

# **TITLE 2: PUBLIC FINANCE**

## **CHAPTER 1: PUBLIC FINANCE GENERAL PROVISIONS**

### **PART 1: GENERAL PROVISIONS [RESERVED]**

### **PART 2: ADOPTION OF RULES BY THE STATE BOARD OF FINANCE**

#### **2.1.2.1 ISSUING AGENCY:**

State Board of Finance, 181 Bataan Memorial Building, Santa Fe, NM.

[2.1.2.1 NMAC - N, 1/15/2001]

#### **2.1.2.2 SCOPE:**

State board of finance.

[2.1.2.2 NMAC - N, 1/15/2001]

#### **2.1.2.3 STATUTORY AUTHORITY:**

Subsection E of Section 6-1-1 NMSA 1978 provides that the state board of finance, in addition to other powers and duties provided by law, may make rules and regulations for carrying out its duties and responsibilities as designated in statute.

[2.1.2.3 NMAC - N, 1/15/2001]

#### **2.1.2.4 DURATION:**

Permanent.

[2.1.2.4 NMAC - N, 1/15/2001]

#### **2.1.2.5 EFFECTIVE DATE:**

January 15, 2001, unless a later date is cited at the end of a section.

[2.1.2.5 NMAC - N, 1/15/2001]

#### **2.1.2.6 OBJECTIVE:**

This rule provides the rulemaking process used by the state board of finance, unless another process is required by law for a specific rule.

[2.1.2.6 NMAC - N, 1/15/2001]

**2.1.2.7 DEFINITIONS:**

**A. "Board"** means state board of finance.

**B. "New Mexico register"** means the official publication for all notices of rule makings and filings of adopted rules, including emergency rules, by agencies and is published by the state records administrator.

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

**D. "Records center"** means the New Mexico commission of public records, state records center and archives.

[2.1.2.7 NMAC - N, 1/15/2001; A, 10/17/2017]

**2.1.2.8 RULEMAKING NOTICE:**

**A.** The board shall distribute a notice of proposed rulemaking at least 30 days before the hearing on the rule change by:

- (1) posting the notice on the board website;
- (2) posting the notice on the sunshine portal;
- (3) making the notice available in the board's offices;
- (4) sending the notice by mail or electronic mail to persons who have made a written request to the board for advance notice of hearings and who have provided a mail or an electronic mail address to the board;
- (5) providing the notice to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees; and
- (6) publishing the notice in the New Mexico register and in a newspaper of general circulation in the state.

**B. Content** - The notice shall include:

- (1) a summary of the full text of the proposed rule;
- (2) a short explanation of the purpose of the proposed rule;

(3) a citation to the specific legal authority authorizing the proposed rule and the adoption of the rule;

(4) information on how a copy of the full text of the proposed rule may be obtained, including an internet link to the full text;

(5) information on how a person may comment on the proposed rule, where comments will be received and when comments are due;

(6) information on where and when a public rule hearing will be held and how a person may participate in the hearing; and

(7) a citation of technical information, if any, that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained.

[2.1.2.8 NMAC - N, 10/17/2017]

#### **2.1.2.9 COMMENTS ON RULEMAKING:**

**A.** The public comment period shall commence upon publication of the notice required by Section 2.1.2.8 NMAC and end as provided for in the notice.

**B.** A person may submit written or electronic comments on a proposed rule change, and those comments shall be made part of the hearing record. Individuals or entities shall provide written comments on the proposed rule change to the board administrator through the end of the public comment period, unless the board president or the board extends the time for filing comments. The board president or the board may extend the time for filing written or electronic comments by making an announcement at the hearing or by posting notice on the board's website. The board administrator shall post copies of written or electronic comments that persons have filed with the board administrator on the board's website as soon as practicable after they are filed.

[2.1.2.9 NMAC - N, 10/17/2017]

#### **2.1.2.10 PROCESS OF ADOPTION OF RULES:**

**A.** Upon completion of the public comment period, the board shall fully consider all submissions of public comments, and the findings and recommendations of a board committee or staff at a public hearing following the public comment period. After the public hearing, the board may:

(1) adopt the proposed rule without revision;

(2) revise and adopt the proposed rule;

- (3) revise the proposed rule and seek additional comments;
- (4) reject the proposed rule; or
- (5) repeal the rule.

**B.** At the time it adopts the rule, the board shall provide to the public a concise explanatory statement containing:

- (1) the date the agency adopted the rule;
  - (2) a reference to the specific statutory or other authority authorizing the rule;
- and
- (3) any findings required by a provision of law for adoption of the rule.

[2.1.2.10 NMAC - N, 1/15/2001; A & Rn, 10/17/2017]

#### **2.1.2.11 FILING AND PUBLICATION; EFFECTIVE DATE:**

**A.** Within 15 days after the adoption of a rule, the board staff shall file the adopted rule with the records center and shall provide to the public the adopted rule.

**B.** Except as provided in 2.1.2.10 NMAC, 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 the rule shall be the date of publication in the New Mexico register.

**C.** Relevant rules may be posted on the board's website, as determined by board staff.

[2.1.2.11 NMAC - N, 1/15/200; A & Rn, 10/17/2017]

#### **2.1.2.12 EMERGENCY RULES:**

**A.** If the board determines that an emergency exists which requires immediate action to prevent an imminent peril to public health, safety or welfare, the unanticipated loss of funding for a an agency program, or a violation of federal law, it may adopt a rule or amendment or repeal thereof, and the emergency rule shall become effective immediately upon its filing in accordance with the State Rules Act. The emergency rule shall be published in the New Mexico register within 30 days of this filing.

**B.** The board shall provide to the public a record of any finding pursuant to Subsection A of this section and a detailed justification for that finding before issuing an emergency rule. The record shall include a statement that the emergency rule is temporary. After such record has been provided to the public, the board may issue the

emergency rule immediately without a public rule hearing or with any abbreviated notice and hearing that it finds practicable.

**C.** The emergency rule shall not continue in effect longer than 45 days unless within that time the board commences proceedings to adopt the rule by issuing the notice required in Section 2.1.2.8 NMAC.

**D.** If the board commences proceedings under Section 2.1.2.8 NMAC, the emergency rule shall remain in effect until a permanent rule takes effect or until the procedures are otherwise completed.

**E.** In no event shall any emergency rule remain in effect for more than 120 days.

[2.1.2.12 NMAC - N, 1/15/2001; A & Rn, 10/17/2017]

## **PART 3: STIMULATE ECONOMIC DEVELOPMENT**

### **2.1.3.1 ISSUING AGENCY:**

Economic Development Department.

[2.1.3.1 NMAC - N/E, 7-14-2006]

### **2.1.3.2 SCOPE:**

This part governs the how the EDD and the authority shall coordinate with each other to, among other things, identify and evaluate potential projects' suitability for financing assistance and formulate recommendations, except to the extent that this part may be inconsistent with specific procedures in governing law. In cases where this part is inconsistent with any rulemaking procedures specified in governing law, the procedures in governing law apply, rather than the procedures in this part.

[2.1.3.2 NMAC - N/E, 7-14-2006]

### **2.1.3.3 STATUTORY AUTHORITY:**

These regulations are adopted by the economic development department ("EDD") pursuant to the Statewide Economic Development Finance Act, Section 6-25-1 to 6-25-28 NMSA 1978, ("Act") the purpose of which are to stimulate economic development in New Mexico and to provide a method of implementing the economic development assistance provisions of Article IX, Section 14.D of the constitution of the state. Section 6-25-5 NMSA 1978 provides that the department and the New Mexico finance authority ("authority") will coordinate to, among other things, identify and evaluate potential projects' suitability for financing assistance and formulate recommendations. These regulations are adopted pursuant to Subsection C of Section 6-25-5 NMSA 1978 and

Section 1.24.10 NMAC. The purpose of these regulations is to govern the activities of the department under the Statewide Economic Development Finance Act.

[2.1.3.3 NMAC - N/E, 7-14-2006]

**2.1.3.4 DURATION:**

Permanent.

[2.1.3.4 NMAC - N/E, 7-14-2006]

**2.1.3.5 EFFECTIVE DATE:**

July 14, 2006, unless a later date is cited at the end of a section.

[2.1.3.5 NMAC - N/E, 7-14-2006]

**2.1.3.6 OBJECTIVE:**

The purposes of this part are to standardize the procedures whereby the EDD and the authority shall coordinate with each other to, among other things, identify and evaluate potential projects' suitability for financing assistance and formulate recommendations under the Statewide Economic Development Finance Act.

[2.1.3.6 NMAC - N/E, 7-14-2006]

**2.1.3.7 DEFINITIONS:**

As used in this part: the terms used in these regulations shall have the same meaning as defined in the act unless other use defined in these regulations.

[2.1.3.7 NMAC - N/E, 7-14-2006]

**2.1.3.8 IDENTIFICATION OF PROJECTS:**

A. In accordance with Section 6-25-5 NMSA 1978, for the purpose of recommending projects to the authority for financing assistance, the department will coordinate with the authority to:

(1) survey potential eligible entities and projects and provide outreach services to eligible entities and local governments for the purpose of identifying and recommending projects to the authority;

(2) survey potential eligible entities and projects for suitability for financing assistance;

(3) formulate recommendations of projects that are suitable for financing assistance;

(4) obtain input and information relevant to the establishment and implementation of criteria for evaluating potential projects.

B. In identifying eligible entities and recommending projects, the department will consider and must determine that the entity is engaged in an enterprise that serves an economic goal and is suitable for financing assistance.

C. The department shall obtain information from the authority from time to time with respect to the availability of various types of financing assistance and the criteria used by the authority for evaluating potential projects.

[2.1.3.8 NMAC - N/E, 7-14-2006]

#### **2.1.3.9 ADMINISTRATIVE COORDINATION WITH AUTHORITY:**

The department will coordinate with the authority from time to time for the authority's provision of staffing support and assistance in carrying out the department's responsibilities under the act.

[2.1.3.9 NMAC - N/E, 7-14-2006]

#### **2.1.3.10 LIBERAL CONSTRUCTION:**

These guidelines shall be liberally construed to carry out their purpose.

[2.1.3.10 NMAC - N/E, 7-14-2006]

#### **2.1.3.11 SEVERABILITY:**

If any part or application of these guidelines is held invalid, the remainder of these guidelines, or their application to other persons or situations, shall not be affected.

[2.1.3.11 NMAC - N/E, 7-14-2006]

## **CHAPTER 2: AUDITS OF GOVERNMENTAL ENTITIES**

### **PART 1: GENERAL PROVISIONS [RESERVED]**

### **PART 2: REQUIREMENTS FOR CONTRACTING AND CONDUCTING AUDITS OF AGENCIES**

#### **2.2.2.1 ISSUING AGENCY:**

Office of the State Auditor.

[2.2.2.1 NMAC - Rp, 2.2.2.1 NMAC, 3/28/2023]

**2.2.2.2 SCOPE:**

All agencies and local public bodies as defined by the Audit Act and designated independent public accountants, including auditors of the OSA, performing professional services related to the examination of financial affairs and transactions of those agencies and local public bodies.

[2.2.2.2 NMAC - Rp, 2.2.2.2 NMAC, 3/28/2023; A, 7/16/2024]

**2.2.2.3 STATUTORY AUTHORITY:**

Audit Act, Section 12-6-12 NMSA 1978.

[2.2.2.3 NMAC - Rp, 2.2.2.3 NMAC, 3/28/2023; A, 7/16/2024]

**2.2.2.4 DURATION:**

Permanent.

[2.2.2.4 NMAC - Rp, 2.2.2.4 NMAC, 3/28/2023]

**2.2.2.5 EFFECTIVE DATE:**

March 28, 2023, unless a later date is cited at the end of a section.

[2.2.2.5 NMAC - Rp, 2.2.2.5 NMAC, 3/28/2023]

**2.2.2.6 OBJECTIVE:**

The objective is to establish regulations for all agencies and local public bodies, as well as the New Mexico state auditor's designated independent public accountants, including auditors of the OSA, performing financial audits, special audits, attestation engagements, performance audits, and forensic accounting engagements for the examination of the financial affairs of all governmental agencies and local public bodies of the state of New Mexico.

[2.2.2.6 NMAC - Rp, 2.2.2.6 NMAC, 3/28/2023; A, 7/16/2024]

**2.2.2.7 DEFINITIONS:**

In addition to the definitions in the Audit Act, Section 12-6-2 NMSA 1978, the following definitions will apply to all financial examinations performed under this rule:

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

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

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

(3) **"Abuse"** includes, but is not limited to, behavior that is deficient or improper when compared with behavior that a prudent person would consider reasonable and necessary business practice given the facts and circumstances but excludes fraud and noncompliance with provisions of laws, regulations, contracts, and grant agreements. Abuse also includes misuse of authority or position for personal interests or for the benefit of another or those of an immediate or close family member or business associate.

(4) **"ACFR"** means the state of New Mexico's annual comprehensive financial report.

(5) **"Attestation engagement"** means an engagement to issue, or where an IPA issues, an examination, a review, AUP report, or report on subject matter, or an assertion about subject matter that is the responsibility of an agency or local public body, including engagements performed pursuant to AICPA and GAGAS attestation standards and all engagements pursuant to Subsection A of Section 12-6-3 NMSA 1978.

(6) **"Audit"** means an examination of the financial affairs or performance of an agency or local public body pursuant to the authority of the Audit Act, 12-6-1, et seq., NMSA 1978.

(7) **"Audit documentation"** means the record of procedures performed, relevant evidence obtained, and conclusions reached (terms such as working papers or workpapers are also sometimes used).

(8) **"Auditor"** means designated independent public accountants, including auditors of the OSA, performing audit or attestation work as defined in the Audit Act and the Public Accountancy Act.

(9) **"AICPA"** means American institute of certified public accountants.

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

(11) **"AUP"** means agreed upon procedures.

**B. Definitions beginning with the letter "B": [RESERVED]**

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

(1) **"Component unit"** means a legally separate entity required to be reported in the financial statements of an agency or LPB due to the entity's close financial relationship with the primary agency or LPB.

(2) **"CPE"** means continuing professional education.

**D. Definitions beginning with the letter "D":** **"DFA"** means the New Mexico department of finance and administration.

**E. Definitions beginning with the letter "E":** **"ERB"** means the New Mexico education retirement board.

**F. Definitions beginning with the letter "F":**

(1) **"FCD"** means financial control division of DFA.

(2) **"FDS"** means financial data schedule.

(3) **"Fraud"** means obtaining something of value through willful misrepresentations. This includes, but is not limited to, fraudulent financial reporting, misappropriation of assets, corruption, and use of public funds for activities prohibited by the constitution or laws of the state of New Mexico. Fraudulent financial reporting means intentional misstatements or omissions of amounts or disclosures in the financial statements to deceive financial statement users, which may include intentional alteration of accounting records, misrepresentation of transactions, or intentional misapplication of accounting principles. Misappropriation of assets means theft of an agency's or LPB's assets, including theft of property, embezzlement of receipts, or fraudulent payments. Corruption means bribery and other illegal acts.

**G. Definitions beginning with the letter "G":**

(1) **"GAAP"** means generally accepted accounting principles that are accepted in the United States of America.

(2) **"GAAS"** means generally accepted auditing standards, which are systematic guidelines used by auditors when conducting audits of an entity's financial records in the United States of America.

