shall be postmarked within 30 days from the end of the month in which services were rendered.

(c) Initial billing of inpatient services shall be issued no later than 60 calendar days from the date of discharge.

(d) Failure of the practitioner to submit the initial billing within the time limits provided by these rules shall constitute a violation of these rules but does not absolve the employer of financial responsibility for the bill.

B. Billing forms have been adopted from the US department of health and human services' health care financing administration.

(1) Billing for services calculated according to the ratio discount method must be on a UB-92 (effective until 6/1/07), UB04 (effective 6/1/07), CMS-1450. This includes inpatient services, emergency room services and hospital outpatient surgery.

(2) Billing for services calculated according to the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule and provided by hospitals may be on form UB04 (effective 6/1/07), CMS-1450 or form CMS-1500. FASCs shall bill for services on a CMS-1500.

(3) Billings for all outpatient services calculated according to the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule must be on form CMS-1500.

(4) Pharmacies and authorized HCPs must include patient identification and appropriate information. Billings for pharmaceuticals requires no specific form.

(5) Completion of forms

(a) "WORKERS' COMPENSATION" or "WORK COMP" shall be clearly printed or stamped at the top of the billing form. Any subsequent billing for the same service(s) must be clearly labeled "TRACER" or "TRACER BILL" at the top of the billing form and may be a copy of the original bill.

(b) Entry of the applicable CPT code and a descriptor are mandatory for each procedure billed, regardless of which form or itemized statement is utilized.

(c) FORM CMS-1500 (12/90) information required for completion is self-explanatory with the following exceptions:

(i) Sections 6, 9, 11a-d, 12, 13, 17a, 19, 22, 23, 24h-k, and 27 are not applicable.

(ii) Section 1. Check "Other".

(iii) Section 1a. Enter patient's social security number.

(iv) Section 4. Enter employer's name.

(v) Section 7. Enter employer's address and telephone number.

(vi) Section 11. Name of workers' compensation insurance carrier or self-insured employer or third party administrator.

(vii) Section 21. Enter ICD-9-CM or DSM code and descriptor for each diagnosis.

(viii) Section 24d. Entry of a specific CPT code, any applicable modifier and the descriptor is mandatory for each procedure/service billed.

(ix) Section 26. Optional

(x) Section 28. Multiple page bills should show the cumulative total in Section 28 of each consecutively numbered page, with the combined total for

all pages on the last page.

(xi) Section 29. This section may be used to indicate any agreed upon discount amount or rate.

(xii) Section 30. This section may be used to indicate the amount due after applying any discounts. Otherwise, leave it blank.

(xiii) Anesthesiologists and laboratories may omit Sections 14, 15, and 16.

(d) Form CMS-1450 (UB-04) must be completed by health care facilities (effective 6/1/2007):

(i) The following locators on the UB-04 must be completed by the health care facilities: 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 14, 15, 17, 18 - 28, 29, 31, 37, 42, 43, 44, 46, 47, 50, 56, 58, 60,63, 65, 67, 72, 73, 74.

(ii) Locator 1. Practitioner name, complete address and telephone number.

(iii) Locator 2. Paid to service provider - name and address.

(iv) Locator 3. Patient control number, medical record number

(v) Locator 4. Enter code 111, 115, 117, 121, 125, 127, 851, 855, or 857 for inpatient; 131, 135, 137 for outpatient and for emergency room; 831 for FASC. (Note: if locator 42 contains an entry beginning with "45", then the service was emergency room, not outpatient.)

(vi) Locator 5. Hospital federal tax identification number.

(vii) Locator 6. Statement coverage dates must be provided.

(viii) Locator 7. (NM Specific) Covered days - the days during the billing period applicable to the cost report.

(ix) Locator 8a. Injured worker's I.D. 8b-injured worker's name

(x) Locator 10. Injured worker's birthdate.

(xi) Locator 11. Gender

(xii) Locator 12. Date of admission to hospital or facility.

(xiii) Locator 14. Type of admission, code values: 1=emergency, 2=urgent, 3=elective, 5=trauma center, 9= information unavailable.

(xiv) Locator 15. Source of admission code values: 1=physician referral, 2=clinic referral, 3=HMO referral, 4 = hospital transfer, 6 = transfer from HCF, 7 = ER, 8 = law enforcement, 9 = unavailable, A = transfer from (CAH).

(xv) Locator 17. Patient status: code values (01-76).

(xvi) Locators 18-28. Use condition code 02 for employment related injury[~~, wo for UMWA~~].

(xvii) Locator 29. Accident and state abbreviation.

(xviii) Locator 31. Date of work-related occurrence. Note: code = 04, 03, 02, 05, 06 or 07.

(xix) Locator 37. New Mexico specific (WCA) DRG code (diagnosis related group) code used by medicare to group medical services provided by inpatient hospital services. Required for type of bill = 111,115, 117, 121, 125, 127, or inpatient for CAH codes 851, 855, and 857.

(xx) Locator 42. Revenue codes for services billed. (Note: revenue code (0001) must be provided in column 42 for total charges.)

(xxi) Locator 43. Lists and describes each medical service and item being billed corresponding to revenue code applicable.

(xxii) Locator 44. Accommodation rate for applicable services provided.

(xxiii) Locator 46. Units of service (mandatory for accommodation rate).

(xxiv) Locator 47. Billed charges. Information based on service provided (revenue code). (note: last revenue code in column 42 must be 0001)

(xxv) Locator 50. Insurance carrier, self-insurer or TPA (claims administrator).

(xxvi) Locator 56. National provider identifier of hospital facility.

(xxvii) Locator 58. Insured's name or employer's name.

(xxviii) Locator 60. SSN of injured worker or worker's identification number.

(xxix) Locator 63. WCA authorization number

(xxx) Locator 65. Employer's name.

(xxxi) Locator 67. Principle diagnosis code must be based on ICD-9-CM. Code must include all five digits.

(xxxii) Locator 67a-h. Other diagnosis codes are based on ICD-9-CM. These codes are sent to payer if available.

(xxxiii) Locator 72. External cause of injury code.

(xxxiv) Locator 73. (N.M. WCA Specific) The health care facilities, current workers' compensation ratio.

(xxxv) Locator 74. and 74 (a-e) Principle procedure code and date: The HCP enters the ICD-9-CM code for the inpatient principle procedure. The principle procedure is the procedure performed for definitive treatment rather than for diagnostic or exploratory purposes, which is necessary to take care of a complication. The code should relate closely to the principle diagnosis. A date should also be provided.

(6) The health care facility is required to submit all requested data to the payer. Failure to do so could result in fines and penalties imposed by the WCA. All payers are required to notify the economic research bureau of unreported data fields within 10 days of payment of any inpatient bill.

C. New Mexico gross receipts tax (NMGRT): Practitioners whose corporate tax status requires them to pay NMGRT shall bill for NMGRT in one of the following ways:

(1) Indicate via a printed or stamped statement adjacent to the combined "total charges" that the individual charges and total charges include NMGRT at the specific percentage applicable to the practitioner.

(2) Make no mention of NMGRT, in which case the bill shall be paid at the lesser of the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule or the billed amount.

(3) Itemize the actual amount of the NMGRT below the combined "total charges" amount for all billed services and items, indicating the specific tax rate (percent) applicable to the municipality or county location of the practitioner; and, add this amount to the combined "total charges" to derive a "total amount billed".

D. Medical records

(1) Initial bills for every visit shall be accompanied by appropriate office notes (medical records) which clearly substantiate the service(s) being billed and are legible.

(2) No charge shall be made to any party to the claim for the initial copy of required information. Second copies provided shall be charged and paid pursuant to Subsection A of 11.4.7.15 NMAC.

(3) A charge may be made to the requesting party to the claim for second and subsequent copies of any medical records.

(4) No charge shall be made for provision of medical records to the WCA's utilization review/case management/peer review contractor for required information.

(5) Records for hospitals and FASCs shall have a copy of the admission history and physical examination report and discharge summary, hospital emergency department medical records, ambulatory surgical center medical records or outpatient surgery records.

[4-1-91, 12-31-91, 11-18-92, 1-15-93, 10-28-93, 3-14-94, 12-2-94, 11-18-94, 12-31-94, 8-1-96, 10-01-98; 11.4.7.10 NMAC - Rn, 11 NMAC 4.7.10, 8-30-02; A, 10-25-02; A, 1-14-04; A, 1-14-05; A, 12-30-05; A, 12-31-06; A, 1-1-07; A, 12-31-07; A, 12-31-09]

11.4.7.11 PAYMENT PROVISIONS AND PROCEDURES

A. Payment due

(1) Full payment is due within 30

days of receipt of a bill for services unless payment is pending in accordance with the criteria for contesting bills set out below and an appropriate explanation of benefits has been given by the payer.