(3) **"GAGAS"** means generally accepted government auditing standards, or the most recent revision of the yellow book issued by the comptroller general of the United States.

(4) **"GASB"** means governmental accounting standards board.

- (5) **"GSD"** means the New Mexico general services department.

**H. Definitions beginning with the letter "H":**

- (1) **"HED"** means the New Mexico higher education department.
- (2) **"HSD"** means the New Mexico human services department.
- (3) **"HUD"** means the United States department of housing and urban development.

**I. Definitions beginning with the letter "I":**

- (1) **"Independence"** means both:
- (a) independence of mind: The state of mind that permits the conduct of an engagement without being affected by influences that compromise professional judgment, thereby allowing an individual to act with integrity and exercise objectivity and professional skepticism; and
- (b) independence in appearance: The absence of circumstances that would cause a reasonable and informed third party to reasonably conclude that the integrity, objectivity, or professional skepticism of an audit organization or member of the engagement team had been compromised.
- (2) **"IPA"** means an independent public accountant designated by the state auditor to perform financial audits, special audits, attestation engagements, performance audits, and forensic accounting engagements for the examination of the financial affairs of agencies and local public bodies.

**J. Definitions beginning with the letter "J": [RESERVED]**

**K. Definitions beginning with the letter "K": [RESERVED]**

**L. Definitions beginning with the letter "L":**

- (1) **"LGD"** means the local government division of DFA.
- (2) **"LPB"** means local public body as defined in the Audit Act, Section 12-6-2 NMSA 1978.

**M. Definitions beginning with the letter "M": [RESERVED]**

**N. Definitions beginning with the letter "N":**

- (1) **"NMAC"** means New Mexico administrative code.

(2) **"NMSA"** means New Mexico statutes annotated.

(3) **"Non-attestation engagement"** means any engagement that is not an attestation engagement, including, but not limited to, services performed in accordance with the statement on standards for consulting services or the statement on standards for forensic services, or any other engagement that is not under Section 12-6-3 NMSA 1978, including certain agency-initiated or other engagements in which the IPA's role is to perform an engagement, assist the client or testify as an expert witness in accounting, auditing, taxation, or other matters, given certain stipulated facts.

**O. Definitions beginning with the letter "O":** **"Office"** or **"OSA"** means the office of the state auditor of New Mexico.

**P. Definitions beginning with the letter "P":**

(1) **"PED"** means the New Mexico public education department.

(2) **"PERA"** means the New Mexico public employee retirement association.

(3) **"Primary government"** means the primary agency or primary local public body that a component unit is attached to due to their financial relationship.

**Q. Definitions beginning with the letter "Q": [RESERVED]**

**R. Definitions beginning with the letter "R":**

(1) **"REC"** means regional education cooperative.

(2) **"Report"** means a document issued as a result of an annual financial and compliance audit, special audit, attestation engagement, performance audit, forensic accounting engagement, or AUP engagement regardless of whether the document is on the contractor's letterhead or signed by the contractor.

(3) **"RSI"** means required supplementary information.

**S. Definitions beginning with the letter "S":**

(1) **"SHARE"** means statewide human resources accounting and management reporting system.

(2) **"SOC"** means system organization controls, which is an audit review in connection with system-level controls of a service organization or entity-level controls of other organizations.

(3) **"SOC-1"** means an audit that provides an opinion regarding the controls as the service organization that are likely to be relevant to user entities' internal control over financial reporting.

(4) **"SOC-2"** means an audit that provides an opinion about controls at the service organization related to security, availability, processing integrity, confidentiality, or privacy to support users' evaluations of their own system of internal control.

(5) **"SOC-3"** means an audit to provide an opinion about the effectiveness of controls at the service organization relevant to security, availability, processing integrity, confidentiality, or privacy.

(6) **"Special audit"** means a limited-scope audit of an agency's or local public body's financial affairs and transactions, in whole or in part, including both attest engagements and non-attest engagements, performance audits, forensic accounting engagements, and any other engagement that is not part of the annual financial statement and compliance audit, depending on designation or scope.

(7) **"Special investigation"** or **"special examination"** means a limited-scope investigation into or examination of an agency's or local public body's financial records and other information designed to investigate allegations of waste, fraud, abuse, theft, non-compliance, or misappropriation of funds, or to quantify the extent of such losses.

(8) **"State auditor"** may refer to either the elected state auditor of the state of New Mexico, or personnel of the office designated by the state auditor.

**T. Definitions beginning with the letter "T":** **"Tier"** is established based on the amount of each LPB's annual revenue, pursuant to Section 12-6-3 NMSA 1978.

**U. Definitions beginning with the letter "U":**

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

(2) **"U.S. GAO"** means the United States government accountability office.

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

**W. Definitions beginning with the letter "W":** **"Waste"** includes, but is not limited to, the act of using or expending resources carelessly, extravagantly, or to no purpose. Importantly, waste can include activities that do not include abuse. Rather waste relates primarily to mismanagement, inappropriate actions, and inadequate oversight. Waste does not necessarily involve fraud or illegal acts. However, waste may be an indication of internal control weakness, non-compliance, fraud, or illegal acts.

**X. Definitions beginning with the letter "X": [RESERVED]**

**Y. Definitions beginning with the letter "Y": [RESERVED]**

**Z. Definitions beginning with the letter "Z": [RESERVED]**

[2.2.2.7 NMAC - Rp, 2.2.2.7 NMAC, 3/28/2023; A, 7/16/2024]

#### **2.2.2.8 THE PROCUREMENT AND AUDIT PROCESS:**

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

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

(2) for IPAs who have audited agencies under this rule in the past, they shall have previously complied with: 2.2.2.9 NMAC, report due dates, including notifying the state auditor regarding late audit reports and 2.2.2.13 NMAC, review of audit reports and audit documentation.

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

for audits, AUPs and other attest engagements and shall publish the list of approved firms concurrent with notification to government agencies to begin the procurement process to obtain an IPA to conduct the agency's annual financial audit. Firms that only perform non-attest engagements, or otherwise do not meet applicable requirements, shall not be included on the list of approved firms.

**C. Disqualified firms:** An IPA firm may not be included on the list of approved firms for audits, AUPs, and other attest engagements if any of the following applies to that IPA:

- (1) the firm received a peer review rating of "failed";
- (2) the firm does not have a current New Mexico firm permit to practice, if applicable;
- (3) the firm profile does not include at least one certified public accountant with a current CPA certificate who has met the GAGAS CPE requirements described at Subsection A of 2.2.2.14 NMAC, to perform GAGAS audits (however, firms seeking to contract only for agreed-upon-procedures engagements will not be disqualified if GAGAS CPE requirements have not been met);
- (4) the IPA has been restricted in the past and has not demonstrated improvement (this includes submitting excessively deficient audit reports or having excessively deficient workpapers);
- (5) the IPA made false statements in their firm profile or any other official communication with the OSA that were misleading enough to merit disqualification; or
- (6) any other reason determined by the state auditor to serve the interest of the state of New Mexico.

**D. Restriction:**

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

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

- (c) failure to comply with this rule;
- (d) poor quality reports as determined by the OSA;
- (e) poor quality working papers as determined by the OSA;
- (f) a peer review rating of "pass with deficiencies" with the deficiencies being related to governmental audits;
- (g) failure to contract through the OSA for New Mexico governmental audits or AUP engagements;
- (h) failure to inform agency in prior years that the IPA is restricted;
- (i) failure to comply with the confidentiality requirements of this rule;
- (j) failure to invite the state auditor or the auditor's designee to engagement entrance conferences, progress meetings or exit conferences after receipt of related notification from the OSA;
- (k) failure to comply with OSA referrals or requests in a timely manner;
- (l) suspension or debarment by the U.S. general services administration;
- (m) false statements in the IPA's firm profile or any other official communication with the OSA;
- (n) failure to cooperate timely with requests from successor IPAs, such as reviewing workpapers;
- (o) failure to have required contracts approved by the OSA; or
- (p) any other reason determined by the state auditor to serve the interest of the state of New Mexico.

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

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

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

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

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

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

- (i) the nature of the restriction;
- (ii) the conditions of the restriction;
- (iii) the reasons for the restriction;

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

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

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

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

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

(2) The OSA shall review an IPA's request for reconsideration and shall make a determination on reconsideration within 15 calendar days of the IPA response letter

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

**F. Procedures to obtain professional services from an IPA:** Concurrent with publication of the list of approved firms, the OSA shall authorize agencies to select an IPA to perform their annual audit or AUP engagement. Agencies are prohibited from beginning the process of procuring IPA services for annual audits or AUPs pursuant to Section 12-6-3 NMSA 1978 until they receive the OSA authorization. Agencies that wish to begin the IPA procurement process for their annual audit or AUP pursuant to Section 12-6-3 NMSA 1978 prior to receiving OSA authorization may request an exception, however any such exceptions granted by OSA are subject to changes in the final audit rule applicable to the annual audit or AUP pursuant to Section 12-6-3 NMSA 1978 and changes in restrictions to, or disqualifications of, IPAs. The notification shall inform the agency that it shall consult its prospective IPA to determine whether the prospective IPA has been restricted by the OSA as to the type of engagement or number of contracts it is eligible to perform. Agencies that may be eligible for the tiered system shall complete the evaluation to determine the level of financial reporting described in Subsection B of 2.2.2.16 NMAC. Agencies that receive and expend federal awards shall follow the uniform guidance procurement requirements from 2 CFR 200.317 to 200.326 and 200.509, and shall also incorporate applicable guidance from the following requirements. Agencies shall comply with the following procedures to obtain professional services from an IPA for an audit or AUP engagement.

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

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

(a) financial statement audit;

(b) federal single audit (if applicable);

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

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

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

(3) Auditor rotation rule: An IPA may not provide services to an agency or LPB consecutively for longer than eight years. After the eighth consecutive year, the agency or LPB must obtain a proposal for another IPA for at least two years before returning to the prior IPA.

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

(5) If the agency is a component unit of a primary government, the agency's procurement for audit services shall include the AU-C 600 (group audits) requirements for the IPA to communicate and cooperate with the group engagement partner and team, and the primary government. This requirement applies to agencies and universities that are part of the statewide ACFR, other component units of the statewide ACFR and other component units of any primary government that use a different audit firm from the primary government's audit firm. Costs for the IPA to cooperate with the group engagement partner and team, and the primary government, caused by the requirements of AU-C 600 (group audit) may not be charged in addition to the cost of the engagement, as the OSA views this in the same manner as compliance with any other applicable standard.

(6) Agencies are encouraged to include representatives of the offices of separately elected officials such as county treasurers, and component units such as charter schools and housing authorities, in the IPA selection process. As part of their evaluation process, the OSA recommends that agencies consider the following when selecting an IPA for their annual audit or AUP pursuant to Section 12-6-3 NMSA 1978:

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

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

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

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

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

(7) After selecting an IPA for their annual audit or AUP pursuant to Section 12-6-3 NMSA 1978, each agency shall enter the appropriate requested information online on the OSA-connect website ([www.osa-app.org](http://www.osa-app.org)). In order to do this, the agency shall register on OSA-Connect and obtain a user-specified password. The agency's user shall then use OSA-Connect to enter information necessary for the contract and for the OSA's evaluation of the IPA selection. After the agency enters the information, the OSA-Connect system generates a draft contract containing the information entered. The agency shall submit to the OSA for approval a copy of the unsigned draft contract by following the instructions on OSA-Connect.

(8) The OSA shall notify the agency as to the OSA's approval or rejection of the selected IPA and contract. The OSA's review of audit contracts does not include evaluation of compliance with any state or local procurement laws or regulations; each agency is responsible for its own compliance with applicable procurement laws, regulations or policies. After the agency receives notification of approval of the selected IPA and contract from the OSA, the agency is responsible for getting the contract signed and sent to any oversight agencies for approval (if applicable). The OSA shall not physically sign the contract. After the agency obtains all the required signatures and approvals of the contract, the agency shall, within three weeks of OSA's approval of the contract, submit a copy of the fully executed contract in an electronic portable document format (PDF) by uploading it in OSA-Connect.

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

(a) RECs, cooperative educational services, independent housing authorities, hospitals and special hospital districts: April 15;

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

(c) incorporated counties (of which Los Alamos is the only one), local workforce investment boards and local public bodies with a June 30 year end that do not qualify for the tiered system: May 15;

(d) councils of governments, district courts, district attorneys, state agencies: June 1 and the state of New Mexico ACFR: July 31;

(e) local public bodies that qualify for the tiered system pursuant to Subsections A and B of 2.2.2.16 NMAC with a June 30 fiscal year end: July 30;

(f) local public bodies that qualify for the tiered system pursuant to Subsections A and B of 2.2.2.16 NMAC with a fiscal year end other than June 30 shall use a due date 30 days after the end of the fiscal year;

(g) agencies and local public bodies that do not qualify for the tiered system with a fiscal year end other than June 30 shall use a due date 30 days before the end of the fiscal year;

(h) component units that are being separately audited: on the primary government's due date;

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

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

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

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

(12) In selecting an IPA for an agency pursuant to Subsection F of 2.2.2.8 NMAC the state auditor shall at a minimum consider the following factors, but may

consider other factors in the state auditor's discretion that serve the best interest of the state of New Mexico and the agency:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**G. State auditor approval/rejection of unsigned contract:** The state auditor shall use discretion and may reject unsigned contracts as follows:

(1) An unsigned audit contract, special audit contract, attestation engagement contract, performance audit contract, forensic accounting engagement contract or AUP professional services contract under 2.2.2.16 NMAC that does not serve the best interests of the public or the agency or local public body because of one or more of the following reasons:

(a) lack of experience of the IPA;

(b) failure to meet the auditor rotation requirements as follows: the IPA is prohibited from conducting the agency audit for a period of two years because the IPA already conducted those services for that agency for a period of six consecutive years;

(c) lack of competence or staff availability;

(d) circumstances that may cause untimely delivery of the audit report or AUP report;

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

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

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

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

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

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

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

(2) An audit contract, special audit contract, attestation engagement contract, performance audit contract, or forensic accounting engagement contract or AUP contract of an IPA that has:

(a) breached a prior-year contract;

(b) failed to deliver an audit or AUP report on time;

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

(d) performed non-audit services (including services related to fraud) for an agency or local public body it is performing an audit, special audit, attestation engagement, performance audit, forensic accounting engagement or an AUP for, without prior approval of the state auditor;

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

(f) failed to respond, in a timely and acceptable manner, to an OSA audit, special audit contract, attestation engagement contract, performance audit contract, forensic accounting engagement contract, AUP report review or working paper review;

(g) impaired independence during an engagement;

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

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

(j) has a history of excessive errors or omissions in reports or working papers;

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

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

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

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

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

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

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

**H. Audit contract requirements:** The agency shall use OSA-Connect at [www.osa-app.org](http://www.osa-app.org) to submit the appropriate audit or AUP engagement contract. The OSA may provide audit or AUP engagement contract forms to the agency via facsimile, e-mail, or U.S. mail if specifically requested by the agency. Only contract templates generated through OSA-Connect shall be accepted and shall:

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

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

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

(4) in the "other" section of the contract additional services shall be related to the scope of work, but not included in previous categories in the compensation section. Such costs shall be fully detailed and sufficiently describe the required audit related work in the "other provisions" section of the contract.

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

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

**K. Subcontractor requirements:**

(1) Audit firms that have only one individual qualified to supervise a GAGAS audit and issue the related audit report pursuant to Section 61-28B-17 NMSA 1978, and GAGAS Paragraph 4.16 shall submit with the firm profile, a completed contingency subcontractor form that is dated to be effective until the date the next firm profile shall be submitted. The form shall indicate which IPA on the state auditor's current list of approved IPA's shall complete the IPA's audits in the event the one individual with the qualifications described above becomes incapacitated and unable to complete the audit. See the related contingency subcontractor form available at [www.osanm.org](http://www.osanm.org). The OSA shall not approve audit contracts for such a firm without the required contingency subcontractor form.

(2) In the event an IPA chooses to use a subcontractor to assist the IPA in working on a specific audit, then the IPA shall submit a subcontract with the reason for subcontracting a portion of the audit work to the OSA for approval. The IPA may subcontract only with IPAs on the approved IPA list. Subcontractors are subject to an independence analysis, which may include the auditor rotation rule requirements of Subsection F of 2.2.2.8 NMAC.

(3) "Technical review contracts" are considered subcontracting and are subject to the requirements of this section. The audit contract shall specify subcontractor responsibility, who shall sign the report(s), and how the subcontractor shall be paid. For additional information see the subcontract work section of the OSA website.

**L. IPA independence:** IPAs shall maintain independence with respect to their client agencies in accordance with the requirements of the current government auditing standards.

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

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

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

(3) Progress payments up to seventy percent do not require state auditor approval provided that the agency certifies the receipt of services before any payments are made to the IPA. If the report has been submitted, progress payments up to eighty-five percent do not require state auditor approval. The agency shall monitor audit progress and make progress payments only up to the percentage that the audit is completed. If requested by the state auditor, the agency or the IPA shall provide a copy of the approved invoices and progress billing(s). Progress payments between seventy percent and ninety-five percent if no report has been submitted, or eighty-five and ninety-five percent if a report has been submitted, require state auditor approval after being approved by the agency. When component unit audits are part of a primary government's audit contract, requests for progress payments on the component unit audit(s) shall be included within the primary government's request for progress payment approval. In this situation, the OSA shall not process separate progress payment approvals submitted by the component unit.

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

(5) Section 12-6-14 NMSA 1978 (contract audits) provides that final payment under an audit contract may be made by the agency to the IPA only after the state auditor has determined, in writing, that the audit has been made in a competent manner in accordance with contract provisions and this rule. The state auditor's determination with respect to final payment shall be communicated as follows:

(a) stated in the letter accompanying the release of the report to the agency;  
or

(b) in the case of ongoing law enforcement investigations, stated in a letter prior to the release of the report to the agency.

In no circumstance may the total billed by the IPA under the audit contract exceed the total contract amount, as amended if applicable. Further, as the compensation section of the contract shall include the dollar amount that applies to each element of the

contracted procedures that shall be performed, if certain procedures, such as a single audit, are determined to be unnecessary and are not performed, the IPA may not bill the agency for these services. Final payment to the IPA by the agency prior to review and release of the audit report by the state auditor is considered a violation of Section 12-6-14 NMSA 1978 and this rule and shall be reported as an audit finding in the audit report of the agency. If this statute is violated, the IPA may be removed from the state auditor's list of approved auditors.

#### **N. Contract amendment requirements:**

(1) Contract amendments to contracts for audit services, AUP services, or non-attest services shall be submitted to the OSA regarding executed contracts. Contracts may not be amended after they expire. The contract should be amended prior to the additional work being performed or as soon as practicable thereafter. The agency shall use OSA-Connect at [www.osa-app.org](http://www.osa-app.org) to submit the appropriate draft audit or AUP engagement contract amendment. The OSA's review of audit contracts and amendments does not include an evaluation of compliance with the state procurement code or other applicable requirements. Although the parties may amend the delivery dates in a contract, audit report regulatory due dates cannot be modified by amendment. The OSA's review of audit contract amendments does not include evaluation of compliance with any state or local procurement laws or regulations; each agency is responsible for its own compliance with applicable procurement laws, regulations, or policies.

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

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

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

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

contract amendments for approval. The OSA shall review amendment requests and respond to the agency and the IPA within 30 calendar days of receipt.

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

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

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

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

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

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

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

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

[2.2.2.8 NMAC - Rp, 2.2.2.8 NMAC, 3/28/2023; A, 7/16/2024]

#### **2.2.2.9 REPORT DUE DATES:**

**A. Report due dates:** The IPA shall deliver the electronic draft annual financial audit report to the state auditor by 11:59 p.m. on the date specified in the audit contract and send it electronically by the due date. IPAs and agencies are encouraged to perform interim work as necessary and appropriate to meet the following due dates.

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

(a) RECs, cooperative educational services and independent housing authorities: September 30;

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

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

(d) school districts, New Mexico taxation and revenue department, New Mexico children youth and families department, New Mexico department of health, New Mexico department of transportation, New Mexico department of workforce solutions, HSD, GSD, New Mexico early childhood education and care department, SLO, and NMCD: November 15;

(e) PED, New Mexico department of homeland security and emergency management, the state investment council, and the three post-employment benefit agencies (PERA, ERB, and the retiree health care authority): the Wednesday before Thanksgiving day;

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

(g) local public bodies and municipalities: December 15;

(h) the state of New Mexico ACFR: December 31;

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

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

(k) regarding component unit reports (e.g., housing authorities, charter schools, hospitals, foundations, etc.), all separate audit reports prepared by an auditor that is different from the primary government's auditor, are due fifteen days before the primary government's audit report is due, unless some other applicable due date requires the report to be submitted earlier;

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

(m) any agency that requires its report to be released by any specific date (e.g., due to board meeting, federal reporting, etc.): the earlier of its agency due date or one month prior to the requested release date; and

(n) late audit or AUP reports of any agency (not performed in the current reporting period): not more than six months after the date the contract was executed.

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

(3) An electronic copy of the report shall be submitted for review by the OSA with the following: copy of the signed management representation letter and a copy of the completed state auditor report review guide (available at [www.saonm.org](http://www.saonm.org)). A report shall not be considered submitted to the OSA for the purpose of meeting the due date until a copy of the signed management representation letter and the completed report review guide are also submitted to the OSA. All separate reports prepared for component units shall also be submitted to the OSA for review, along with a copy of the management representation letter, and a completed report review guide for each separate audit report. A separate component unit report shall not be considered submitted to the OSA for the purpose of meeting the due date until a copy of the signed management representation letter and the completed report review guide are also submitted to the OSA. If a due date falls on a weekend or holiday, or if the OSA is closed due to inclement weather, the audit report is due the following business day by 11:59 p.m.

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

(5) As soon as the auditor becomes aware that circumstances exist that will make an agency's audit report be submitted after the applicable due date provided in Subsection A of 2.2.2.9 NMAC, the auditor shall notify the state auditor in writing. This notification shall consist of a letter, not an email. However, a scanned version of the official letter sent via email is acceptable. The late audit notification letter is subject to the confidentiality requirements detailed at Subsection M of 2.2.2.10 NMAC. This does not prevent the state auditor from notifying the legislative finance committee or applicable oversight agency pursuant to Subsections F and G of Section 12-6-3 NMSA 1978. There shall be a separate notification for each late audit report. The notification shall include a specific explanation regarding why the report will be late, when the IPA expects to submit the report and a concurring signature by a duly authorized representative of the agency. If the IPA is going to miss the expected report submission

date, then the IPA shall send a revised notification letter. In the event the contract was signed after the report due date, the notification letter shall still be submitted to the OSA explaining the reason the audit report will be submitted after the report due date. The late report notification letter is not required if the report was submitted to the OSA for review by the due date, and then rejected by the OSA, making the report late when resubmitted. Reports resubmitted to the OSA with changes of the IPA's opinion after the report due date shall be considered late and a late audit finding shall be included in the audit report.

(6) The due date of any report not listed in Subsection A of 2.2.2.9 NMAC shall be the date specified in the contract.

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

(1) The IPA shall deliver to the state auditor an editable electronic copy of the audit report for review by 11:59 p.m. on the day the report is due. Unfinished or excessively deficient reports shall not satisfy this requirement; such reports shall be rejected and returned to the IPA and the OSA may take action in accordance with Subsection C of 2.2.2.13 NMAC. When the OSA rejects and returns a substandard audit report to the IPA, the OSA shall consider the audit report late if the corrected report is not resubmitted by the due date. The IPA shall also report a finding for the late audit report in the audit report. The firm shall submit an electronic version of the corrected rejected report for OSA review. The name of the electronic file shall be "corrected rejected report" followed by the agency name and fiscal year.

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

(3) All reports prepared by IPAs shall be addressed to the state auditor, the agency executive and governing body (if applicable). Reports prepared by the OSA will be addressed to the agency executive and governing body (if applicable). The OSA will review all audit reports submitted by the report due date before reviewing reports that are submitted after the report due date. Once the review of the report is completed pursuant to Subsection A of 2.2.2.13 NMAC, the OSA will issue an "OSA review notes" communication that lists any comments, corrections, or issues that are required to be addressed by the IPA prior to final submission to the OSA. Within five days of receipt of the "OSA review notes" communication, the IPA shall submit the corrected report with the following items to the OSA: an electronic searchable version of the audit report labeled "final" in PDF format, a written response to any OSA comments, corrections, and issues, and an electronic excel version of the summary of findings report and any other required electronic schedule if applicable, and an electronic excel version of the

schedule of asset management costs for investing agencies, if applicable (all available at [www.osa.nm.gov](http://www.osa.nm.gov)). The OSA will not release the report until all comments, corrections, and issues have been addressed and the searchable electronic PDF version of the report and all required electronic excel schedules have been received. The electronic file containing the final audit report shall:

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

- (b) be version 5.0 or newer;

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

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

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

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

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

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

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

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

- (k) have a name that starts with the OSA agency number, followed by the agency name, the fiscal year, and "final"; and

- (l) be searchable.

(4) The IPA shall deliver to the agency the number of copies of the audit report indicated in the audit contract only after the state auditor has officially released the audit report with a "release letter."

- (a) The audited agency may waive the five-day waiting period required by Section 12-6-5 NMSA 1978. To do so, the agency's governing authority or the governing authority's designee must provide written notification to the OSA of the

waiver. The notification must be signed by the agency's governing authority or the governing authority's designee and be sent via letter, e-mail or fax to the attention of the state auditor. The OSA encourages agencies wishing to waive the five-day waiting period to provide the written notification prior to the submission of the final report to the OSA.

(b) The IPA shall deliver to the agency the number of copies of the audit report indicated in the audit contract only after the state auditor has officially released the audit report with a "release letter". Release of the audit report to the agency or the public prior to it being officially released by the state auditor shall result in an audit finding.

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

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

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

(b) the circumstances that caused the reissuance; and

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

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

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

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

(c) a summary of the changes that appear in the resubmitted updated report compared to the prior released report. Agency management and the IPA are

responsible for ensuring that the latest version of the resubmitted report is provided to each recipient of the prior version of the report. The OSA shall notify the appropriate oversight agencies regarding the updated report on the OSA website.

**C. Required status reports:** For an agency that has failed to submit audit reports as required by this rule, and has therefore been designated as late, the state auditor requires the agency to submit written status reports to the OSA on each March 15, June 15, September 15, and December 15 unless and until the late audit report has been submitted. Status reports shall be signed by a member of the agency's governing authority, a designee of the governing authority or a member of the agency's top management. If the agency has a contract with an IPA to conduct the audit, the agency must send the IPA a copy of the quarterly status report. IPAs engaged to audit agencies with late reports are responsible for assisting these agencies in complying with the reporting requirements of this section. Failure to do so shall be noted by the OSA and taken into account during the IPA Firm Profile evaluation process. At a minimum, the quarterly written status report shall include:

- (1) a detailed explanation of the agency's efforts to complete and submit its audit;
- (2) the current status of any ongoing audit work;
- (3) any obstacles encountered by the agency in completing its audit; and
- (4) a projected completion date for the financial audit report.

[2.2.2.9 NMAC - Rp, 2 2.2.9 NMAC, 3/28/2023; A, 7/16/2024]

## **2.2.2.10 GENERAL CRITERIA:**

### **A. Annual financial and compliance audits:**

(1) The financial audit shall cover the entire financial reporting entity including the primary government and the component units of the primary government, if any. For any financial and compliance audit the agency should produce all documents necessary to conduct the engagement.

(a) The primary government shall determine whether an agency that is a separate legal entity from the primary government is a component unit of the primary government as defined by GASBS 14, 39, 61, and 80 (as amended). The flowchart at GASBS 61.68 may be useful in making this determination. The primary government shall notify all other agencies determined to be component units by September 15 of the subsequent fiscal year. Failure to meet this due date results in a compliance finding. IPAs shall use GASB guidelines as found in relevant GASBS to determine the correct presentation of the component unit. All agencies that meet the criteria to be a component unit of the primary government shall be included with the audited financial

statements of the primary government by discrete presentation or blended, as appropriate. Component units are reported using the government financial reporting format. Component units of component units are also subject to OSA review, and must be reported using the government financial reporting format. If a component unit does not qualify to be reported using the governmental format and is not statutorily required to be reported using the governmental format, that fact shall be explained in the notes to the financial statements (summary of significant accounting policies: financial reporting entity). If there was a change from the prior year's method of presenting a component unit or change in component units reported, the notes to the financial statements shall disclose the reason(s) for the change.

(b) If a primary government has no component units, that fact shall be disclosed in the notes to the financial statements (summary of significant accounting policies: financial reporting entity). If the primary government has component units that are not included in the financial statements due to materiality, that fact shall also be disclosed in the notes.

(c) The state auditor requires component unit(s) to be audited by the same audit firm that audits the primary government (except for public housing authority component units that are statutorily exempt from this requirement, and the statewide ACFR). For clarification, housing departments of a local government or a regional housing authority are not exempt from this requirement. Requests for exemption from this requirement shall be submitted in writing by the primary government to the state auditor. If the request to use a different auditor for the component unit is approved in writing by the state auditor, the following requirements shall be met:

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

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

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

(iv) all bid and auditor selection processes shall comply with the requirements of this rule;

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

(vi) the primary government, the primary engagement partner, management of the component unit, and the component unit auditor shall all coordinate

their efforts to ensure that the audit reports of the component unit and the primary government are submitted by the applicable due dates;

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

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

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

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

(a) The level of planning materiality described at AAG SLV 4.72-4.73 and exhibit 4-1 shall be used. Planning materiality for component units is at the individual component unit level.

(b) The scope of the audit includes the following statements and disclosures which the auditor shall audit and give an opinion on. The basic financial statements (as defined by GASB and displayed in AAG SLV exhibit 4-1) consisting of:

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

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

(iii) budgetary comparison statements for the general fund and major special revenue funds that have legally adopted annual budgets (when budget information is available on the same fund structure basis as the GAAP fund structure, the state auditor requires that the budgetary comparison statements be included as part of the basic financial statements consistent with GASBS 34 fn. 53, as amended, and AAG SLV 11.12 and 11.13); and

(iv) the related notes to the financial statements.

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

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

- (i) management's discussion and analysis (GASBS 34.8-.11);
- (ii) RSI data required by GASBS 67 and 68 for defined benefit pension plans;
- (iii) RSI schedules required by GASBS 43 and 74 for postemployment benefit plans other than pension plans;
- (iv) RSI schedules required by GASBS 45 and 75 regarding employer accounting and financial reporting for postemployment benefits other than pensions; and
- (v) infrastructure modified approach schedules derived from asset management systems (GASBS 34.132-133).