(2) Bills may be paid individually or batched for a combined payment; however, each service, date of service and the amount of payment applicable to each procedure must be appropriately identified.

B. Criteria for contesting health care services bills

(1) All bills shall be paid in full unless one or more of the following criteria are met.

(a) denial of compensability;

(b) services are deemed not to be reasonable and necessary;

(c) incomplete billing information or support documentation;

(d) inaccurate billing or billing errors;

(e) reduction specifically authorized by this rule.

(2) These criteria are the only permissible reasons for contesting workers' compensation bills submitted by practitioners.

(3) Payment for non-contested portions shall be timely.

C. Payer's explanation of benefits (EOB) for contested bills

(1) Whenever a payer contests a bill or the payment for services is denied, delayed, reduced or otherwise differs from the amount billed, the payer shall provide the practitioner with a written EOB.

(2) Only the EOBs listed below may be used. Failure of the payer to indicate the appropriate EOB(s) constitutes an independent violation of these rules.

(3) An EOB shall be attached and shall be clearly related to each payment disposition by procedure and date of service.

(4) Standard EOBs: The following EOBs are grouped in accordance with the criteria for contesting health care services bills.

(a) EOB-01 Claim not compensable. The compensability of this workers' compensation claim has been denied by the employer or payer.

(b) EOB-02 Services not reasonable and necessary. This service/procedure/item is not considered reasonable or necessary for the compensable problem.

(c) EOB-03 Incomplete billing information or support documentation. The information/documentation listed was not included with the bill. The charge(s) will be evaluated upon its receipt. Forward expeditiously.

(d) Inaccurate billing/billing errors:

(i) EOB-04 This code is invalid. It is not in the edition of the American medical association's c*urrent procedural terminology* adopted in the director's annual order or this rule. Please code properly and resubmit.

(ii) EOB-05 This procedure was billed more than once on the same date. (Indicate payment disposition.)

(iii) EOB-06 An identical bill for this claimant and date of service was previously submitted and (paid, reduced, or denied).

(iv) EOB-07 The code for this service has been changed to agree with the CPT code for this procedure in the governing version of the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule.

(v) EOB-08 The billed service is not substantiated by the medical notes.

(vi) EOB-09 This procedure does not warrant separate identification as it is normally an integral part of procedure code number___ that was billed on (date).

(vii) EOB-10 A new patient charge was made for this service without meeting the definition of new patient in these rules. Payment is commensurate with the established patient designation.

(e) Reduction specifically authorized by this rule:

(i) EOB-11 This procedure/service was not provided by an authorized HCP as specified in NMSA 1978, Section 52-4-1.

(ii) EOB-12 Payment has been reduced commensurate with the level of service documented in the medical records (including procedures with surgical modifiers).

(iii) EOB-13 Payment has been prorated for this procedure.

(iv) EOB-14 Payment has been reduced to the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule, assigned hospital ratio, FASC amount, Pharm MAP or the contracted or negotiated amount for this procedure or service.

(v) EOB-15 This service was provided by a caregiver without an agreed upon fee.

(vi) EOB-16 Professional fee at 40% of the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule, technical fee at 60% of the [~~statutory physicians' fee schedule~~] healthcare provider fee schedule, or billed amount, whichever is less.

(vii) EOB-17 Medical records shall accompany each bill at no charge.

[12-31-91, 1-15-93, 8-1-96, 10-01-98; 11.4.7.11 NMAC - Rn, 11.4.7.11 NMAC, 8-30-02; A, 10-25-02; A, 1-14-04; A, 1-14-05; A, 12-31-07; A, 12-31-09]

11.4.7.12 ANESTHESIA

A. The maximum allowable amount for the CPT code series 00100-01999 (which is specific to the field of anesthesia), shall be determined by including a monetary conversion factor of [~~$44.94~~] $50.68 which shall be multiplied by the basic unit values, time units, and any physical status [~~and/or~~] or qualifying circumstances modifiers to determine the maximum allowable amount. The units need to be separate in this equation.

B. The "basic unit value" assigned to each procedure in the CPT code series 00100-01999 in the *ASA relative value guide* adopted by the director in his annual order shall be used when billing.

C. "Time units" shall be recorded and billed in 15-minute increments and fractions of units rounded to the nearest fraction (1/15th) of a unit. For example, 19 minutes is billed as follows:

19 minutes = 1 unit (15 minutes) + 4/15 of a unit (4 minutes)

[~~1 unit = $44.94~~
~~4 minutes = $44.94 / 15 = $2.99~~
~~$2.99 x 4 = $11.96~~
~~19 minutes = $44.94 + $11.96 = $56.90~~]

1 unit = $50.68
4 minutes = $50.68 / 15 = $3.38
$3.38 x 4 = $13.52
19 minutes = $50.68 + 13.52 = $64.20

D. Physical status modifiers may be used in billing, as appropriate, and shall adhere to the coding and unit value assignments in the *ASA relative value guide* adopted by the director is his annual order.

E. Qualifying circumstances modifiers may be used in billing, as appropriate, and shall adhere to the coding and unit value assignments in the *ASA relative value guide* adopted by the director in his annual order.

[1-15-93, 8-1-96, 8-15-97, 10-01-98, 6-30-99; 11.4.7.12 NMAC - Rn, 11NMAC 4.7.12, 8-30-02, A, 10-25-02; A, 1-14-05; A, 12-31-07; A, 12-31-09]

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS

LABOR RELATIONS DIVISION

This is an amendment to 11.1.2 NMAC, Sections 1 and 11 through 13, effective 12/31/2009. This rule was also renumbered and reformatted from 11 NMAC 1.1, to comply with current NMAC requirements.

11.1.2.1 ISSUING AGENCY: [New Mexico Department of Labor, Labor and Industrial Division, Public Works Bureau] New Mexico Department of Workforce Solutions, Labor Relations Division, Labor and Industrial Bureau, Public Works Section
[8/15/98; 11.1.2.1 NMAC - Rn & A, 11 NMAC 1.1.1, 12/31/09]

11.1.2.11 PROCEDURE TO BE EMPLOYED IN THE PREDETERMINATION OF WAGE RATES ON PUBLIC WORKS: [Authority: Subsections A to G of 11.1.2.11 NMAC adopted pursuant to Section 13-4-11, New Mexico Statutes Annotated, 1978 Compilation.

A. Purpose and scope: The regulations contained in this part set forth the procedure for the determination of prevailing wage rates, on a statewide basis, pursuant to Section 13-4-11, NMSA 1978.

B. Computation of prevailing wage rate and definitions: The prevailing wage rate for laborers and mechanics employed on projects within the street, highway, utility and light engineering construction classification (type "A") and for laborers and mechanics employed on building projects and heavy engineering projects within the general building (type "B") and heavy engineering construction classification (type "H") and for laborers and mechanics employed on projects determined within the residential building classification (type "C") shall be computed on a statewide basis without regard to zone, incentive, or subsistence pay. However, while zone, incentive, or subsistence pay shall not be considered in determining the statewide base wage rate, it shall be computed and applied on a locality basis in type "B" and type "C" construction in accordance with the same formula utilized to determine the prevailing statewide base wage rate. For the purpose of zone, incentive or subsistence pay determination, "locality basis" shall mean location, municipality or site from which the zone, incentive or subsistence pay data emanated for the survey. Working foreman hours shall be included in the determination of the prevailing wage for that particular craft by surveying hours worked with the majority of the mechanics in that classification paid by that contractor/subcontractor. Where working foremen are the only mechanics on that project, those hours will be surveyed at the predetermined rated issued on that project. Working foremen in groupings for truck drivers, operators, and laborers shall not be included. For each classification the director shall employ the following methodology:

(1) The base wage rate paid in each work classification shall be grouped in ten cent ($ .10) numerically consecutive intervals, beginning with $.01 and including $.105, from which a weighted average of each group shall be taken, (see the following example).

Example:

Rates paid as follows would be grouped in this manner:

256 man hours at $10.01 = $2,562.56
340 man hours at $10.05 = $3,417.00
204 man hours at $10.10 = $2,060.40
800 man hours (for group) into $8,039.96 = $10.05 base wage for group

2,011 man hours at $10.11 = $20,331.21
722 man hours at $10.16 = $7,335.52
1,067 man hours at $10.20 = $10,883.40
3,800 man hours (for group) into $38,550.13 = $10.14 base wage for group and so forth

(2) The prevailing wage rate for a given classification on contract work of a similar nature in the state shall be:

(a) The base wage rate (as determined in Paragraph (1) of Subsection B of 11.1.2.11 NMAC above) paid for the majority of man hours worked in said classification, or

(b) In the event that (1) is not applicable, then the base wage rate (as determined in Paragraph (1) of Subsection B of 11.1.2.11 NMAC above) paid for the greater number of man hours, provided that such greater number constitutes at least thirty per cent (30%) of the man hours worked in the classification.