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

- (i) primary government combining and individual fund financial statements for all non-major funds (GASBS 34.383);
- (ii) the schedule of expenditures of federal awards required by uniform guidance;
- (iii) the schedule of pledged collateral required by Subsection P of 2.2.2.10 NMAC;
- (iv) the FDS of housing authorities pursuant to Subsection B of 2.2.2.12 NMAC;
- (v) the school district schedule of cash reconciliation required by Subsection C of 2.2.2.12 NMAC. In addition, the school district schedule of cash

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

(vi) any other SI schedule required by this rule.

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

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

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

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

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

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

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

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

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

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

(2) The financial statements are the responsibility of the agency. The agency shall maintain adequate accounting records, prepare financial statements in accordance with accounting principles generally accepted in the United States of America, and

provide complete, accurate, and timely information to the IPA as requested to meet the audit report due date imposed in Subsection A of 2.2.2.9 NMAC.

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

(4) If the IPA prepared the financial statements in their entirety from the client-provided trial balance or underlying accounting records the IPA should conclude significant threats to independence exist and shall document the threats and safeguards applied to mitigate the threats to an acceptable level. If the threats cannot be documented as mitigated the IPA may appropriately decide to decline to provide the service. IPAs should refer to the GAGAS conceptual framework to evaluate independence. The fact that the auditor prepared the financial statements from the client-provided trial balance or underlying records shall be disclosed on the exit conference page of the audit report.

#### **E. Audit documentation requirements:**

(1) The IPA's audit documentation shall be retained for a minimum of five-years from the date shown on the opinion letter of the audit report or longer if requested by the federal oversight agency, cognizant agency, or the state auditor. Audit documentation, including working papers, are the property of the IPA or responsible certificate holder per Subsection A of Section 61-28B-25 NMSA 1978. Audit documentation includes all documents used to support any opinions or findings included in the report. The state auditor shall have access to the audit documentation at the discretion of the state auditor.

(2) When requested by the state auditor, all of the audit documentation shall be delivered to the state auditor by the due date indicated in the request. State auditor review of audit documentation does not transfer the ownership of the documents. Ownership of the audit documentation is maintained by the IPA or responsible certificate holder.

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

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

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

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

**F. Auditor communication requirements:**

(1) The IPA shall comply with the requirements for auditor communication with those charged with governance as set forth in AU-C 260 and GAGAS 6.06 and 6.07.

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

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

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

(5) The IPA shall conduct an audit entrance conference with the agency with representatives of the agency's governing authority and top management, which may include representatives of any component units (housing authorities, charter schools, hospitals, foundations, etc.), if applicable. The OSA has the authority to notify the agency or IPA that the state auditor shall be informed of the date of the entrance conference and any progress meetings. If such notification is received, the IPA and agency shall invite the state auditor or the auditor's designee to attend all such conferences no later than 72 hours before the proposed conference or meeting.

(6) All communications with management and the agency's oversight officials during the audit, regarding any instances of non-compliance or internal control weaknesses, shall be made in writing. The auditor shall obtain and report the views of responsible officials of the audited agency concerning the audit findings, pursuant to GAGAS 6.57-6.60. Any violation of law or good accounting practice, including instances of non-compliance or internal control weaknesses, shall be reported as audit findings per Section 12-6-5 NMSA 1978. Separate management letter comments shall not be issued as a substitute for such findings.

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

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

(1) In an effort to ensure that the finances of state and local governments are thoroughly examined, OSA may provide IPAs with written communications to inform the IPA that OSA received information that may suggest elevated risk in specific areas relevant to a particular agency's annual financial and compliance audit. These communications shall be referred to as "referrals." Referrals are considered confidential audit documentation. Referrals may relate to any topic, including the scope of the annual financial and compliance audit. IPAs shall take the circumstances described in OSA referral communications into account in their risk assessment and perform such procedures as, in the IPA's professional judgment, are necessary to determine what further actions, if any, in the form of additional disclosures, findings, and recommendations are appropriate in connection with the annual audit of the agency.

After the conclusion of fieldwork but at least 14 days prior to submitting the draft annual audit report to the OSA for review, IPAs shall provide written confirmation to the OSA that the IPA took appropriate action in response to the referral. This written confirmation shall be submitted separately from any draft report and addressed to the attention of the OSA's special investigations division. The written confirmation shall be submitted electronically to [SIDreferrals@osa.state.nm.us](mailto:SIDreferrals@osa.state.nm.us) and shall respond to all aspects of the referral and list any findings associated with the subject matter of the referral. IPAs shall retain adequate documentation in the audit workpapers to support the written confirmation to OSA that the IPA took appropriate action in response to the referral. As outlined in 2.2.2.13 NMAC the OSA may review IPA workpapers associated with the annual audit of any agency. OSA workpaper review procedures shall include examining the IPA documentation associated with referrals. Insufficient or inadequate documentation may result in deficiencies noted in the workpaper review letter and may negatively impact the IPA during the subsequent firm profile review process. In accordance with Subsection D of 2.2.2.8 NMAC, an IPA may be placed on restriction if an IPA refuses to comply with OSA referrals in a timely manner.

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

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

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

evidence, such as the interpretation of contracts, laws and regulations. In addition to the significant state statutes, rules and regulations identified by the IPA, compliance with the following shall be tested if applicable (with the exception of the statewide ACFR):

(1) Procurement Code, Sections 13-1-1 to 13-1-199 NMSA 1978 including providing the state purchasing agent with the name of the agency's chief procurement officer, pursuant to Section 13-1-95.2 NMSA 1978, and Procurement Code Regulations, 1.4.1 NMAC, or home rule equivalent. All agencies must retain support for procurement until the contract expires or the minimum time required for record retention is met, whichever is longer.

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

(3) Public Money Act, Sections 6-10-1 to 6-10-63 NMSA 1978, including the requirements that county and municipal treasurers deposit money in their respective counties, and that the agency receive a joint safe keeping receipt for pledged collateral. (In instances when another statute provides for a different timeline applicable to the agency, that statute shall control.)

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

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

(6) Public Employees Retirement Act, Sections 10-11-1 to 10-11-142 NMSA 1978. IPAs shall test to ensure eligible contributions are remitted to PERA. The IPA shall evaluate and test internal controls regarding employee eligibility for PERA and other benefits. IPAs shall evaluate risk associated with employees excluded from PERA and test that employees are properly excluded.

(7) Educational Retirement Act, Sections 22-11-1 to 22-11-55 NMSA 1978. IPAs shall test to ensure eligible contributions are remitted to ERA. The IPA shall evaluate and test internal controls regarding employee eligibility for ERA and other benefits. IPAs shall evaluate risk associated with employees excluded from ERA and test that employees are properly excluded.

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

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

(10) Special, deficiency, and supplemental appropriations (appropriation laws applicable for the year under audit).

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

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

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

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

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

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

(17) Retiree Health Care Act, Sections 10-7C-1 to 10-7C-19 NMSA 1978. IPAs shall test to ensure eligible contributions are reported to NMRHCA. NMRHCA employer and employee contributions are set forth in Section 10-7C-15 NMSA 1978. The IPA shall evaluate and test internal controls regarding employee eligibility for NMRHCA and other benefits. IPAs shall evaluate risk associated with employees excluded from NMRHCA and test that employees are properly excluded.

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

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

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

(21) The New Mexico opioid allocation agreement.

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

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

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

(3) compliance supplement, latest edition; and

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

#### **L. Audit finding requirements:**

(1) Communicating findings: IPAs shall communicate findings in accordance with generally accepted auditing standards and the requirements of GAGAS 6.17-6.30. All finding reference numbers shall follow a standard format with the four-digit audit year, a hyphen, and a three-digit sequence number (e.g. 20XX-001, 20XX-002 ... 20XX-999). All prior year findings shall include the finding numbers used when the finding was first reported under historical numbering systems in brackets, following the current year finding reference number (e.g., 2021-001 (2020-003)) to enable the report user to see what year the finding originated and how it was identified in previous years. Finding reference numbers for single audit findings reported on the data collection form shall match those reported in the schedule of findings and questioned costs and the applicable auditor's report. Depending on the IPA's classification of the finding, the finding reference number shall be followed by one of the following descriptions: "material weakness"; "significant deficiency"; "material non-compliance"; "other non-compliance"; or "other matters."

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

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

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

(i) When auditors detect violations of law or good accounting practices that shall be reported per Section 12-6-5 NMSA 1978, but that do not rise to the level of significant deficiencies or material weaknesses, such findings are considered to warrant the attention of those charged with governance due to the statutory reporting requirement. The auditor shall communicate such violations in the "compliance and other matters" paragraph in the report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in accordance with government auditing standards.

(ii) Findings required by Section 12-6-5 NMSA 1978 shall be presented in a separate schedule of findings labeled "Section 12-6-5 NMSA 1978 findings". This

schedule shall be placed in the back of the audit report following the financial statement audit and federal award findings. Per AAG GAS 13.49 there is no requirement for such findings to be included or referenced in the uniform guidance compliance report.

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

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

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

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

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

(v) recommendation addressing each condition and cause; and

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

(e) Uniform guidance regarding single audit findings (uniform guidance 200.511): The auditee is responsible for follow-up and corrective action on all audit findings. As a part of this responsibility, the auditee shall prepare a summary schedule of prior audit findings and a corrective action plan for current year audit findings in accordance with the requirements of uniform guidance 200.511. The corrective action plan and summary schedule of prior audit findings shall include findings relating to the financial statements which shall be reported in accordance with GAGAS. The summary schedule of prior year findings and the corrective action plan shall be included in the reporting package submitted to the federal audit clearinghouse (AAG GAS 13.49 fn 38). In addition to being included in the agency response to each audit finding, the corrective action plan shall be provided on the audited agency's letterhead in a document separate from the auditor's findings. (COFAR frequently asked questions on the office of management and budget's uniform administrative requirements, cost principles, and audit requirements for federal awards at 2 CFR 200, Section 511-1).

(f) All audit reports shall include a summary of audit results preceding the presentation of audit findings (if any). The summary of audit results shall include the type of auditor report issued and whether the following categories of findings for internal control over financial reporting were identified: material weakness, significant deficiency, and material noncompliance. AUP reports completed pursuant to 2.2.2.16 NMAC are not required to include a summary of audit results.

(2) Prior year findings:

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

(b) Uniform guidance regarding single audit prior year findings (uniform guidance 200.511): The auditor shall follow up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with the uniform guidance, and report, as a current-year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding (AAG GAS 13.53).

(3) Current-year audit findings: Written audit findings shall be prepared and submitted to management of the agency as soon as the IPA becomes aware of the findings so the agency has time to respond to the findings prior to the exit conference. The agency shall prepare "planned corrective actions" as required by GAGAS 6.57 and 6.58. The agency shall respond, in writing, to the IPA's audit findings within 10 business days. Lack of agency responses within the 10 business days does not warrant a delay of the audit report. The agency's responses to the audit findings and the "planned corrective actions" shall be included in the finding after the recommendation. If the IPA disagrees with the management's comments in response to a finding, they may explain in the report their reasons for disagreement, after the agency's response (GAGAS 6.59). Pursuant to GAGAS 6.60, "if the audited agency refuses to provide comments or is unable to provide comments within a reasonable period of time, the auditors may issue the report without receiving comments from the audited agency. In such cases, the auditors should indicate in the report that the audited agency did not provide comments."

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

(5) If an agency has entered into any professional services contract with an IPA with a scope of work that relates to fraud, waste, or abuse, and the contract was not approved by the state auditor, the IPA shall report a finding of non-compliance with Paragraph (2) of Subsection C of 2.2.215 NMAC.

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

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

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

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

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

(1) The IPA shall hold an exit conference with representatives of the agency's governing authority and top management, which may include representatives of any component units (housing authorities, charter schools, hospitals, foundations, etc.), if applicable. The OSA has the authority to notify the agency or IPA that the state auditor shall be informed of the date of any progress meetings and the exit conference. If such notification is received, the IPA and agency shall invite the state auditor to attend all such conferences. If component unit representatives cannot attend the combined exit conference, a separate exit conference shall be held with the component unit's governing authority and top management. The exit conference and presentation to governance shall occur in the forum agreed to by the agency and the IPA, to include virtual or telephonic options. The OSA reserves the right to require an in-person exit conference and presentation to the board. The date of the exit conference(s) and the names and titles of personnel attending shall be stated in the last page of the audit report.

(2) The IPA, with the agency's cooperation, shall provide to the agency for review a draft of the audit report (stamped "draft"), a list of the "passed audit adjustments," and a copy of all the adjusting journal entries at or before the exit

conference. The draft audit report shall include, at minimum, the following elements: independent auditor's report, basic financial statements, audit findings, summary schedule of prior year audit findings, and the reports on internal control and compliance required by government auditing standards and uniform guidance.

(3) Agency personnel and the agency's IPA shall not release information to the public relating to the audit until the audit report is released by the OSA, and has become a public record. This does not preclude an agency from submitting financial statements and notes to the financial statements, clearly marked as "draft" or "unaudited" to federal or state oversight agencies or bond rating agencies. Any draft financial statements provided to federal or state oversight agencies or to bond rating agencies shall exclude draft auditor opinions and findings, and any pages including references to auditor opinions or findings.

(4) Once the audit report is officially released to the agency by the state auditor (by a release letter) and the required waiting period of five calendar days has passed, unless waived by the agency in writing as described in Subparagraph (a) of Paragraph (4) of Subsection B of 2.2.2.9 NMAC, the audit report shall be presented by the IPA, to a quorum of the governing authority of the agency at a meeting held in accordance with the Open Meetings Act, if applicable. This requirement only applies to agencies with a governing authority, such as a board of directors, board of county commissioners, or city council, which is subject to the Open Meetings Act. The IPA shall ensure that the required communications to those charged with governance are made in accordance with AU-C 260.12 to 260.14.

(5) At all times during the audit and after the audit report becomes a public record, the IPA shall follow applicable standards and 2.2.2 NMAC regarding the release of any information relating to the audit. Applicable standards include but are not limited to the AICPA Code of Conduct ET Section 1.700.001 and related interpretations and guidance, and GAGAS 6.53-6.55 and GAGAS 6.63-6.65. The OSA and the IPA shall not disclose audit documentation if such disclosure would undermine the effectiveness or integrity of the audit process. AU-C 230.A29.

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

(1) IPAs shall comply with the requirements of GAGAS 6.19-6.24 relating to fraud, noncompliance with provisions of laws, regulations, contracts and grant agreements, waste, and abuse. Relating to contracts and grant agreements, IPAs shall extend the AICPA requirements pertaining to the auditors' responsibilities for laws and regulations to also apply to consideration of compliance with provisions of contracts or grant agreements. Concerning abuse, if an IPA becomes aware of abuse that could be quantitatively, or qualitatively material to the financial statements or other financial data significant to the audit objectives, the IPA shall apply audit procedures specifically directed to ascertain the potential effect on the financial statements or other financial data significant to the audit objectives.

(2) Pursuant to Section 12-6-6 NMSA 1978 (criminal violations), an agency, LPB, or IPA shall notify the state auditor immediately upon discovery of any apparent violation of a criminal statute in connection with financial affairs. If an agency or IPA has already made a report to law enforcement that fact shall be included in the notification. If not immediately known, a follow-up notification shall include an estimate of the dollar amount involved, if known or estimable, and a description of the apparent violation, including names of persons involved and any action taken or planned.

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

**P. Public monies:**

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

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

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

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

(b) account name;

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

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

(ii) types of investment accounts include state treasurer general fund investment pool (SGFIP), state treasurer local government investment pool (LGIP), U.S. treasury bills, securities of U.S. agencies such as Fannie Mae (FNMA), Freddie Mac

(FHLMC), government national mortgage association (GNMA), Sallie Mae, small business administration (SBA), federal housing administration (FHA), etc.

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

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

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

(4) Pledged collateral:

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

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

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

following for each financial institution: fifty percent pledged collateral requirement per statute, total pledged collateral, uninsured and uncollateralized.

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

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

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

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

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

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

#### **Q. Budgetary presentation:**

(1) Prior year balance included in budget:

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

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

(2) The differences between the budgetary basis and GAAP basis revenues and expenditures shall be reconciled. If the required budgetary comparison information is included in the basic financial statements, the reconciliation shall be included on the statement itself or in the notes to the financial statements. If the required budgetary comparison is presented as RSI, the reconciliation to GAAP basis shall appear in either a separate schedule or in the notes to the RSI (AAG SLV 11.14). The notes to the financial statements shall disclose the legal level of budgetary control for the entity and any excess of expenditures over appropriations at the legal level of budgetary control. The legal level of budgetary control for local governments is at the fund level. The legal level of budgetary control for school districts is at the function level. The legal level of budgetary control for state agencies is explained at Subsection A of 2.2.2.12 NMAC. For additional information regarding the legal level of budgetary control the IPA may contact the applicable oversight agency (DFA, HED, or PED).

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

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

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

## **R. Appropriations:**

### **(1) Budget related findings:**

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

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

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

(a) Special, deficiency, specific, and capital outlay appropriations shall be disclosed in the notes to the financial statements. The original appropriation, the appropriation period, expenditures to date, outstanding encumbrances, unencumbered balances, and amounts reverted shall be shown in a SI schedule or in a note to the financial statements. The accounting treatment of any unexpended balances shall be fully explained in the SI schedule or in a note to the financial statements. This is a special requirement of the state auditor, and it does not apply to the statewide ACFR audit.

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

## **S. Consideration of internal control and risk assessment in a financial statement audit:**

(1) Audits performed under this rule shall include tests of internal controls (manual or automated) over assertions about the financial statements and about compliance related to laws, regulations, and contract and grant provisions. IPAs and agencies are encouraged to reference the U.S. GAOs' Standards for Internal Control in the Federal Government, known as the "Green Book", which may be adopted by state, local, and quasi-governmental Agencies as a framework for an internal control system.

(2) The department of information technology is to engage in an SOC-2 compliance audit of the SHARE system annually, starting in 2024.

(3) The OSA may select additional agencies' application systems of record for SOC Audit.

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

(1) The AICPA provides examples of independent auditor's reports in the appendix to chapter 4 of AAG GAS and appendix A to chapter 16 of AAG SLV. Guidance is provided in footnote 4 to appendix A to chapter 16 of AAG SLV regarding wording used when opining on budgetary statements on the GAAP basis. IPAs conducting audits under this rule shall follow the AICPA report examples. All independent auditor's reports shall include a statement that the audit was performed in accordance with auditing standards generally accepted in the United States of America and with applicable government auditing standards per GAGAS 6.36. This statement shall be modified in accordance with GAGAS 2.17b if some GAGAS requirements were not followed. Reports for single audits of fiscal years beginning on or after December 26, 2014 shall have references to OMB Circular A-133 replaced with references to Title 2 U.S. Code of Federal Regulations (CFR) Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance 200.110(b), AAG GAS 4.89, Example 4-1).

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

(a) The state auditor requires the report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in accordance with government auditing standards be dated the same date as the independent auditor's report.

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

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

(4) The state auditor requires the financial statements, RSI, SI, and other information required by this rule, and the following reports to be included under one report cover: the independent auditor's report; the report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in accordance with government auditing standards; and the report on compliance for each major federal program and on internal control over compliance required by the uniform guidance. If applicable, the independent auditor's report shall include the AU-C 725 opinion on SI, the schedule of expenditures of federal awards and the HUD FDS (required by HUD guidelines on reporting and attestation requirements of uniform financial reporting standards). The report shall also contain a

table of contents and an official roster. The IPA may submit a written request for an exemption from the "one report cover" requirement, but shall receive prior written approval from the state auditor in order to present any of the above information under a separate cover.

**U. Disposition of property:** Sections 13-6-1 and 13-6-2 NMSA 1978 govern the disposition of tangible personal property owned by state agencies, local public bodies, school districts, and state educational institutions. At least 30 days prior to any disposition of property included on the agency inventory list, written notification of the official finding and proposed disposition duly sworn and subscribed under oath by each member of the authority approving the action shall be sent to the state auditor. The disposition list shall include worn out, unusable or obsolete items, and may include trade-ins, and lost, stolen, or destroyed items, as applicable.

**V. Joint powers agreements:**

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

(2) For self-insurance obtained under a JPA, see the GASB Codification Section J50.113.

**W. Inventory certification:**

(1) All agencies shall comply with the requirements of Section 12-6-10 NMSA 1978 and also maintain a capitalization policy that complies with the law. All agencies shall maintain an inventory listing of chattels and equipment that cost over five thousand dollars (\$5,000).

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

**X. Tax increment development districts:** Pursuant to Subsection C of Section 5-15-9 NMSA 1978, tax increment development districts (TIDDs) are political subdivisions of the state, and they are separate and apart from the municipality or county in which they are located. Section 5-15-10 NMSA 1978 states that the district shall be governed

by the governing body that adopted a resolution to form the district or by a five-member board composed of four members appointed by that governing body; provided, however, that the fifth member of the five-member board is the secretary of finance and administration or the secretary's designee with full voting privileges. However, in the case of an appointed board of directors that is not the governing body, at the end of the appointed directors' initial terms, the board shall hold an election of new directors by majority vote of owners and qualified resident electors. Therefore, a TIDD and its audit firm shall apply the criteria of GASBS 14, 39, 61, and 80 to determine whether the TIDD is a component unit of the municipality or county that approved it, or whether the TIDD is a related organization of the municipality or county that approved it. If the TIDD is determined to be a related organization per the GAAP requirements, then the TIDD shall contract separately for an audit separate from the audit of the municipality or county that approved it.

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

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

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

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

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

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

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

(f) PERA and ERB shall each prepare an employer guide that illustrates the use of their respective schedule of employer allocations report to create journal entries generally required by GASBS 68. The calculations necessary at the employer level (for adjusting journal entries, amortization of deferred amounts, etc.) shall be described and illustrated. The employer guides shall be made available to the participant employers by June 30 of the subsequent fiscal year. Stand-alone state agency financial statements that exclude the proportionate share of the collective net pension liability of the state of New Mexico shall include note disclosure referring the reader to the statewide ACFR for the state's net pension liability and other pension-related information.

(2) Stand-alone state agency financial statements that exclude the proportionate share of the collective net pension liability of the state of New Mexico shall include note disclosure referring the reader to the statewide ACFR for the state's net pension liability and other pension-related information.

**Z. GASBS 77, tax abatement agreements:** Unaudited, but final, GASBS 77 disclosure information shall be provided to any agency whose tax revenues are affected by the reporting agency's tax abatement agreements no later than September 15 of the subsequent fiscal year. This due date does not apply if the reporting agency does not have any tax abatement agreements that reduce the tax revenues of another agency. All tax abatement agreements entered into by an agency's component unit(s) shall be disclosed in the same manner as the tax abatement agreements of the primary government. If an agency determines that any required disclosure is confidential, the agency shall cite the legal authority for the determination.

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

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

(2) Pursuant to AU-C 805.16, the RHCA auditors shall issue a separate auditor's report and express a separate opinion on the AU-C 805 audit performed

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

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

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

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

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

(7) Stand-alone state agency financial statements that exclude the proportionate share of the collective OPEB liability of the state of New Mexico, shall include note disclosure referring the reader to the statewide ACFR for the state's net OPEB liability and other OPEB-related information.

[2.2.2.10 NMAC - Rp, 2.2.2.10 NMAC, 3/28/2023; A, 7/16/2024]

#### **2.2.2.11 [RESERVED]:**

#### **2.2.2.12 SPECIFIC CRITERIA:**

The specific criteria described in this section shall be considered in planning and conducting governmental audits. These requirements are not intended to be all-

inclusive; therefore, OSA recommends that IPAs review the NMSA and NMAC while planning governmental audits.

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

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

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

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

(4) Net position/fund balance:

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

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

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

(iii) unrestricted as defined by GASBS 63.11.

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

(5) Book of record:

(a) The state maintains the centralized accounting system SHARE. The SHARE data and reports are the original book of record that the auditor is auditing. Each fiscal year, the agency shall record all audit adjusting journal entries in SHARE.

The financial information in SHARE shall agree to the agency's audited financial statements, with the exception of accounts payable as explained in Subsection A of 2.2.2.12 NMAC. If the agency maintains a separate accounting system, it shall be reconciled with the SHARE system and all applicable adjustments shall be recorded in SHARE in the month in which the transactions occurred. DFA FCD provides guidance to agencies, which IPAs shall review, regarding policy and procedure requirements. These documents are available on the DFA FCD website and include:

- (i) the manual of model accounting practices (MAPs);
- (ii) various white papers, yearly closing instructions; and
- (iii) various accounting guideline memos.

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

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

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

- (i) state general fund;
- (ii) other state funds;
- (iii) internal service funds/inter-agency transfers; or
- (iv) federal funds.

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

(6) Reversions to state general fund:

(a) All reversions to the state general fund shall be identified in the financial statements or the notes to the financial statements by the fiscal year of appropriation

(i.e., reversion to state general fund - FY 16). The gross amount of the appropriation and the gross amount of the reversion shall be shown separately.

(b) Subsection A of Section 6-5-10 NMSA 1978 states "all unreserved undesignated fund balances in reverting funds and accounts as reflected in the central accounting system as of June 30 shall revert by September 30 to the general fund. The division may adjust the reversion within 45 days of release of the audit report for that fiscal year." Failure to transfer reverting funds timely in compliance with the statute requires an audit finding.

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

(a) transfers; and

(b) reimbursements (GASBS 34.410):

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

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

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

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

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

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

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

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

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

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

(11) Budgetary basis for state agencies: the state budget is adopted on the modified accrual basis of accounting except for accounts payable accrued at the end of the fiscal year that do not get accrued by the statutory deadline per Section 6-10-4 NMSA 1978. Those accounts payable that do not get paid timely or accrued by the statutory deadline shall be paid out of the next year's budget. If an agency needs to recognize additional accounts payable amounts that were not accrued by the statutory deadline, then the budgetary statements and the fund financial statements require a

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

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

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

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

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

(16) Format for the statement of activities: state agencies that have more than one program or function shall use the financial statement format presented in GASBS 34, Illustrations B-1 through B-4. The simplified statement of activities (GASBS 34,

Illustration B-5) may not be used for agencies that have multiple programs or functions. GASBS 34.41 requires governments to report direct expenses for each function.

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

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

(2) The financial statements of a housing authority that is a department, program or component unit of a primary government shall be included in the financial audit report of the primary government. IPAs shall use GASB guidelines as found in relevant GASBS to determine the correct presentation of the component unit.

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

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

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

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

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

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

that "a public housing authority other than a regional housing authority shall not bear the cost of an audit conducted solely at the request of its local primary government entity."

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

(5) Public housing authorities and their IPAs shall follow the requirements of Guidelines on Reporting and Attestation Requirements of Uniform Financial Reporting Standards (UFRS), which is available on the U.S. department of housing and urban development's website under a search for UFRS. Additional administrative issues related to audits of public housing authorities follow.

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

(i) electronically report on the comparison of the electronic FDS submission in the real estate assessment center staging database through the use of an identification (ID) and password;

(ii) include an electronic version of the FDS in the audit report;

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

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

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

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

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

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

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

#### **(2) REC audits:**

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

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

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

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

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

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

(b) The audit report of each school district shall include a cash reconciliation schedule which reconciles the cash balance as of the end of the previous fiscal year to the cash balance as of the end of the current fiscal year. This schedule is also required for each charter school chartered by a school district and each charter school chartered by PED. This schedule shall account for cash in the same categories used by the district in its monthly cash reports to PED. Subsection D of 6.20.2.13 NMAC states that school districts shall use the "cash basis of accounting for budgeting and reporting".

The financial statements are prepared on the accrual basis of accounting. Subsection E of 6.20.2.13 NMAC states that "if there are differences between the financial statements, school district records and department records, the IPA should provide the adjusting entries to the school district to reconcile the report to the school district records." If there are differences between the school district records and the PED report amounts, other than those explained by the adjusting entries, the IPA shall issue a finding which explains that the PED reports do not reconcile to the school district records.

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

(d) Student activity funds: Risk should be assessed and an appropriate sample tested regarding controls over student activity funds.

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

(f) Sub-funds of the general fund: school district audit reports shall include individual fund financial statements for the following sub-funds of the general fund: operational, transportation, instructional materials and teacherage (if applicable).

(4) Pertaining to charter schools:

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

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

(c) No charter school that has been determined to be a component unit may be omitted from the financial statements of the primary government based on materiality. All charter schools that are component units shall be included in the basic

financial statements using one of the presentation methods described in GASBS 34.126, as amended.

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

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

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

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

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

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

and restricted - all operations" and shall include revenues and expenses. HED approved the following categories which shall be used for the budgetary comparisons.

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) relating to third-party marketers (as defined in Section 6-8-22 NMSA 1978): the name of the firm or individual, the location of the marketer (in-state or out-of-state), a brief description of investments subject to the agreement, and any fees, commissions or retainers;

(c) relating to traditional asset classes: name of the investment, asset class, value of the investment, and fees (including both "direct" and "embedded" costs).

(2) For private asset classes and alternative investment classes, the schedules shall, at minimum, include the following information:

(a) relating to consultants: the aggregate fees by asset class and consultant location (in-state or out-of-state), and a brief description of investments included in each asset class;

(b) relating to third-party marketers (as defined in Section 6-8-22 NMSA 1978): aggregate fees, commissions and retainers by asset class and third-party marketer location (in-state or out-of-state), and a brief description of investments included in each asset class;

(c) relating to alternative asset classes: the total fees by asset class (including both "direct" and "embedded" costs), and a brief description of the investments included in each asset class.

(3) These schedules shall be included as unaudited other information in the audit report.

**G. Pertaining to audits of local public bodies; budgetary comparisons:**

Auditors shall test local public body budgets for compliance with required reserves and disclose those reserves on the face of the financial statements and in notes financial statements (if applicable).

[2.2.2.12 NMAC - Rp, 2.2.2.12 NMAC, 3/28/2023; A, 7/16/2024]

**2.2.2.13 REVIEW OF AUDIT REPORTS AND AUDIT DOCUMENTATION:**

**A. Statutory requirement to review audit reports:** Subsection B of Section 12-6-14 NMSA 1978 requires the state auditor or personnel of the office designated by the state auditor to examine all reports of audits of agencies made pursuant to contract. All audits performed under contracts approved by the state auditor are subject to review. The OSA shall review all reports submitted by the IPA to determine if the reports are presented in accordance with the requirements of this rule and applicable auditing, accounting and financial reporting standards. The OSA shall review all audit reports submitted by the report due date before reviewing reports that are submitted after the report due date. As discussed in Subsection B of 2.2.2.9 NMAC, audit reports reissued by the agency and IPA, pursuant to AU-C 560, are also subject to OSA review procedures.