(c) In the event that neither (1) nor (2) above is applicable the weighted average in the classification shall be the prevailing rate.

(d) In the event that the prevailing wage rate as determined by the application of (1) or (2) above (whichever is applicable) would result in lowering the prevailing wage as determined from the last survey immediately preceding by more than 3%, the director shall compute the rate under Rule (3) above, and unless application of Rule (3) above would have the effect of further lowering the rate, the prevailing rate determined shall be the rate computed by application of Rule (3) above or the rate as was determined by the last survey preceding, whichever is lower.

(e) Fringe benefits as part of wages, as defined in Section 13-4-12 (A) (2), NMSA, 1978, shall be determined by applying Subparagraph (d) of Paragraph (2) of Subsection B of 11.1.2.11 NMAC above to the total dollar amount of fringe benefits paid by each contractor multiplied by the number of hours for which the total was paid. The fringe benefit figure so determined shall be expressed by a single dollar figure representing the total dollar amount of fringe benefits prevailing as a lump sum, rather than by separate dollar amounts representing each individual category of fringe benefits found to be prevailing.

(3) The term "base wage rate" contemplated in this section, shall mean the straight time hours and hourly rate paid each laborer or mechanic.

(4) The term "weighted average" shall mean the sum of the products of the grouped man hours times group base wage rate divided by the total number of man hours worked in the classification.

(5) The term "similar nature" shall mean contract work performed on projects as defined in the several Subparagraphs of Subsection B of 11.1.2.9 NMAC of these regulations.

(6) The term "director" shall mean the public official charged by law with the administration of the Public Works Minimum Wage Act.

(7) The term "state" shall mean the state of New Mexico.

C. Obtaining and compiling wage rate information and preparation of wage rate surveys: For the purpose of making wage determinations, the director shall conduct a continuing program for the obtaining and compiling of wage rate information, as required by Section 13-4-11, NMSA 1978, employing the procedures set forth in this Section.

(1) Separate surveys shall be prepared for the street, highway, utility and light engineering classification (type "A"), and for the general building (type "B") and heavy engineering construction classification (type "H") and for the residential construction classification (type "C"), and wage determination shall be issued on the basis thereof.

(2) The annual survey period shall be the month of June of each year. Wage rate decisions issued as a result of this survey and wage determination shall remain effective until superseded beginning fifteen (15) days following the making of the wage determination pursuant to Subsection

D of 11.1.2.11 NMAC of these rules and regulations. Each annual survey and wage determination shall be and remain valid and the director shall issue to requesting agencies wage decisions based thereon until such survey and wage determination is superseded by an effective new survey and wage determination. A wage determination based upon a new survey shall not go into effect pending a final disposition of any appeal to the labor and industrial commission, sitting as the appeals board. If no appeal is timely filed pursuant to properly preserved objection as provided in Subsection D of 11.1.2.11 NMAC, infra, such survey and determination shall become effective on the applicable date specified in Paragraph (2) of Subsection C of 11.1.2.11 NMAC, above.

(3) Surveys and wage rate determination shall be on a statewide basis.

(4) Wage rate surveys prepared by the director for the street, highway, utility and light engineering construction classification (type "A"), and for the general building (type "B") and for the residential building construction classification (type "C"), and for heavy engineering construction classification (type "H") shall be compiled from certified weekly payrolls and verified wage information submitted and prepared in accordance with Subsection C of 11.1.2.10 NMAC of these rules and regulations and shall be utilized by the director in making wage rate determinations; provided, the director shall encourage the voluntary submission of wage data by contractors, contractors' associations, labor organizations and public officers. He shall give due regard to such information, voluntarily submitted, together with information obtained from field surveys, conducted in accordance with Section 13-4-11, NMSA 1978, in evaluating the validity and accuracy of certified payrolls and verified wage information incorporated in the director's survey.

(a) Certified weekly payrolls and verified wage information: The director shall compile his survey from the information contained in the certified payrolls and verified information submitted for the survey period prepared in accordance with Subsection C of 11.1.2.10 NMAC of these rules and regulations. Not less than twenty-five (25) days prior to the time scheduled for the hearing specified in Subsection D of 11.1.2.11 NMAC infra, the director shall prepare a detailed statement of the information, if any, which he has excluded from said certified payrolls or verified wage information in preparing his survey. Said statement, together with all certified payrolls and verified wage information, shall be available for inspection by any interested party in the offices of the director, subject to limitations imposed by Subsection F of 11.1.2.10 NMAC, supra. To the extent the director fails to object in said detailed statement, the information contained in said certified payrolls or verified wage information shall be incorporated by the director directly into the survey for the period concerned and the director shall be barred from raising any objection to said information in any subsequent proceeding before the labor and industrial commission, sitting as the appeals board, or otherwise. The information contained in said certified payrolls or verified wage information shall be conclusive upon him as to its validity, accuracy and completeness. This provision shall not prevent any interested party from objecting to information contained in such certified payrolls or verified wage information.

(b) Within the time limits specified in Subparagraph (a) of Paragraph (4) of Subsection C of 11.1.2.11 NMAC, supra, the director may object to the information contained in certified weekly payrolls or verified wage information timely submitted to him and refuse to incorporate it in his survey only on the ground that information contained therein does not accurately state the wages being paid mechanics or laborers employed under said contract or is not in accordance with the wage rates contained in the contract specifications, if any.

(c) The director may omit from his survey information contained in certified payrolls or in properly prepared and submitted verified wage information only to the extent he has a specific objection as enumerated in Subparagraph (a) of Paragraph (4) of Subsection C of 11.1.2.11 NMAC, supra, thereto.

D. Review of survey results after notice to all interested parties: Survey results shall be reviewed at a meeting with all known interested parties. The time, date and place of said meeting will be established at the discretion of the director. Notice of the subject matter, the time, date and place of the meeting, the manner in which interested persons may present their views, and the method by which copies of the survey results (including lists of contractors and projects covered by the survey) and copies of the director's statement of information excluded from the survey pursuant to Paragraph (4) of Subsection C of 11.1.2.11 NMAC, supra, may be obtained, shall be published once at least thirty (30) days prior to the meeting date in a newspaper of general circulation. Such notice shall also be mailed by the director to all known interested parties at least thirty (30) days prior to the meeting date along with a copy of the survey results (including lists of contractors and projects covered by the survey) and a copy of the labor commissioner's statement of information excluded from the survey pursuant to Paragraph (4) of Subsection C of 11.1.2.11 NMAC, supra. Any objections to the survey results may be communicated to the director by an interested party either orally at such meeting or in writing delivered to the director on or before the date of such meeting, and the director shall make a record of any and all objections and of his rulings thereon prior to making his determination of prevailing wage rates. The director shall notify the objecting party and all other parties in attendance at the meeting of his ruling(s) on objections simultaneously with the making of his wage determination. Objections to the survey results not made by any interested party receiving proper and timely notice of such meeting shall be deemed waived and shall not constitute a ground for appeal unless the basis for such objection shall not have been reasonably discoverable by examination of the certified payrolls and verified wage information upon which the survey results are based, which data and all work papers and other material relating thereto shall be available at the office of the director, not less than thirty (30) days prior to such meeting, for inspection and copying by any interested party. For purposes of this Subsection D of 11.1.2.11 NMAC the term "all interested parties" shall include without limitation the state highway department, incorporated cities and Class A and B counties and their respective school boards or authorities, state institutions of higher learning and other contracting agencies which with regular frequency undertake public works projects subject to the Act, and all other persons (including labor organizations, contractors and contractor associations) who make written request to the director to receive notice as provided in this section.

E. Determination of prevailing wage rates: The director shall determine prevailing wage rates applicable in the state for the type of construction proposed based on the survey data assembled and compiled.

F. Addendum changes: Wage rate corrections or changes to decisions rendered shall not be issued without allowing the requesting agency at least ten (10) days notice before the date bids are to be submitted.