**B. Comprehensive reviews:** Released audit reports are subject to a comprehensive report and audit documentation review by the state auditor. The IPA's audit documentation shall be assembled in one complete file or one complete set of files in one location, whether the documentation is hardcopy or electronic. The documentation shall be either all hardcopy or all electronic. OSA reviews of audit and AUP working papers include inspection of firm documentation related to compliance with governmental auditing, accounting and financial reporting standards, rules and other requirements issued by GASB, AICPA, GAO, and the OSA.

**C. Consequences of deficiencies:** If during the course of its review of an audit report or the related audit documentation, the OSA finds significant deficiencies that warrant a determination that the audit was not made in accordance with the provisions of the contract or applicable standards and requirements, any or all of the following action(s) may be taken;

(1) the IPA may be required by OSA to correct the deficiencies in the report or audit documentation, and reissue the audit report to the agency and any others receiving copies;

(2) the IPA's eligibility to perform future engagements may be limited in number or type of engagement pursuant to Subsection D of 2.2.2.8 NMAC;

(3) for future audit reports, for some or all audit contracts, the IPA may be required to submit working papers with the audit reports for review by the OSA prior to the release of the report; or

(4) the IPA may be referred to the New Mexico public accountancy board for possible licensure action.

**D. Results of work paper reviews:** After the review is completed, the OSA shall issue a letter to advise the IPA about the results of the review. The IPA shall respond in writing to all review comments when directed. If the firm disagrees with any comments, the firm shall provide references to professional standards supporting the firm's disagreement. Failure to respond shall be noted during the firm profile review process. Results of work paper reviews are confidential audit documentation.

[2.2.2.13 NMAC - Rp, 2 2.2.13 NMAC, 3/28/2023]

#### **2.2.2.14 CONTINUING PROFESSIONAL EDUCATION AND PEER REVIEW REQUIREMENTS:**

**A. Continuing professional education:** IPAs performing annual financial and compliance audits, or other attest engagements under GAGAS shall ensure that all members of their staff comply with the CPE requirements of the most recent revision of GAGAS.

**B. Peer review requirements:** IPAs performing annual financial and compliance audits, or other attest engagements under GAGAS shall comply with the requirements of the most recent revision of GAGAS relating to quality control and assurance and external peer review.

(1) An audit firm's due date for its initial peer review is 18 months from the date the firm enrolled in the peer review program or should have enrolled, whichever is earlier. A firm's subsequent peer review is due three years and six months from the previous peer review year end.

(2) The IPA firm profile submission to the state auditor shall include copies of the following peer review documentation:

- (a) the peer review report for the auditor's firm;
- (b) if applicable, detailed descriptions of the findings, conclusions and recommendations related to deficiencies or significant deficiencies required by GAGAS 5.91;
- (c) if applicable, the auditor's response to deficiencies or significant deficiencies;
- (d) the letter of acceptance from the peer review program in which the firm is enrolled; and
- (e) a list of the governmental audits reviewed during the peer review.

(3) A peer review rating of "failed" on the auditor's peer review shall disqualify the IPA from performing New Mexico governmental audits.

(4) During the procurement process IPAs shall provide a copy of their most recent external peer review report to the agency with their bid proposal or offer. Any subsequent peer review reports received during the period of the contract shall also be provided to the agency.

(5) The peer review shall meet the requirements of GAGAS 5.60 to 5.95.

(6) The peer reviewer shall be familiar with this rule. This is a requirement of the state auditor that can be achieved by attendance at audit rule training provided by the OSA.

**C. State auditor quality control reviews:** The state auditor performs its own quality control review of IPA audit reports and working papers. An IPA that is included on the state auditor's list of approved firms for the first time may be subject to an OSA quality control review of the IPA's working papers. This review shall be conducted as soon as the documentation completion date, as defined by AU-C Section 230, has passed (60 days after the report release date). When the result of the state auditor's quality control review differs significantly from the external quality control report and corresponding peer review rating, the state auditor may no longer accept external peer review reports performed by that reviewer. In making this determination, the state auditor shall take into consideration the fact that AICPA peer reviews are performed on a risk-based or key-element approach looking for systemic problems, while the state auditor reviews are engagement-specific reviews.

**D. SOC Audit qualifications:** The OSA requires any firm or IPA contracting with an agency or LPB to conduct a SOC 1 or SOC 2 Audit engagement to have the

following proof of qualifications: Firms must have a SOC engagement peer review rating of pass to qualify for a SOC engagement.

[2.2.2.14 NMAC - Rp, 2.2.2.14 NMAC, 3/28/2023; A, 7/16/2024]

## **2.2.2.15 SPECIAL AUDITS AND EXAMINATIONS:**

### **A. Fraud, waste or abuse in government reported by agencies, IPAs or members of the public:**

(1) Reports of fraud, waste & abuse: Pursuant to the authority set forth Subsection C of Section 12-6-3 NMSA 1978, the OSA may initiate special investigation or examination procedures in connection with reports of financial fraud, waste and abuse in government. Reports received or created by the OSA are confidential audit information and audit documentation in connection with the state auditor's statutory duty to examine and audit the financial affairs of every agency, or in connection with the state auditor's statutory discretion to audit the financial affairs and transactions of an agency in whole or in part.

(2) Confidentiality of sources: The identity of a person making a report to the OSA alleging financial fraud, waste, or abuse in government is confidential audit information and may not be disclosed, except as required by Section 12-6-6 NMSA 1978.

(3) Confidentiality of files: A report alleging financial fraud, waste, or abuse in government that is made to the OSA and any resulting special audit, performance audit, attestation engagement or forensic accounting or other non-attest engagement files are confidential audit documentation and may not be disclosed by the OSA or the agency, except to an independent auditor, performance audit team or forensic accounting team in connection with a special audit, performance audit, attestation engagement, forensic accounting engagement, non-attest engagement, or other existing or potential engagement regarding the financial affairs or transactions of an agency.

(a) Any records that result in, or are part of, any subsequent or resulting special audit, performance audit, attestation engagement or forensic accounting or other non-attest engagement will be audit workpapers and therefore confidential. Records that result from, or are part of OSA, special investigations that do not result in a subsequent special audit, performance audit, attestation engagement or forensic accounting or other non-attest engagement may be disclosed, with personal identifier information redacted, once the examination or investigation is closed.

(b) Any information related to a report alleging financial fraud, waste, or abuse in government provided to an independent auditor, performance audit team or forensic accounting team, is considered to be confidential audit or engagement documentation and is subject to confidentiality requirements, including but not limited to requirements

under Subsections E and M of 2.2.2.10 NMAC, the Public Accountancy Act, and the AICPA Code of Professional Conduct.

(4) If the OSA makes inquiries of agencies as part of the investigation process, agencies shall respond to the OSA inquiries within 15 calendar days of receipt or as soon as practicable under the circumstances with written notice to the OSA stating the basis for any delay. IPAs shall test compliance with this requirement and report noncompliance as a finding in the annual financial and compliance audit report.

#### **B. Special audit or examination process:**

(1) Designation: Pursuant to Section 12-6-3 NMSA 1978, in addition to the annual audit, the state auditor may cause the financial affairs and transactions of an agency to be audited in whole or in part. Accordingly, the state auditor may designate an agency for special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement regarding the financial affairs and transactions of an agency or local public body based on information or a report received from an agency, IPA or member of the public. For purposes of this rule "special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement" includes, without limitation, AUP, consulting, and contract close-out (results-based award) engagements that address financial fraud, waste, or abuse in government. It also includes non-attest engagements performed under the forensic services standards issued by the AICPA and engagements performed following the Code of Professional Standards issued by the Association of Certified Fraud Examiners (ACFE). The state auditor shall inform the agency of the designation by sending the agency a notification letter. The state auditor may specify the subject matter, the scope and any procedures required, the AICPA or other professional standards that apply, and for a performance audit, performance aspects to be included and the potential findings and reporting elements that the auditors expect to develop. Pursuant to Section 200.503 of Uniform Guidance, if a single audit was previously performed, the special audit, attestation engagement, performance audit or forensic accounting engagement shall be planned and performed in such a way as to build upon work performed, including the audit documentation, sampling, and testing already performed by other auditors. The attestation and performance audit engagements may be conducted pursuant to government auditing standards if so specified by the OSA.

(2) Costs: All reasonable costs of special audits, attestation engagements, forensic accounting engagements, non-attest engagements, or single-entity performance audits conducted pursuant to this Section shall be borne by the agency audited pursuant to Section 12-6-4 NMSA 1978. The state auditor, in its sole discretion, may apportion among the Agencies audited some or all of the reasonable costs of a multi-entity performance audit.

(3) Who performs the engagement: The state auditor may perform the special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement alone or with other professionals selected by

the state auditor. Alternatively, the state auditor may require the engagement to be performed by an IPA or a team that may be comprised of any of the following: independent public accountants; individuals with masters degrees or doctorates in a relevant field such as business, public administration, public policy, finance, or economics; individuals with their juris doctorate; CFE-certified fraud examiners; CFF-certified forensic auditors; CIA-certified internal auditors; or other specialists. If the state auditor designates an agency for an engagement to be conducted by an IPA or professional team, the agency shall:

(a) upon receipt of notification to proceed from the state auditor, identify all elements or services to be solicited, obtain the state auditor's written approval of the proposed scope of work, and request quotations or proposals for each applicable element of the engagement;

(b) follow all applicable procurement requirements which may include, but are not limited to, Uniform Guidance, Procurement Code (Sections 13-1-28 through 13-1-199 NMSA 1978), or equivalent home rule procurement provisions when selecting an IPA or team to perform the engagement;

(c) submit the following information to the state auditor by the due date specified by the state auditor:

(i) a completed template for special audits, attestation engagements, performance audits or forensic accounting engagements, provided at [www.osanm.org](http://www.osanm.org), which the agency shall print on agency letterhead; and

(ii) a completed contract form including the contract fee, start and completion date, and the specific scope of services to be performed in the format prescribed by the OSA, provided at [www.osanm.org](http://www.osanm.org), with all required signatures on the contract.

(d) If the agency fails to select an IPA and submit the signed contract to OSA by the due date specified by the state auditor, or, if none within 60 days of notification of designation from the state auditor, the state auditor may conduct the engagement or select the IPA for that agency in accordance with the process described at Subsection F of 2.2.2.8 NMAC.

(4) Errors: Contracts that are submitted to the OSA with errors or omissions shall be rejected by the state auditor. The state auditor shall return the rejected contract to the agency indicating the reason(s) for the rejection.

(5) Recommendation rejections: In the event the agency's recommendation is not approved by the state auditor, the state auditor shall promptly communicate the decision, including the reason(s) for rejection, to the agency, at which time the agency shall promptly submit a different recommendation. This process shall continue until the state auditor approves a recommendation and related contract. During this process,

whenever a recommendation and related contract are not approved, the agency may submit a written request to the state auditor for reconsideration of the disapproval. The agency shall submit its request no later than 15 calendar days from the date of the disapproval and shall include documentation in support of its recommendation. If warranted, after review of the request, the state auditor may hold an informal meeting to discuss the request. The state auditor shall set the meeting in a timely manner with consideration given to the agency's circumstances.

(6) Contract amendments: Any proposed contract amendments shall be processed in accordance with Subsection N of 2.2.2.8 NMAC.

(7) Access to records and documents: For any special audit, attestation engagement, performance audit or forensic accounting engagement, or non-attest engagement, the state auditor and any engaged professionals shall have available to them all documents necessary to conduct the special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement. Furthermore, pursuant to Section 12-6-11 NMSA 1978, when necessary for a special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement the state auditor may apply to the district court of Santa Fe County for issuance of a subpoena to compel the attendance of witnesses and the production of books and records.

(8) Entrance, progress and exit conferences: The IPA or other professional shall hold an entrance conference and an exit conference with the agency, unless the IPA or other professional has submitted a written request to the state auditor for an exemption from this requirement and has obtained written approval of the exemption. The OSA has the authority to notify the agency or IPA or other professional that the state auditor shall be informed of the date of the entrance conference, any progress meetings and the exit conference. If such notification is received, the IPA or other professional and the agency shall invite the state auditor or the auditor's designee to attend all such conferences no later than 72 hours before the proposed conference or meeting. The state auditor may also require the IPA or other professional to submit its audit plan to the state auditor for review and approval. The date of the exit conference(s) and the names and titles of personnel attending shall be stated on the last page of the special audit report.

(9) Required reporting: All reports for special audits, attestation engagements, performance audits, forensic accounting engagements, or non-attest engagements related to financial fraud, waste or abuse in government undertaken pursuant to 2.2.2.15 NMAC (regardless of whether they are conducted pursuant to AICPA standards for consulting services, forensic services or for attestation engagements, non-attest engagements, or other professional standards) shall report as findings any fraud, illegal acts, non-compliance or internal control deficiencies, pursuant to Section 12-6-5 NMSA 1978. Each finding shall comply with the requirements of Subsection L of 2.2.2.10 NMAC for audit and attest engagements or Subsection D of 2.2.2.15 NMAC for non-attest engagements.

(10) Report review: As required by Section 12-6-14 NMSA 1978, the state auditor shall review reports of any special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement made pursuant to this section for compliance with the professional services contract and this rule. Upon completion of the report, the IPA or other professional shall deliver the electronic report to the state auditor with a copy of any signed management representation letter, if applicable. Unfinished or excessively deficient reports shall be rejected by the state auditor. If the report is rejected the firm shall submit an electronic version of the corrected rejected report for state auditor review. The name of the electronic file shall be "corrected rejected report" followed by the agency name and fiscal year. The IPA or other professional shall respond to all review comments as directed by the state auditor.

(11) Report release: After OSA's review of the report for compliance with the professional services contract and this rule, the state auditor shall authorize the IPA to print and submit the final report. An electronic version of the report, in the PDF format described at Subsection B of 2.2.2.9 NMAC, shall be delivered to the state auditor within five business days. The state auditor shall not release the report until all the required documents are received by the state auditor. The state auditor shall provide the agency with a letter authorizing the release of the report pursuant to Section 12-6-5 NMSA 1978. Agency and local public body personnel shall not release information to the public relating to the special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement until the report is released and has become a public record pursuant to Section 12-6-5 NMSA 1978. Except for the exception under Subsection B of 2.2.2.15 NMAC, at all times during the engagement and after the engagement report becomes a public record, the IPA or other professional(s) shall not disclose to the public confidential information about the auditee or about the engagement. Confidential information is information that is not generally known to the public through common means of providing public information like the news media and internet.

(12) Disclosure by professionals: The IPA or other professional shall not disclose information identified as confidential information provided to them by the state auditor unless otherwise specified by the state auditor. Disclosure of confidential information by the IPA or other professional may result in legal action by the state auditor, or in the case of an IPA, restriction pursuant to Subsection D of 2.2.2.8 NMAC.

(13) Payment: Progress payments up to (but not including) ninety-five percent of the contract amount do not require state auditor approval and may be made by the agency if the agency monitors the progress of the services procured. If requested by the state auditor, the agency shall provide a copy of the approved progress billing(s). Final payments over ninety-five percent may be made by the agency pursuant to either of the following:

(a) stated in the letter accompanying the release of the report to the agency,  
or

(b) in the case of ongoing law enforcement investigations, stated in a letter prior to the release of the report to the agency.

**C. Agency-initiated special audits or examinations:**

(1) Applicability: With the exception of agencies that are authorized by statute to conduct performance audits and forensic accounting engagements, this section applies to all special audits and examinations in which an agency enters into a professional services contract for a special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement relating to financial fraud, waste or abuse, but the agency has not been designated by the state auditor for the engagement pursuant to this rule. For purposes of this rule, "special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement" includes, without limitation, AUP, consulting, forensic services and contract close-out (results-based award) engagements that address financial fraud, waste or abuse in government.

(2) Any agency, local public body, IPA or other professional that enters into a professional services contract for a special audit or examination of the financial affairs and transactions of an agency or local public body that was not designated by the state auditor for the engagement must notify the OSA and provide a copy of any resulting report or any resulting findings of violations of law or good accounting practices to the OSA. Findings shall be reported as described in Subsection D of 2.2.2.15 NMAC. All findings relating to any violation of a criminal statute in connection with financial affairs must be reported immediately to the OSA pursuant to Section 12-6-6, NMSA 1978.

**D. Finding requirements for special audits or examinations:** Communicating findings: All finding reference numbers shall follow a consistent format. Findings required by Section 12-6-5 NMSA 1978 shall be presented in a separate schedule of findings and placed at the end of the report.

(1) Section 12-6-5 NMSA 1978 requires that for every special audit and examination made "each report set out in detail, in a separate section, any violation of law or good accounting practices found by the audit or examination."

(2) Each finding shall specifically state and describe the following:

(a) condition (provides a description of a situation that exists and includes the extent of the condition and an accurate perspective, the number of instances found, the dollar amounts involved, if specific amounts were identified);

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

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

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

(e) recommendation addressing each condition and cause; and

(f) agency response (the agency's response shall include specific planned corrective actions with a timeline and designation of what employee position(s) are responsible for meeting the deadlines in the timeline).

[2.2.2.15 NMAC - Rp, 2.2.2.15 NMAC, 3/28/2023; A, 7/16/2024]

#### **2.2.2.16 ANNUAL FINANCIAL PROCEDURES REQUIRED FOR LOCAL PUBLIC BODIES WITH ANNUAL REVENUES LESS THAN FIVE HUNDRED THOUSAND DOLLARS (\$500,000) (TIERED SYSTEM):**

**A. Annual revenue and state funded capital outlay expenditures determine type of financial reporting:** All local public bodies shall comply with the requirements of Section 6-6-3 NMSA 1978. Pursuant to Section 12-6-3 NMSA 1978, the annual revenue of a local public body determines the type of financial reporting a local public body shall submit to the OSA. Local public bodies are mutual domestic water consumers associations, land grants, incorporated municipalities, and special districts.

(1) The annual revenue of a local public body shall be calculated on a cash basis as follows:

(a) Revenue shall exclude capital outlay funds. OSA defines capital outlay funds as funds expended pursuant to the Property Control Act definition of a capital outlay project. Per section 15-3B-2 NMSA 1978 "Capital outlay project" means the acquisition, improvement, alteration or reconstruction of assets of a long-term character that are intended to continue to be held or used, including land, buildings, machinery, furniture and equipment. A "capital outlay project" includes all proposed expenditures related to the entire undertaking.

(b) Revenue shall exclude federal or private grants. For the purpose of 2.2.2.16 NMAC "private grant" means funding provided by a non-governmental entity.

(2) For the purposes of 2.2.2.16 NMAC "state funded capital outlay expenditures" are expenditures made pursuant to any funding provided by the New Mexico legislature for a capital outlay project as defined in the Property Control Act,

Section 15-3B-2 NMSA 1978, either received directly by the local public body or disbursed through an administering agency.

**B. Determination of revenue and services:** Annually, following the procedures described in Subsection F of 2.2.2.8 NMAC, the state auditor shall provide local public bodies written authorization to obtain services to conduct a financial audit or other procedures. Upon receipt of the authorization, a local public body shall determine its annual revenue in accordance with Subsection A of 2.2.2.16 NMAC. The following requirements for financial reporting apply to the following annual revenue amounts (tiers):

(1) if a local public body's annual revenue is less than ten thousand dollars (\$10,000) and the local public body did not directly expend at least fifty percent of, or the remainder of, a single capital outlay award, then the local public body is exempt from submitting a financial report to the state auditor, except as otherwise provided in Subsection C of 2.2.2.16 NMAC (tier one);

(2) if a local public body's annual revenue is ten thousand dollars (\$10,000) or more but less than fifty thousand dollars (\$50,000), then the local public body is exempt from submitting a financial report to the state auditor, except as otherwise provided in Subsection C of 2.2.2.16 NMAC (tier two);

(3) if a local public body's annual revenue is less than fifty thousand dollars (\$50,000), and the local public body expended at least fifty percent of, or more of, a single capital outlay award during the fiscal year, then the local public body shall procure the services of an IPA for the performance of a tier three AUP engagement in accordance with the audit contract for a tier three AUP engagement;

(4) if a local public body's annual revenue is greater than fifty thousand dollars (\$50,000) but less than two hundred-fifty thousand dollars (\$250,000), then the local public body shall procure the services of an IPA for the performance of a tier four AUP engagement in accordance with the audit contract for a tier four AUP engagement;

(5) if a local public body's annual revenue is greater than fifty thousand dollars (\$50,000) but less than two hundred-fifty thousand dollars (\$250,000), and the local public body expended any capital outlay funds during the fiscal year, then the local public body shall procure the services of an IPA for the performance of a tier five AUP engagement in accordance with the audit contract for a tier five AUP engagement;

(6) if a local public body's annual revenue is two hundred-fifty thousand dollars (\$250,000) or greater, but less than five hundred thousand dollars (\$500,000), the local public body shall procure services of an IPA for the performance of a tier six AUP engagement in accordance with the audit contract for a tier six AUP engagement; the report shall include at a minimum, a compilation of financial statements and a financial report consistent with the agreed-upon procedures;

(7) if a local public body's annual revenue is five hundred thousand dollars (\$500,000) or more, this section shall not apply and the local public body shall procure services of an IPA for the performance of a financial and compliance audit in accordance with other provisions of this rule;

(8) notwithstanding the annual revenue of a local public body, if the local public body expended seven hundred-fifty thousand dollars (\$750,000) or more of federal funds subject to a federal single audit during the fiscal year then the local public body shall procure a single audit.

**C. Exemption from financial reporting:** A local public body that is exempt from financial reporting to the state auditor pursuant to Subsection B of 2.2.2.16 NMAC shall submit written certification to LGD and the state auditor. The certification shall be provided on the form made by the state auditor, available through OSA-Connect. The local public body shall certify, at a minimum:

- (1) the local public body's annual revenue for the fiscal year; and
- (2) that the local public body did not expend fifty percent of or the remainder of a single capital outlay award during the fiscal year.
- (3) The OSA will not accept the certification of exemption from financial reporting for the current year until the prior year certifications or AUP reports (whichever is appropriate) have been submitted.

**D. Procurement of IPA services:** A local public body required to obtain an AUP engagement shall procure the services of an IPA in accordance with Subsection F of 2.2.2.8 NMAC.

**E. Access to records and documents:** For any AUP the agency should produce all documents necessary to conduct the engagement.

**F. Requirements of the IPA selected to perform the AUP:**

(1) The IPA shall provide the local public body with a dated engagement letter during the planning stages of the engagement, describing the services to be provided. See Subsection F of 2.2.2.10 NMAC for applicable restrictions on the engagement letter.

(2) The IPA may not subcontract any portion of the services to be performed under the contract with the local public body except for the activation of a contingency subcontractor form in the event the IPA is unable to complete the engagement.

(3) The IPA shall hold an entrance conference and an exit conference with the local public body. The entrance and exit conference shall occur in the forum agreed to by the local public body and the IPA, to include virtual or telephonic options. The OSA

reserves the right to require an in-person entrance or exit conference. The OSA has the authority to notify the agency or IPA that the state auditor shall be informed of the date of the entrance conference, any progress meetings and the exit conference. If such notification is received, the IPA and agency shall invite the state auditor to attend all such conferences no later than 72 hours before the proposed conference or meeting.

(4) The IPA shall submit the report to the OSA for review in accordance with the procedures described at Subsection B of 2.2.2.9 NMAC. Before submitting the report to OSA for review, the IPA shall review the report using the AUP report review guide available on the OSA's website at [www.saonm.org](http://www.saonm.org). The report shall be submitted to the OSA for review with the completed AUP report review guide. Once the AUP report is officially released to the agency by the state auditor (by a release letter) and the required waiting period of five calendar days has passed, unless waived by the agency in writing, the AUP report shall be presented by the IPA, to a quorum of the governing authority of the agency at a meeting held in accordance with the Open Meetings Act, if applicable. This requirement only applies to agencies with a governing authority, such as a board of directors, board of county commissioners, or city council, which is subject to the Open Meetings Act. The IPA shall ensure that the required communications to those charged with governance are made in accordance with AU-C 260.12 to 260.14.

#### **G. Progress payments:**

(1) Progress payments up to ninety-five percent of the contract amount do not require state auditor approval and may be made by the local public body if the local public body ensures that progress payments made do not exceed the percentage of work completed by the IPA. If requested by the state auditor, the local public body shall provide the OSA a copy of the approved progress billing(s).

(2) Final payments from ninety-five percent to one hundred percent may be made by the local public body pursuant to either of the following:

(a) stated in the letter accompanying the release of the report to the agency,  
or

(b) in the case of ongoing law enforcement investigations, stated in a letter prior to the release of the report to the agency. In this situation a letter releasing the report to the agency will be issued when it is appropriate to release the report.

#### **H. Report due dates, notification letters and confidentiality:**

(1) For local public bodies with a June 30 fiscal year-end that qualify for the tiered system, the report or certification due date is December 15. Local public bodies with a fiscal year end other than June 30 shall submit the AUP report or certification no later than five months after the fiscal year-end. Late AUP reports (not the current reporting period) are due not more than six months after the date the contract was

executed. An electronic copy of the report shall be submitted to the OSA. AUP reports submitted via fax or email shall not be accepted. A copy of the signed dated management representation letter shall be submitted with the report. If a due date falls on a weekend or holiday, or if the OSA is closed due to inclement weather, the report is due the following business day by 11:59 p.m. If the report is mailed to the state auditor, it shall be postmarked no later than the due date to be considered filed by the due date. If the due date falls on a weekend or holiday the audit report shall be postmarked by the following business day.

(2) As soon as the IPA becomes aware that circumstances exist that will make the local public body's AUP report be submitted after the applicable due date, the auditor shall notify the state auditor of the situation in writing. This notification shall consist of a letter, not an email. However, a scanned version of the official letter sent via email is acceptable. The late AUP notification letter is subject to the confidentiality requirements detailed at Subsection M of 2.2.2.10 NMAC. This does not prevent the state auditor from notifying the legislative finance committee or applicable oversight agency pursuant to Subsections F and G of Section 12-6-3 NMSA 1978. There shall be a separate notification for each late AUP report. The notification shall include a specific explanation regarding why the report will be late, when the IPA expects to submit the report and a concurring signature by the local public body. If the IPA will not meet the expected report submission date, then the IPA shall send a revised notification letter. In the event the contract was signed after the report due date, the notification letter shall still be submitted to the OSA explaining the reason the AUP report will be submitted after the report due date. The late report notification letter is not required if the report was submitted to the OSA for review by the deadline, and then rejected by the OSA, making the report late when resubmitted.

(3) Local public body personnel shall not release information to the public relating to the AUP engagement until the report is released and has become a public record pursuant to Section 12-6-5 NMSA 1978. At all times during the engagement and after the AUP report becomes a public record, the IPA shall follow applicable professional standards and 2.2.2 NMAC regarding the release of any information relating to the AUP engagement.

**I. Findings:** All AUP engagements shall report as findings any fraud, illegal acts, non-compliance or internal control deficiencies, consistent with Section 12-6-5 NMSA 1978. The findings shall include the required content listed at Subparagraph (d) of Paragraph (1) of Subsection L of 2.2.2.10 NMAC.

**J. Review of AUP reports and related workpapers:** AUP shall be reviewed by the OSA for compliance with professional standards and the professional services contract. Noncompliant reports shall be rejected and not considered received. Such reports shall be returned to the firm and a copy of the rejection letter shall be sent to the local public body. If the OSA rejects and returns an AUP report to the IPA, the report shall be corrected and resubmitted to the OSA by the due date, or the IPA shall include a finding for non-compliance with the due date. The IPA shall submit an electronic

version of the corrected rejected report for OSA review. The name of the electronic file shall be "corrected rejected report" followed by the agency name and fiscal year. The OSA encourages early submission of reports to avoid findings for late reports. After its review of the AUP report for compliance with professional standards and the professional services contract, the OSA shall authorize the IPA to print and submit the final report. An electronic version of the AUP report, in PDF format, as described at Subsection B of 2.2.2.9 NMAC, shall all be delivered to the OSA within five business days. The OSA shall not release the AUP report until the electronic version of the report is received by the OSA. The OSA shall provide the local public body with a letter authorizing the release of the report after the required five day waiting period. Released reports may be selected by the OSA for comprehensive report and workpaper reviews. After such a comprehensive report and workpaper review is completed, the OSA shall issue a letter to advise the IPA about the results of the review. The IPA shall respond to all review comments as directed. If during the course of its review, the OSA finds significant deficiencies that warrant a determination that the engagement was not performed in accordance with provisions of the contract, applicable AICPA standards, or the requirements of this rule, any or all of the following action(s) may be taken:

(1) the IPA may be required to correct the deficiencies in the report or audit documentation, and reissue the AUP report to the agency and any others receiving copies;

(2) the IPA's eligibility to perform future engagements may be limited in number or type of engagement pursuant to Subsection D of 2.2.2.8 NMAC;

(3) for future reports, for some or all contracts, the IPA may be required to submit working papers with the reports for review by the OSA prior to the release of the report; or

(4) the IPA may be referred to the New Mexico public accountancy board for possible licensure action.

**K. IPA independence:** IPAs shall maintain independence with respect to their client agencies in accordance with the requirements of the current government auditing standards.

[2.2.2.16 NMAC - Rp, 2.2.2.16 NMAC, 3/28/2023; A, 7/16/2024]

## **PART 3: BUDGET CERTIFICATION OF LOCAL PUBLIC BODIES**

### **2.2.3.1 ISSUING AGENCY:**

State of New Mexico Department of Finance and Administration, Local Government Division.

[2.2.3.1 NMAC - N, 6/1/2008]

#### **2.2.3.2 SCOPE:**

All local public bodies required to obtain budget approval from the local government division.

[2.2.3.2 NMAC - N, 6/1/2008]

#### **2.2.3.3 STATUTORY AUTHORITY:**

Sections 6-6-1 through 6-6-19 NMSA 1978 and Section 9-6-5E NMSA 1978.