G. Effectiveness of wage rate decisions: Wage rate decisions shall remain effective until superseded; provided that changes to decisions rendered shall not be issued without allowing the requesting agency at least ten (10) days notice before the date bids are to be submitted. New wage rate decisions shall be issued for all contracts on which bids have not been submitted before the date on which a new survey and wage determination becomes effective pursuant to Subsection C of 11.1.2.11 NMAC, supra, provided, that any such new decision shall not supersede any previously issued decision unless such new decision is received by the contracting agency at least ten (10) days prior to the date on which

~~bids are to be submitted. Notwithstanding anything in these regulations to the contrary or apparently to the contrary, the director shall not be required to issue a wage rate decision to a requesting agency unless such agency reasonably expects to advertise the contract for bids and to receive bids within 120 days from the date of its written request.~~] Authority: Subsections A to F of 11.1.2.11 NMAC adopted pursuant to Section 13-4-11, New Mexico Statutes Annotated, 1978 Compilation.

A. Purpose and scope: The regulations contained in this part set forth the procedure for the determination of prevailing wage rates, on a statewide basis, pursuant to Section 13-4-10, NMSA 1978.

B. Computation of prevailing wage rate and definitions: The director shall determine the prevailing wage and prevailing fringe benefit rates for respective classes of workers employed on public works projects at the same wage rates and fringe benefits rates used in collective bargaining agreements between labor organizations and their signatory employers in the state of New Mexico that govern predominantly similar classes or classification of workers and the crafts involved. The prevailing wage rate for workers employed on projects within the street, highway, utility and light engineering construction classification (type "A") and for workers employed on building projects and heavy engineering projects within the general building (type "B") and heavy engineering construction classification (type "H") and for workers employed on projects determined within the residential building classification (type "C") shall be established on a statewide basis without regard to incentive, or subsistence pay. However, while incentive or subsistence pay shall not be considered in determining the statewide base wage rate, it shall be computed and applied on a zone basis in type "B" and type "H" construction in accordance with the same formula utilized to determine the prevailing statewide base wage rate. For the purpose of incentive or subsistence pay determination, "zone basis" shall mean location, municipality or site from which the, incentive or subsistence pay data received by the director. Working foreman hours shall be included in the determination of the prevailing wage for that particular craft based upon information received by the director.

(1) The director shall determine prevailing wage rates and prevailing fringe benefit rates for respective classes of workers employed on public works projects at the same wage rates and fringe benefit rates used in collective bargaining agreements between labor organizations and their signatory employers that govern predominately similar classes or classifications of workers. The director shall also give due regard to information obtained during the director's determination of the prevailing wage rates and prevailing fringe benefit rates made pursuant to this subsection. The term "due regard" means that the director shall consider credible substantial information from any interested person with respect to why the prevailing wage should not be the same wage set by the collective bargaining agreement. Such information shall be given the weight appropriate to its credibility and gravity and the director may rely on such evidence to make reasonable adjustment to the wage indicated by the weighted average of collective bargaining agreement in the locality.

(2) The term "base wage rate" contemplated in this section, shall mean the straight time hours and hourly rate paid each worker.

(3) Fringe benefits, as defined in Section 13-4-10.1c, NMSA, 1978, shall be determined by the director as established in Paragraph (1) of Subsection B. The fringe benefit figure so determined may also be expressed by a dollar amount representing fringe benefits.

(4) The term "locality" shall mean the boundaries of the state of New Mexico.

(5) As defined in these regulations "worker means any individual employed as a non-professional public works project subject to the New Mexico Public Works Act.

(6) The first annual determination of prevailing wage rates shall be set by the director, pursuant to 11.1.2.11 NMAC. In the event that any subsequent prevailing wage rate determination would result in lowering or increasing the prevailing wage by more than five percent (5%), the director shall establish the prevailing wage rate at no more than five percent (5%) above or below the most recently determined amount.

C. Determinations shall be made in the following manner provided that due regard is given to other data as established in Paragraph (1) of Subsection B.

(1) The director shall determine the prevailing wage and prevailing fringe benefit rates for respective classes of workers employed on public works projects at the same wage rates and fringe benefit rates used in collective bargaining agreements between labor organizations and their signatory employers in the state of New Mexico that govern predominately similar classes or classification of workers and the crafts involved.

(2) If the director determines that no collective bargaining agreement exists, the director may take a weighted average of the information and data that is submitted, and utilize this weighted average data as the prevailing wage rate and fringe benefit rate. A weighted average shall mean the sum of the wage or fringe rates divided by the number of wage or fringe rates submitted.

(3) If more than one collective bargaining agreement exists for the same classification or craft in the state of New Mexico, the director shall take a weighted average of the agreements to set the prevailing wage and fringe rates. A weighted average shall mean the sum of the wage or fringe rates as determined by the collective bargaining agreements divided by the number of applicable number of collective bargaining agreements.

D. Obtaining and compiling wage rate information: For the purpose of making wage determinations, the director shall conduct a continuing program for the obtaining and compiling of collective bargaining agreements in order to accurately determine the prevailing wage and fringe rate for public works projects.

(1) Collective and bargaining agreement wage rate and fringe benefit information shall include the following information:

(a) the validity and accuracy of such wage information must be verified upon submittal, and if the wage information is submitted on paper, the verification shall be in writing and signed by the person submitting the data;

(b) such verification need not be in any particular form, but shall contain the following information:

(i) a statement by the person submitting the data that, to the best of his or her knowledge and belief, the information submitted is true and accurate;

(ii) a statement by classification as described in 11.1.2.13 NMAC and corresponding crafts and the corresponding wage rate and fringe benefit;

(iii) a general description of the nature of the work performed on each classification and by each craft;

(iv) identification and signature by the contractor (signatory) with whom the wage rate and fringe benefit were negotiated.

(2) Separate determinations shall be prepared for the street, highway, utility and light engineering classification (type "A"), and for the general building (type "B") and heavy engineering construction classification (type "H") and for the residential construction classification (type "C"), and wage determination shall be issued on the basis thereof.

(3) Prevailing wage and fringe rates will be issued on July 1 of every calendar year based on collective bargaining agreements and/or other relevant information. All collective bargaining agreements and/or other relevant data must be submitted to the director by the second Friday in March for consideration. Prevailing wage and fringe

rates shall remain in effect until superceded by new wages.

(4) Prevailing wage and fringe benefit rates determined by the provisions of this section shall be compiled as official records and kept on file in the director's office and the records shall be updated in accordance with the applicable rates used in subsequent collective bargaining agreements.

(5) Prevailing wage and fringe rates shall be set on a statewide basis.

E. Review of prevailing wage determination after notice to all interested parties: Wage and fringe rate results shall be reviewed at a meeting with all known interested parties at least forty five (45) days prior to their annual July 1 adoption. The time, date and place of said meeting will be established at the discretion of the director. Notice of the subject matter, the time, date and place of the meeting, the manner in which interested persons may present their views. Any objections to the wage or fringe rates results may be communicated to the director by an interested party either orally at such meeting or in writing delivered to the director on or before the date of such meeting, and the director shall make a record of any and all objections and of his/her rulings thereon prior to making his determination of prevailing wage rates. The director shall notify the objecting party and all other parties in attendance at the meeting of his ruling(s) on objections simultaneously with the making of his wage determination. Objections to the prevailing wage determinations not made by any interested party receiving proper and timely notice of such meeting shall be deemed waived.

F. Appeal of the director's wage and fringe rates shall be made pursuant to 11.1.2.16 NMAC.

[5/31/72, 1/14/76, 6/4/79, 3/7/80, 1/29/81, 5/28/81, 11/4/88, 2/8/90, 2/14/94, 8/15/98; 11.1.2.11 NMAC - Rn & A, 11 NMAC 1.1.11, 12/31/09]

11.1.2.12 ADOPTION OF STANDARD JOB CLASSIFICATIONS AND DESCRIPTIONS APPLICABLE ON PUBLIC WORKS IN NEW MEXICO SUBJECT TO THE PUBLIC WORKS MINIMUM WAGE ACT: [~~Authority: Subsections A to C of 11.1.2.12 NMAC adopted pursuant to Section 13-4-11, New Mexico Statutes Annotated, 1978 Compilation~~

~~A. Purpose and scope: The regulations in this part set forth the procedures for establishment of standard job classifications and descriptions for various classifications of laborers and mechanics employed on contract work of a similar nature and as defined in the several Paragraphs of Subsection B of 11.1.2.9 NMAC, of these rules and regulations. These are adopted in order to permit the director to administer the Public Works Minimum Wage Act uniformly.~~

~~B. Adoption of standard job classifications and descriptions:~~

~~(1) The director may seek the assistance of contractors, contractors' associations, labor organizations, interested parties, and public officers in establishing standard job classifications and descriptions for work to be performed in the state subject to the Public Works Minimum Wage Act. Separate standard job classifications and descriptions shall be established for each of the separate types of construction projects as defined in the several Paragraphs of Subsection B of 11.1.2.9 NMAC, of these rules and regulations in order to reflect the various classifications of laborers and mechanics employed on contract work of a similar nature.~~

~~(2) Standard job classifications and descriptions shall be adopted as regulations by the director pursuant to Section 13-4-11, NMSA 1978, and in accordance with the procedures set out in Section 15 of these rules and regulations. Existing job classifications and descriptions shall remain effective until superseded on the effective date of newly adopted standard job classifications and descriptions as provided in Section 15 of these rules and regulations. Upon issuance by the director of new standard job classifications and descriptions pursuant to Subsection B of 11.1.2.15 NMAC infra, the director shall mail copies of the said job classifications and descriptions pursuant to Paragraph (3) of Subsection B of 11.1.2.14 NMAC, infra.~~

~~C. Addition, deletion, or modification of job classifications:~~

~~(1) Any person wishing to add, delete, or modify a standard job classification and description shall submit a written request containing the proposed classification and description.~~

~~(2) Any proposal for a standard job classification and description shall contain the following clearly defined information:~~

~~(a) occupational title;~~

~~(b) a description of the physical duties to be performed by a laborer or mechanic having such a classification;~~

~~(c) evidence of existing prevailing rates of pay, including fringe benefits;~~

~~(d) evidence that the proposed classification is used in the type of contract work for which the classification is proposed; and~~

~~(e) Such other justification as the director may deem advisable in the circumstances.~~]

Authority: Subsections A to C of 11.1.2.12 NMAC adopted pursuant to Section 13-4-11, New Mexico Statutes Annotated, 1978 Compilation

A. Purpose and scope: The regulations in this part set forth the procedures for establishment of standard job classifications and descriptions for various classifications of workers employed on contract work of a similar nature and as defined in the several paragraphs of Subsection B of 11.1.2.9 NMAC, of these rules and regulations. These are adopted in order to permit the director to administer the Public Works Minimum Wage Act uniformly.

B. Adoption of standard job classifications and descriptions:

(1) The director may seek the assistance of contractors, contractors' associations, labor organizations, interested parties, and public officers in establishing standard job classifications and descriptions for work to be performed in the state subject to the Public Works Minimum Wage Act. Separate standard job classifications and descriptions shall be established for each of the separate types of construction projects as defined in the several paragraphs of Subsection B of 11.1.2.9 NMAC, of these rules and regulations in order to reflect the various classifications of laborers and mechanics employed on contract work of a similar nature.

(2) Standard job classifications and descriptions shall be adopted as regulations by the director pursuant to Section 13-4-11, NMSA 1978, and in accordance with the procedures set out in 11.1.2.15 NMAC. Existing job classifications and descriptions shall remain effective until superseded on the effective date of newly adopted standard job classifications and descriptions as provided in 11.1.2.15 NMAC. Upon issuance by the director of new standard job classifications and descriptions pursuant to Subsection B of 11.1.2.15 NMAC infra, the director shall mail copies of the said job classifications and descriptions pursuant to Paragraph (3) of Subsection B of 11.1.2.14 NMAC, infra.

C. Addition, deletion, or modification of job classifications:

(1) Any person wishing to add, delete or modify a standard job classification and description shall submit a written request containing the proposed classification and description.

(2) Any proposal for a standard job classification and description shall contain the following clearly defined information:

(a) occupational title;

(b) a description of the physical duties to be performed by a laborer or mechanic having such a classification;

(c) evidence of existing prevailing rates of pay, including fringe benefits;

(d) evidence that the proposed classification is used in the type of contract work for which the classification is proposed; and

(e) such other justification as

the director may deem advisable in the circumstances.

[5/31/72, 1/14/76, 6/4/79, 11/4/88; 11.1.2.12 NMAC - Rn & A, 11 NMAC 1.1.12, 12/31/09]

11.1.2.13 [~~SURVEY CATEGORIES AND WAGE DIFFERENTIALS WITHIN EACH CRAFT CLASSIFICATION, APPLIED ON PUBLIC WORKS PROJECTS IN NEW MEXICO:~~ ~~Authority: Subsections A to E of 11.1.2.13 NMAC adopted pursuant to Section 13-4-11, New Mexico Statutes Annotated, 1978 Compilation.~~

~~A. Purpose and scope: The regulations in this part set forth the establishment of survey categories within the various crafts employed on contract work of a similar nature, and of wage rate differentials within each such craft which will remain constant and reflect the skill differential of each classification within the craft, provided that changes may be made if future surveys clearly substantiate such change.~~

~~B. Survey categories for type A construction: The following classifications within the various crafts shall be surveyed by the director in his survey:~~

~~(1) bricklayer, blocklayer, stonemason;~~

~~(2) carpenters;~~

~~(3) cement masons;~~

~~(4) electricians-lineman/wireman or technician (outside);~~

~~(5) ironworkers;~~

~~(6) *group iv operators;~~

~~(7) *group ii truck drivers;~~

~~(8) brush painters;~~

~~(9) spray painters;~~

~~(10) plumbers, pipe fitters, steam fitters;~~

~~(11) *group II laborers (semi-skilled).~~

~~(12) Each of the above asterisked categories shall constitute the basis for wage rate differentials for the respective crafts which each represents. When appropriate wage requests are made for crafts which are not listed above, the director shall utilize the same survey procedures and base periods to determine the prevailing rate as he uses for the other crafts.~~

~~C. Survey categories for type "B" and Type "C" construction: The following classifications within the various crafts shall be surveyed by the director in his survey:~~

~~(1) asbestos worker/heat and frost insulator;~~

~~(2) boilermaker;~~

~~(3) bricklayer, blocklayer, stonemason;~~

~~(4) carpenter/lather - building; residential;~~

~~(5) carpenter/lather - heavy engineering;~~

~~(6) cement mason (composition or mastic - finishing machine operator) - building, residential, and heavy engineering;~~

~~(7) electricians: *wireman or technician (inside), *lineman or technician (outside); *installer (sound);~~

~~(8) elevator constructor;~~

~~(9) helper;~~

~~(10) glazier;~~

~~(11) ironworker;~~

~~(12) *painters;~~

~~(13) plasterer;~~

~~(14) plumbers and pipefitters, lead burner;~~

~~(15) roofer;~~

~~(16) sheet metal worker;~~

~~(17) soft floor layer (carpet, asph. tile, linoleum);~~

~~(18) sprinkler fitter;~~

~~(19) tile setter, helper;~~

~~(20) *group VIII operators - building ; residential;~~

~~(21) semi - skilled laborers: cement mason tenders; hodcarriers; plaster spreader opr.; plaster tenders; gunite nozzlemen; pumpcrete nozzlemen - building; residential;~~

~~(22) tenders (to cement mason and plasterer); hodcarriers - heavy engineering;~~

~~(23) *group II truck drivers - building; residential;~~

~~(24) *group IV operators - heavy engineering;~~

~~(25) *group II truck drivers - heavy engineering.~~

~~(26) Each of the above asterisked categories shall constitute the basis for wage rate differentials for the respective crafts which each represents. When appropriate wage requests are made for crafts which are not listed above, the director shall utilize the same survey procedures and base periods to determine the prevailing rate as he uses for other crafts.~~

~~D. Wage rate differentials in craft classifications:~~

~~(1) The director may seek the assistance of contractors, contractors' associations, labor organizations, other interested parties and public officers in setting appropriate wage differentials within each craft employed on contract work of a similar nature.~~

~~(2) Informational data pertaining to wage rate differentials within a craft employed on contract work of a similar nature may be presented to the director by any of the above-named interested parties.~~

~~E. Changes in wage spreads:~~

~~(1) Wage rate investigations shall be conducted to ascertain the propriety of wage differentials within craft classifications employed on contract work of a similar nature.~~

~~(2) When a change in wage rate differential is indicated by substantial evidence, all known interested parties shall be notified and given a reasonable time in which to present their views before a permanent change in a wage differential is made by the director.~~

~~F. Appendix A: Electrician classifications and wage spreads for type "A" construction:~~

~~(1) Groundman (outside) -$3.41;~~

~~(2) Equipment operator (outside) -$0.59;~~

~~(3) Lineman/wireman or technician(outside) (Base);~~

~~(4) Cable splicer (outside) +$1.18.~~

~~G. Appendix B: Laborer classification groups and wage spreads for type "A" construction:~~

~~(1) Group I (unskilled): -$0.30: building and common laborer; carpenter tender chainman; rodman; stakedriver; concrete buggy operator (hand); concrete workers; flagman; soil sample tester;~~

~~(2) Group II (semiskilled): (base): wagon, air tract, drill and diamond drillers' tender (outside); air and power tool man (not a carpenter's tool); asphalt heaterman; asphalt jointman; asphalt raker; batching plant scaleman; tenderers (to cement mason and plasterer); chain sawman; concrete power buggyman; concrete touch-up man; concrete sawman - coring mach.; curbing machine, asphalt or cement; cutting torchman; metal form setter-road; grade setter; hod carrier; mortar mixer and mason tender; powderman or blaster helper; sandblaster; scaler; vibratorman (hand type) ; vibratory compactor (hand type); window washer; nurseryman-gardener; wagon, air tract, drill and diamond driller (outside); roadway hardware worker;~~

~~(3) Group III (miscellaneous): +$0.40: gunite pumpcreteman and nozzleman; multi-plate setter; manhole builder; pipielayer; powderman-blaster-makeup; landscaper; traffic control technician; laboratory technician.~~

~~H. Appendix C: Equipment operator classification groups and wage spreads for type "A" construction:~~

~~(1) Group I: -$0.80: concr. paving curing machine;~~

~~(2) Group II: -$0.60: belt type conveyors (material and concrete); broom (self prop.); fork lift; grease truck oper.; head oiler; hydro lift; tractor (under 50 drawbar HP with or without attach.); indus. loco. brakeman; front end loader (2CY or less): fireman; oiler; screedman; roller (pull type); mulching machine, roller (self propelled);~~

~~(3) Group III: -$0.02: concr. paving form grader; concr. paving gang~~

vibrator; concr. paving joint or saw mach.; concr. paving sub grader; tractor with backhoe attachment; subgrade or base finisher; power plant (elec. gen. or welding mach.);

(4) Group IV: (base): bulldozer (including self-propelled roller with dozer attachment); batch or continuous mix plant (concr., soil cement, or asph.); roller (steel wheel); front end loader (2 through 10CY); scraper oper., motor grader;

(5) Group V: +$0.00: asph. distr.; asph. paving or laydown mach.; asph. retort heater; mixer, heavy duty, asph. or soil cement; trenching mach.; clam type shaftmucker; backhoe, clamshell, dragline, gradall, shovel (under 3/4 CY); elevating grader or belt loader; cranes (crawler or mobile) under 20 ton; air compressor (300 CFM and over); crushing screening and washing plants; drlg. mach. (cable core or rotary); mixer, concr. (1 CY and less); pump (6 in. intake or over); winch truck; hoist (1 drum); indus. loco. motorman; lumber stacker; tractor (50 drawbar HP or over);

(6) Group VI: +$0.15: concr. paver mixer; hoist (2 drums and over); side boom; traveling crane; piledriver; backhoe, clamshell, dragline, gradall, shovel (3/4 CY to 3 CY); cranes (crawler or mobile) 20 ton to 40 ton; front end loader (over 10 CY); mixer., concr. (over 1 CY); mechanic and/or welder;

(7) Group VII: +$0.20: concr. slip-form paving mach.; concr. paving finishing mach.; concr. paving longitudinal float; gunite mach.; refrig.; jumbo form or drlg.; stage; slusher; concr. paving spreader; pumpcrete mach.; grout pump oper.;

(8) Group VIII: +$0.35: mine hoist; bulldozer (multiple units); scraper (multiple units); mucking mach.; backhoe, clamshell, dragline, gradall, shovel (over 3 CY); cranes (crawler or mobile) over 40 tons;

(9) Group IX: +$0.85: belt loader (CMI type) oper.; pipemobile oper. assistant; derrick, cableway;

(10) Group X: +$1.65: pipemobile operator; mole operator.

I. Appendix D: Truck driver classification groups and wage spreads for type "A" construction:

(1) Group I: -$0.20: pick-up truck 3/4 ton or under; warehouseman; dump truck, under 8 cubic yards; flatbed, 1 1/2 ton or under;

(2) Group II: (BASE): dump truck, 8 to 16 cubic yards; tank truck, under 6,000 gallons; flatbed, over 1 1/2 ton;

(3) Group III: +$0.20: spreader box (self-propelled); distributor (asphalt) transit mix; lowboy, light equipment; off-highway hauler; tank truck, over 6,000 gallons; dump truck, over 16 cubic yards; trailer semi-trailer dump;

(4) Group IV: +$0.40: diesel-powered transport; lowboy, heavy equipment.

J. Appendix E: Electrician classifications and wage spreads for type "H" heavy engineering construction:

(1) Outside classifications:

(a) Groundman (outside) -$3.41;

(b) Equipment operator (outside) -$0.59;

(c) Lineman or technician (outside) (base);

(d) Cable splicer (outside) +$1.18.

(2) Inside classifications:

(a) Wireman or technician (inside) (base);

(b) Cable splicer (inside) +$1.73.

(3) Sound classifications:

(a) Installer (sound) (base);

(b) Technician (sound) +$1.55;

(c) Soundman +$3.62.

K. Appendix F: Laborer classification groups and wage spreads for type "H" heavy engineering construction:

(1) Group I (unskilled): -$0.30: building and common laborer; carpenter tender; chainman; rodman; stakedriver; concr. buggy opr. (hand); concr. workers; flagmen; soil sample tester;

(2) Group II (semi-skilled): (base): wagon, air tract, drill and diamond drillers' tender (outside); air and power tool opr. (not a carpenter's tool); asbestos remover; asph. heaterman; asph. jointman; asph. raker; batching plant scaleman; tenderers (to cement mason and plasterer); chain sawman; concr. power buggyman opr.; concr. touch-up man; concr. sawman - coring mach.; curbing mach., asph. or cement; cutting torchman; metal form setter-road; grade setter; hod carrier; mortar mixer and mason tender; powderman or blaster helper; sandblaster; scaler; vibratorman (hand type); vibratory compactor (hand type); window washer; nurseryman-gardener; wagon, air tract, drill and diamond driller (outside); roadway hardware worker;

(3) Group III (miscellaneous): +$0.30: gunite pumpcreteman and nozzleman; multi-plate setter; manhole builder; pipelayer; powderman - blaster - makeup; landscaper; traffic control technician; laboratory technician;

(4) Group IV (shaft workers): +$0.87: air tugger opr.; concr. workers (incl. all cement chipping and finish, underground); drillers; form setters and handlers; hand muckers; miners; powdermen; timbermen (wood or steel); reinforcing steel setters; tunnel liner; plate setters, all cutting and welding incidental to miner's work; toplanders; bottomlanders;

(5) Group V (shaft workers): +$1.12: shifters;

(6) Group VI (tunnel workers): -$0.15: laborers and handmuckers;

(7) Group VII (tunnel workers): +$0.00: groutmen; nippers; trackmen;

(8) Group VIII (tunnel workers): +$0.25: drillers; form setters and handlers; scalers; miners; timbermen; brakemen; concr. workers (incl. all cement chipping and finishing underground); reinforcing steel setters; timbermen (wood or steel); tunnel liner plate setters; all cutting and welding incidental to miner's work;

(9) Group IX (tunnel workers): +$0.45: powdermen;

(10) Group X (tunnel workers): +$1.12: shifters.

L. Appendix G: Equipment operator classification groups and wage spreads for type "H" - heavy engineering construction:

(1) Group I: -$0.80: concr. paving curing machine;

(2) Group II: -$0.60: belt type conveyors (material and concr.); broom (self prop.); forklift; greases truck oper.; head oiler; hydro lift; tractor (under 50 drawbar HP with or without attach.); indus. loco. brakeman; front end loader (2 CY or less); fireman; oiler; screedman; roller (pull type); mulching machine, roller (self propelled);

(3) Group III: -$0.02: concr. paving form grader; concr. paving gang vibrator; concr. paving joint or saw mach.; concr. paving sub grader; tractor with backhoe attachment; subgrade or base finisher; power plant (elec. gen. or welding mach.);

(4) Group IV: (base): bulldozer (including self-propelled roller with dozer attachment); batch or continuous mix plant (concr., soil-cement, or asph.); roller (steel wheel); front end loader (2 through 10 CY); scraper oper.; motor grader;

(5) Group V: +$0.00: asph. distr.; paving or laydown mach.; asph. retort heater; mixer, heavy duty, asph. or soil cement; trenching mach.; clam type shaftmucker; backhoe, clamshell, dragline, gradall, shovel (under 3/4 CY); elevating grader or belt loader; cranes (crawler or mobile) under 20 ton; air compressor (300 CFM and over); crushing screening and washing plants; drlg. mach. (cable core or rotary); mixer, concr. (1 CY and less); pump (6 in. intake or over); winch truck; hoist (1 drum); indus. loco. motorman; lumber stacker; tractor (50

drawbar HP or over);

(6) Group VI: +$0.15: concr. paver mixer; hoist (2 drums and over); side boom; traveling crane; piledriver; backhoe, clamshell, dragline, gradall, shovel (3/4 CY to 3 CY); cranes (crawler or mobile) 20 ton to 40 ton; front end loader (over 10 CY); mixer., concr. (over 1 CY); mechanic and/or welder;

(7) Group VII: +$0.20: concr. slip-form paving mach.; concr. paving finishing mach.; concr. paving longitudinal float; gunite mach.; refrig.; jumbo form or drlg.; stage; slusher; concr. paving spreader; pumpcrete mach.; grout pump oper.;

(8) Group VIII: +$0.35: mine hoist; bulldozer (multiple units); scraper (multiple units); mucking mach.; backhoe, clamshell, dragline, gradall, shovel (over 3 CY); cranes (crawler or mobile) over 40 tons;

(9) Group IX: +$0.85: belt loader (CMI type) oper.; pipemobile oper. assistant; derrick, cableway;

(10) Group X: +$1.65: pipemobile operator; mole operator.

M. Appendix H: Truck driver classification groups and wage spreads for type "H" - heavy engineering construction:

(1) Group I: -$0.20: pick-up truck 3/4 ton or under; warehouseman; dump truck, under 8 cubic yards; flatbed, 1 1/2 ton or under;

(2) Group II: (base): dump truck, 8 to 16 cubic yards; tank truck, under 6,000 gallons; flatbed, over 1 1/2 ton;

(3) Group III: +$0.20: spreader box (self-propelled); distributor (asphalt) transit mix; lowboy, light equipment; off-highway hauler; tank truck, over 6,000 gallons; dump truck, over 16 cubic yards; trailer semi-trailer dump;

(4) Group IV: +$0.40: diesel-powered transport; lowboy, heavy equipment.

N. Appendix I: Electrician classifications and wage spreads for type "B" building construction and type "A" residential construction:

(1) Outside classifications:

(a) Groundman (outside) -$3.41;

(b) Equipment operator (outside) -$0.59;

(c) Lineman or technician (outside) (base);

(d) Cable splicer (outside) +$1.18.

(2) Inside classifications:

(a) Wireman or technician (inside) (base);

(b) Cable splicer (inside) +1.73.

(3) Sound classifications:

(a) Installer (sound) (base);

(b) Technician (sound) +$1.55;

(c) Soundman +$3.62.

O. Appendix J: Laborer classification groups and wage spreads for type "B" building and type "C" residential construction:

(1) Group I: -$0.87: watchmen;

(2) Group II (unskilled): -$0.30: building and common laborers; carpenter tenders; concr. workers; stakedrivers; concr. buggy opr. (hand); flagmen; soil sample tester;

(3) Group III (semi-skilled): (base): air and power tool opr. (not a carpenter's tool); asbestos remover; asph. heaterman; asph. jointman; asph. raker; batching plant scaleman; chain sawman; concr. touch-up man; concr. sawman - coring mach.; curbing mach. asph. or cement; cutting torchman; metal form setter-road; grade setter; gunite reboundmen; rod and chainmen; concrete power buggy opr.; powderman or blaster helper; sandblaster (pot men); nozzlemen; scaler; vibratorman (handtype); vibratory compactor (hand type); wagon core and diamond drillers' tenders (outside); window washers; fog mach. opr.; nurseryman-gardener; multi-plate setter; conc. burner; cement mason tenders; hodcarriers; mortar mixers; plaster spreader opr.; plaster tenders; gunite nozzlemen; pipelayer; pumpcrete nozzlemen; manhole builder; roadway hardware worker;

(4) Group IV: +$0.10: wagon, core, diamond drillers;

(5) Group V: (miscellaneous): +$0.30: landscaper; traffic control technican; laboratory technician;

(6) Group VI: +$0.45: powdermen and blasters.

P. Appendix K: Equipment operator classification groups and wage spreads for type "B" building construction and type "C" residential construction:

(1) Group I: -$2.52: fireman; oiler; helpers: mechanic, welder, grease truck; screedman; scale oper. such as (bin-a-batch) rubber tired farmtype tractor; tractors under 50 H.P w/o attachments; brakeman; concr. paving curing mach. (bridge type);

(2) Group II: -$1.48: rollers; sheepsfoot or pneumatic self propelled w/o dozer; concr. conveyor; service truck opr. (head oiler); air compressor (300 CFM and over); pumps (6" and over); screening plants: concr. mixers (under 1 CY); concr. saw or grinder-span type; hoists, 1 drum; air tugger; elevating belt type loaders; fork-lift lumber stacker; tractor-farm type (under 50 H.P. w/attachments); motorman and industrial locomotive opr.; winch trucks; front end loader (under 2 CY). power plants which generate over 15 KW; welding machines;

(3) Group III: -$1.40: bituminous distributors; boilers, retort and hot oil heaters; concr. mixers (1 CY and over). concr. paver (single drum); drlg. equip.; motor graders (rough); shaft and tunnel equip.; refrig., slusher, jumbo form; trenching mach. (all types); pumpcrete and gunite mach.; slipform paver; mech. bull-floats; concr. slab spreading mach.; concr. slab finish. mach.; asph. plants; bitum. finish mach.; crushing plants;

(4) Group IV: -$1.34: front end loader (2 thru 10 CY); rollers steel wheeled (all types); bulldozers: scrapers (motor or towed); elevating graders; concr. batching plants; self-propelled rollers, (equipped w/dozer); twin-bowl scrapers and quad 8 or 9 pushers; three bowl scrapers; tractor (farm type) w/hydraulic backhoes;

(5) Group V: -$1.28: concr. paver, double drum; cat cranes; hysters; side and swingboom cats; hoist (2 drum); auto fine grader;

(6) Group VI: -$1.18: mucking mach. (all types); motor grader-finish;

(7) GroupVII: -$1.08: hydraulic cranes (with less than 50' of boom - 20 tons and under); steam engineers; loader (front end and over 10 CY); concr. pump (snorkel type); mechanic welder;

(8) Group VIII: (base): all shovel type equip.: cranes; draglines; backhoes; derricks; guy and stiff leg; pipemobile (#2 opr.); piledriver; hydraulic cranes (20 tons and over); mine hoist (belt loader "CMI" type); cranes, draglines (w/booms and jib over 150'). shovel (wheel type); boring mach. (tunnel or shaft mole); pipemobile.

Q. Appendix L: Truck driver classification groups and wage spreads for type "B" building construction and type "C" residential construction:

(1) Group I: -$0.12: pick-up 3/4 ton and under; service station; lubrication; light tire repair or washer; swamper or riding helper; teamster 2 or 4 up; ambulance driver;

(2) Group II: (base): bus or taxi driver; dump or batch truck, under 8 CY WLC; flatbed (bobtail) 2 ton and under; mechanic and welder helper: forklift under 5 ton MRC;

(3) Group III: +$0.08: dump trucks (incl. all hwy. and off-hwy.) 8 up to 16 CY WLC; water, fuel or oil trucks less than 3,000 gal.; flatbed (bobtail) over 2 tons;

(4) Group IV: +$0.20: distributor driver; hvy. tire repair; lumber carrier driver; young buggy or similar equip.; transit mix or agitator 2 or 3 axle bobtail equip.; scissor truck; bulk cement bobtail 2 or 3 axles; semi-

~~trailer driver (flatbed or van single axle); forklift 5 ton and over MRC; field equip. servicemen;~~

~~(5) Group V: +$0.25: dumpster and dumpcrete driver; water, fuel or oil truck (3,000 to 6,000 gal. capacity); lowboy, light equip. driver; euclid type tank wagon (under 6,000 gal.);~~

~~(6) Group VI: +$0.35: vacuum truck; dump trucks (incl. all hwy. and off-hwy.) 16 up to 22 CY WLC;~~

~~(7) Group VII: +$0.45: transit mix or agitator semi or 4 axle equip. driver; flaherty truck type spreader box driver; slurry truck driver; bulk cement driver: semi-doubles: 4 axle bobtail; winch truck and "A" frame; dump trucks (incl. all hwy. and off-hwy.) 22 CY up to 35 CY WLC head field equip. serviceman;~~

~~(8) Group VIII: +$0.59: euclid diesel powered turnarocker; terra cobra; DW 10; DW 20; letourneau pulls and similar diesel powered equip.; lowboy heavy equip. driver; water, fuel or oil trucks (6,000 gal. and over incl. tank wagon drivers); semi-trailer driver (flatbed or van tandems); light equip. mechanic; dump trucks (incl. all hwy. and off-hwy.) 35 CY WLC and over; truck and trailer or semi-trailer (flatbed); eject all driver;~~

~~(9) Group IX: +$0.74: lowboy (heavy equip., double gooseneck); heavy equip. mechanic; welder (body and fender man); warehouseman; material checker-cardexman; expeditor.~~]

CATEGORIES WITHIN EACH CRAFT CLASSIFICATION, APPLIED ON PUBLIC WORKS PROJECTS IN NEW MEXICO: Authority: Subsections A to C of 11.1.2.13 NMAC adopted pursuant to Section 13-4-11, New Mexico Statutes Annotated, 1978 Compilation.

A. Purpose and scope: The regulations in this part set forth the establishment of categories within the various crafts employed on contract work of a similar nature within each such craft which will remain constant and reflect the skill differential of each classification within the craft. Predetermination of wage rates for each category will be made based on information provided to the director for each classification. Within a category or classification subclassifications should be broken out and distinct in wage rate data provided to the director, i.e., sound technicians, operator groups, laborer groups.

B. Categories for type "A" construction: The following classifications within the various crafts shall be determined by the director.

(1) bricklayer, blocklayer, stonemason;
(2) carpenters;
(3) cement masons;
(4) electricians-lineman/wireman or technician (outside);
(5) ironworkers;
(6) operators (groups);
(7) truck drivers (groups);
(8) brush painters;
(9) spray painters;
(10) plumbers, pipe fitters, steam fitters;
(11) laborers (groups);

C. Categories for type "B"construction: The following classifications within the various crafts shall be determined by the director.

(1) heat and frost insulator;
(2) boilermaker;
(3) bricklayer, blocklayer, stonemason;
(4) carpenter/lather - building;
(5) drywall finisher/taper;
(6) cement mason (composition or mastic - finishing machine operator) - building;
(7) electricians: wireman or technician (inside), lineman or technician (outside): installer (sound);
(8) elevator constructor;
(9) elevator constructor helper;
(10) glazier;
(11) ironworker;
(12) painters;
(13) plasterer;
(14) plumbers and pipefitters, lead burner;
(15) roofer;
(16) sheet metal worker;
(17) soft floor layer (carpet, asph. tile, linoleum);
(18) sprinkler fitter;
(19) tile setter;
(20) tile setter helper;
(21) laborers (groups);
(22) operators - building (groups);
(23) truck drivers - building (groups);
(24) operators - heavy engineering (groups).

D. Categories for type "C" construction: The following classifications within the various crafts shall be determined by the director.

(1) heat and frost insulator;
(2) boilermaker;
(3) bricklayer, blocklayer, stonemason;
(4) carpenter/lather - building;
(5) drywall finisher/taper;
(6) cement mason (composition or mastic - finishing machine operator) - building;
(7) electricians: wireman or technician (inside), lineman or technician (outside), installer (sound);
(8) elevator constructor;
(9) elevator constructor helper;
(10) glazier;
(11) ironworker;
(12) painters;
(13) plasterer;
(14) plumbers and pipefitters, lead burner;
(15) roofer;
(16) sheet metal worker;
(17) soft floor layer (carpet, asph. tile, linoleum);
(18) sprinkler fitter;
(19) tile setter;
(20) tile setter helper;
(21) laborers, groups
(22) operators - building, groups;
(23) truck drivers - building, groups;
(24) operators - heavy engineering, groups.

E. Categories for type "H" construction: The following classifications within the various crafts shall be determined by the director.

(1) heat and frost insulator;
(2) boiler maker;
(3) bricklayer/blocklayer/stone mason;
(4) carpenter/lather;
(5) millwright/piledriver;
(6) cement mason;
(7) electricians (and all included subclassifications);
(8) glazier;
(9) ironworker;
(10) painter;
(11) plumber/pipefitter.

[5/31/72, 1/14/76, 6/4/76, 6/4/79, 1/29/81, 5/28/81, 3/25/85, 8/29/85, 12/16/85, 11/4/88, 9/25/89, 1/14/92, 2/14/94, 5/31/94, 8/15/98; 11.1.2.13 NMAC - Rn & A, 11 NMAC 1.1.13, 12/31/09]

End of Adopted Rules Section

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Other Material Related to Administrative Law

NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION

Director's Response to Public Comment

The proposed changes to the WCA Healthcare Provider Fee Schedule and Part 7 of the WCA Rules were released for public comment on September 28, 2009 through October 28, 2009.

The WCA received comments supporting the broadening of payer groups used to formulate the medical fee schedule because of cost shifting within the system. Medical cost containment is crucial to attract business to New Mexico in the future. The changes to the fee schedule would represent an approximate increase of two percent in total medical costs in workers' compensation. Prior to issuing a final fee schedule, the WCA Director followed the processes established by NMSA 1978, 52-4-5 by soliciting comments from the Medical Advisory Committee and at a public hearing. The fee schedule changes will be implemented as proposed.

The original request from the Medical Advisory Committee asked that the WCA examine a fee for the calculation of an impairment rating. The WCA initially drafted a proposed rule to establish the fee based on a unit of time. This proposed rule was presented to the Medical Advisory Committee and discussed. During the public comment period, comments were received concerning the amount allowed for the calculation: some supported a lower amount and some supported a higher amount. A discussion concerning the practice of using other CPT codes other than the designated disability rating CPT codes indicated that there were discrepancies on how the CPT codes should be utilized when reviewing medical records and taking medical histories for impairment ratings. The WCA had received CPT code data from a limited number of insurers to establish a unit price for impairment rating, including the review of medical records. The current practice of using multiple CPT codes for a variety of scenarios of medical review for impairment ratings made it difficult to establish a reasonable price. The WCA will ask the Medical Advisory Committee to reevaluate the proposed rule. At this time, the impairment ratings CPT codes will continue to be billed on a by report basis.

At the hearing, comments were received concerning the implementation of the three day authorization requirement. Concern was expressed that closed files may take longer to locate than active files. A question was also raised as to whether the insurer has to respond to a request for authorization even though the claim has been denied. Insurers would also need a medical report to find out what procedure is being requested and the justification for it. A scenario involving multiple carriers could create problems with authorization as well. Many speakers suggested that there were not sufficient requirements for tracking the authorization requests and any potential response, making enforcement difficult. Another speaker said that most adjusters authorize procedures in a timely manner and that the WCA should deal with the adjusters that are not authorizing procedures in a timely manner. Others suggested that the rule would generate more litigation and force a denial. There was also a recommendation that the WCA convene a task force to study this issue. The WCA will not enact this requirement until it can establish appropriate and fair paper trail requirements for such a rule.

With regard to anesthesia, it was suggested that the current anesthesia charges be increased by 10% as opposed to the proposed 12.7 increase. Based upon the regional and local billed charged data, the support for the 12.7% increase was strongly evident. Additionally, review of the anesthesia maximum amount had not been adjusted for over 5 years. Other comments suggested that the WCA review the anesthesia rules annually. The director will ask the Medical Advisory Committee to review this request. The rule will be implemented as proposed.

The proposed change of name for the fee schedule will be implemented. It will be referred to in the future as "healthcare provider fee schedule."

The public record of this rulemaking shall incorporate this Response to Public Comment and the formal record of the rulemaking proceedings shall close upon execution of this document.

_____

Glenn R. Smith
Director
N.M. Workers' Compensation Administration
December 15, 2009

End of Other Related Material Section

Submittal Deadlines and Publication Dates 2009

Volume XX	Submittal Deadline	Publication Date
Issue Number 21	November 2	November 13
Issue Number 22	November 16	December 1
Issue Number 23	December 2	December 15
Issue Number 24	December 16	December 31

Submittal Deadlines and Publication Dates 2010

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Issue Number 1	January 4	January 15
Issue Number 2	January 19	January 29
Issue Number 3	February 1	February 12
Issue Number 4	February 15	February 26
Issue Number 5	March 1	March 15
Issue Number 6	March 16	March 31
Issue Number 7	April 1	April 15
Issue Number 8	April 16	April 30
Issue Number 9	May 3	May 14
Issue Number 10	May 17	May 28
Issue Number 11	June 1	June 15
Issue Number 12	June 16	June 30
Issue Number 13	July 1	July 15
Issue Number 14	July 16	July 30
Issue Number 15	August 2	August 16
Issue Number 16	August 17	August 31
Issue Number 17	September 1	September 15
Issue Number 18	September 16	September 30
Issue Number 19	October 1	October 15
Issue Number 20	October 18	October 29
Issue Number 21	November 1	November 15
Issue Number 22	November 16	December 1
Issue Number 23	December 2	December 15
Issue Number 24	December 16	December 30

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