[2.2.3.3 NMAC - N, 6/1/2008]

#### **2.2.3.4 DURATION:**

Permanent

[2.2.3.4 NMAC - N, 6/1/2008]

#### **2.2.3.5 EFFECTIVE DATE:**

June 1, 2008 unless a later date is cited at the end of a section.

[2.2.3.5 NMAC - N, 6/1/2008]

#### **2.2.3.6 OBJECTIVE:**

2.2.3 NMAC codifies required budgetary and financial reporting by local public bodies to the local government division supported by timely audits as of the previous fiscal year submitted to the state auditor's office and the local government division. The intended result is to promote submission of budgets and reports to the local government division by local public bodies with documentation that provides assurance that the financial statements and position of the local public body have been audited in accordance with requirements of the New Mexico state auditor found in 2.2.2.1 through 2.2.2.14 NMAC, the requirements for contracting and conducting audits of agencies, ("the audit rule"). The purpose of coordinating the submission of audits timely from the previous fiscal year with the budget certification process is two-fold: 1) to allow for corroboration of items in the previous fiscal year audit with the budget and financial reports submitted to the local government division, and 2) to require correspondence and other documentation that can be maintained in a record for reference by government officials and the public.

[2.2.3.6 NMAC - N, 6/1/2008]

#### **2.2.3.7 DEFINITIONS:**

A. "Account" means a double entry bookkeeping of assets, liabilities, income and expenses with debit and credit entries on ledger pages or other media which are posted to record a change(s) in value.

B. "Conditional budget certification" means the certification of the budget of a local public body but with specified conditions requiring compliance by the local public body in order to receive budget certification and means that the local public body is operating without final budget certification, as defined by Subsection F of 2.2.3.7 NMAC.

C. "Deficit" means any fund where its budget or financial reports reflect more expenditures than revenues and cash balances available to legally pay for them.

D. "Emergency" means a natural or man made event that poses an immediate danger or threat to public health, welfare and safety.

E. "Extenuating circumstances" means documented situations, conditions or events that hinder or delay a local public body from complying with the local government division's requirements and timelines for submitting budgets, financial reports and audits.

F. "Final budget certification" means budget approval by a local government division official in accordance with Section 6-6-2 NMSA 1978.

G. "Fund" means a group of related accounts that are self balancing within their group as defined by the government accounting standards board (GASB). A fund is not an account.

H. "Local government division" is the division of the state of New Mexico department of finance and administration with budgetary and fiscal oversight responsibilities and authority over local public bodies.

I. "Local government division official" means any employee or public officer of the local government division of the New Mexico department of finance and administration.

J. "Local public body" means every political subdivision of the state which expends public money from whatever source derived, including but not limited to any county, incorporated municipality, or special district, land grants registered with the New Mexico secretary of state's office. Also under the definition are mutual domestic water associations, soil and water conservation districts, water and sanitation districts, watersheds, draws, medical clinics, hospitals, hospital districts, regional transportation districts, flood control authorities, natural gas associations, public improvement districts, and regional housing authority districts if required by the audit rule.

[2.2.3.7 NMAC - N, 6/1/2008]

#### **2.2.3.8            UNTIMELY ANNUAL AUDITS AND BUDGET CERTIFICATION:**

A. Pursuant to Section 6-6-2 NMSA 1978, budgets shall be submitted by the local public body to the local government division. Receipt of the most current audit(s) that were required to be conducted and submitted for review per the New Mexico state auditor's required report due dates for the previous fiscal year(s) shall be confirmed by the local government division. The local government division, by letter to the local public body, shall inform the governing body of the local public body and other state public officers, elected and appointed, of the need for corrective action, in accordance with Subsection E of 2.2.3.8 NMAC by the local public body when previous fiscal year audit(s) have not been submitted. During the corrective action process, the local government division may grant conditional budget certification to the local public body.

B. The local government division shall identify and report to state public officers a list of local public bodies that have failed to contract with an independent public auditor for its annual audit. The identification shall include reasons why the local public body has failed to obtain an audit contract. The identification shall also report on whether or not a line item of the amount in the preliminary and final executed budgets has been included for the cost of the annual audit of the local public body.

C. When the cause of the delay is due to the independent public auditor's inability to complete the audit, the local public body will communicate this in writing to the local government division and to the state auditor.

D. When the cause of the delay is due to the inability of the local public body to make progress payments on the contract between the local public body and the independent public auditor, the local public body shall communicate this by letter to the local government division and to the state auditor. The local public body shall explain why progress payments have not been made, when they will be made and whether a shortage of funds exists.

E. Any necessary corrective action shall begin with a meeting and continue with follow up meetings if needed, between officials of the local public body and representatives of the local government division and the state auditor's office to consider any extenuating circumstances. The meeting(s) shall address the extenuating circumstances, including but not limited to, the documented reason(s) why the required annual audit has not been conducted or completed. A plan for corrective actions shall be developed and agreed to in writing by officials of the local public body, the local government division and the state auditor's office, and signed by all the parties. The local public body will report monthly to the local government division and to the state auditor's office on the progress of the corrective action plan, until the required annual audit is completed and the local public body receives budget certification or conditional budget certification if there are other issues or deficits in the budget which may necessitate conditional budget certification.

F. The local public body shall communicate in writing to the local government division and to the state auditor when it has completed its required audit(s) and the local government division shall certify the local public body's interim and final budgets upon

confirmation by the state auditor's office that the required audit has been submitted to the state auditor's office for review and publication, unless there are other issues or deficits in the budget which may necessitate conditional budget certification.

[2.2.3.8 NMAC - N, 6/1/2008]

#### **2.2.3.9 NON-COMPLIANCE BY LOCAL PUBLIC BODIES:**

If the local public body does not comply with this rule to bring its annual audit(s) into compliance with the audit rule as it pertains to timeliness of submission, the local public body may only receive conditional budget certification and final budget certification shall be withheld until the corrective action plan process set forth in Subsection E of 2.2.3.8 NMAC has been completed to the satisfaction of the local government division unless there are other issues which may necessitate conditional budget certification. In addition, the local government division may provide information regarding audits not in compliance with the audit rule as it pertains to timeliness of submission, to any funding entity, including but not limited to the legislature or the community development block grant council. The local government division will take measures to ensure that enforcement of the rule does not hinder the delivery of financial resources in emergency situations, conditions or events.

[2.2.3.9 NMAC - N, 6/1/2008]

## **CHAPTER 3-19: [RESERVED]**

## **CHAPTER 20: ACCOUNTING BY GOVERNMENTAL ENTITIES**

### **PART 1: ACCOUNTING AND CONTROL OF FIXED ASSETS OF STATE GOVERNMENT, ACCOUNTING FOR ACQUISITIONS AND ESTABLISHING CONTROLS**

#### **2.20.1.1 ISSUING AGENCY:**

General Services Department, Administrative Services Division.

[2.20.1.1 NMAC - Rp, 2.20.1.1 NMAC, 12/31/2019]

#### **2.20.1.2 SCOPE:**

This rule applies to all state government agencies as defined in the "Audit Act," Section 12-6-1 NMSA 1978.

**A.** The term "agency" is intended to be all-inclusive as used in the Audit Act, Section 12-6-2 NMSA 1978.

**B.** Fixed assets purchased or owned by agencies are included under the definition regardless of the method of acquisition or source of the funds used for purchased assets.

[2.20.1.2 NMAC - Rp, 2.20.1.2 NMAC, 12/31/2019]

### **2.20.1.3      STATUTORY AUTHORITY:**

Section 12-6-10 NMSA 1978 directs the general services department to promulgate regulations to state agencies for the accounting and control of fixed assets owned by government agencies.

[2.20.1.3 NMAC - Rp, 2.20.1.3 NMAC, 12/31/2019]

### **2.20.1.4      DURATION:**

Permanent.

[2.20.1.4 NMAC - Rp, 2.20.1.4 NMAC, 12/31/2019]

### **2.20.1.5      EFFECTIVE DATE:**

Effective December 31, 2019, unless a later date is cited at the end of a section or paragraph.

[2.20.1.5 NMAC - Rp, 2.20.1.5 NMAC, 12/31/2019]

### **2.20.1.6      OBJECTIVE:**

**A.** The objective of Section 2.20.1 NMAC is to establish standards for the accounting for and the controlling of the fixed assets acquired and owned by state agencies as defined under article 2, and to define a uniform system for the classification of such assets.

**B.** To accomplish this, subsequent sections of this rule describe the procedures for the acquisition of fixed assets, the methods for assigning values to acquired assets (valuation), the methods of depreciating fixed assets whether required or optional, the establishment of internal controls on fixed assets, the procedures for conducting the annual inventory of fixed assets, and the allowable methods for the disposition of fixed assets.

[2.20.1.6 NMAC - Rp, 2.20.1.6 NMAC, 12/31/2019]

### 2.20.1.7 DEFINITIONS:

**A. "Agency"** means any governmental entity as defined in Section 13-6-2 NMSA 1978. This definition includes:

- (1) any department, institution, board, bureau, court, commission, district or committee of the government of the state;
- (2) district courts, magistrate courts, district attorneys;
- (3) charitable institutions for which appropriations are made by the legislature;
- (4) every political subdivision of the state, created under general or special act which receives or expends public money from whatever source derived, including but not limited to counties, county institutions, boards, bureaus or commissions, municipalities; drainage, conservancy, irrigation or other special districts;
- (5) every office or officer of any of these organizations.

**B. "Betterment"** means a replacement or major renovation of an existing asset or unit of an existing asset by an improved or superior asset or unit, the effect of which is to improve the efficiency of the primary asset or lengthen the remaining service life.

**C. "Classification system"** means the methods and designations used for identifying fixed assets. This should reflect the object code that was used to acquire the asset and its intended use. Section 2.20.1.9 NMAC of this rule specifies the classifications to be used.

**D. "Component"** means a separately identifiable part of an asset that is more meaningfully defined as an aggregate assembly.

**E. "Depreciation"** means the method applied to allocating the cost of a fixed asset over the duration of its useful life.

**F. "Official or governing authority"** means the person of highest authority within an agency.

**G. "Fixed asset"** means any property or equipment that has an initial value to an agency, whether in cash or trade value, of more than five thousand dollars (five thousand dollars (\$5,000)). It is not acquired for subsequent sale or consumption but for utilization in the course of an agency's normal operations in producing and distributing goods or rendering services. The asset is expected to be used or held beyond the fiscal year in which it was acquired without being consumed by its use. Fixed assets include those assets constructed by agency personnel. This five thousand dollars (\$5,000) threshold for capitalization is a statutory (Section 12-6-10 NMSA 1978) minimum and

does not preclude agencies from controlling assets of lesser value through their fixed asset systems when such control is desirable or appropriate.

**H. "Fixed asset coordinator"** means the individual within an agency or a section of an agency who is responsible for controlling and accounting for the fixed assets in the custody and use of the agency or section.

**I. "General fixed assets"** means those assets acquired by governmental funds, and not accounted for directly in the real accounts of such funds.

**J. "General fixed asset account group"** means those accounts used to record and track fixed assets acquired by "governmental funds." These "funds" include the general fund, the special revenue fund, and the capital project fund. Assets are recorded in these accounts, along with any betterments, impairments or depreciation. Assets are carried in this account group to recognize that they are not a component of fund balance available for appropriation.

**K. "Object code"** means the expenditure accounting code that indicates the category of benefits for which the money was spent.

**L. "Physical inventory"** means the process of verifying that fixed assets owned by the agency are present in their assigned custody and location, and evaluating their condition.

**M. "Proprietary funds"** means those funds used to account for the provision of services by a government entity to other government entities or to the public. The financial objective of such funds is to recover through user charges the full cost (including depreciation) of operations.

**N. "Tag"** means any label or marking that is permanently affixed to a fixed asset, including indelible ink or dyes, numbers physically stamped into the fixed asset, adhesive labels or barcodes, and metal tags.

[2.20.1.7 NMAC - Rp, 2.20.1.7 NMAC, 12/31/2019]

#### **2.20.1.8 FIXED ASSET ACCOUNTING SYSTEM:**

**A.** Agencies should implement systematic and well-documented methods for accounting for their fixed assets. A computerized system is recommended, with appropriate controls on access and authorization of transactions.

**B.** The information to be recorded and maintained on its fixed assets, must include at a minimum the following:

- (1)** agency name or commonly used initials used to identify the agency;

- (2) fixed asset number or fixed asset number plus component number;
- (3) a description using words meaningful for identification;
- (4) location, specifically a building and room number. If the asset is movable, the name and location of the fixed asset coordinator should be used;
- (5) manufacturer name (NOT the vendor's name, unless vendor is the manufacturer);
- (6) model number or model name;
- (7) serial number, or vehicle identification number (VIN) for vehicles in agency's use & possession. If the fixed asset has no serial number, e.g., a custom-built asset, absence should be acknowledged by coding this as "none";
- (8) estimated useful life or units expected to be produced;
- (9) date acquired (month and year);
- (10) cost (according to the valuation methods described in Section 2.20.1.10 NMAC;
- (11) fund and organization that purchased the asset, or to which it was transferred.

**C.** The system must be capable of generating lists of fixed assets in sequences useful for managing them. It must track all transactions including acquisitions, depreciation (if needed), betterments and dispositions. It must generate all necessary accounting entries to the agency's general ledger.

[2.20.1.8 NMAC - Rp, 2.20.1.8 NMAC, 12/31/2019]

#### **2.20.1.9 CLASSIFICATION OF FIXED ASSETS:**

**A.** The type of service that the asset was purchased for must be used to classify fixed assets. The object code under which it was purchased is usually a reliable indicator of the service for which it was purchased.

**B.** Object codes from the category for capital outlay may be used. Purchases from other categories may also be capitalized if appropriate. For example, certain types of repairs or maintenance may increase the useful life of the asset. These costs should be added to the cost of the asset.

**C.** The recommended classifications and definitions are:

(1) **"Land"**: Only real property is included in this category. Costs to be included that are not specifically stated in Subsection B of Section 2.20.1.10 NMAC include fees for appraisals, title searches, attorney's fees, demolition of structures (less any salvage) as part of site preparation, and agent's commissions.

(2) **"Land Improvements"**: Improvements subsequent to the acquisition of land are in this category. Such assets have a limited economic life. Examples are roadways, landscaping, utility infrastructure, and fencing. This category may also be used to record leasehold improvements. Leasehold improvements should be capitalized to recognize the allocation of the cost of the improvements for the duration of their useful lives.

(3) **"Buildings and Structures"**: This category shall be used for all buildings and structures that are permanently fixed to land.

(4) **"Furniture and Fixtures"**: These are assets that are not permanently fixed to land, but are the contents of a building.

(5) **"Information Technology Equipment"** (including software): This category of equipment includes computers and peripherals, and all equipment related to electronic communications.

(6) **"Equipment and Machinery"**: Equipment that is related to industrial production, construction, land or grounds maintenance, food service, public safety should be recorded in this category.

(7) **"Farm Equipment"**: All equipment related to agricultural or ranch production should be recorded in this category.

(8) **"Livestock and Poultry"**: This category is only used for farm or ranch animals that are not purchased for immediate consumption or production of food.

(9) **"Library and Museum Acquisitions"**: Assets in this category only include holdings of libraries or museum collections. A publication that is available in a library but that is acquired by an agency for its private use would be appropriately categorized as furniture and fixtures. Similarly, a farm museum would use this classification for tractors and ploughs, even if they are used for their intended purpose.

(10) **"Motor Vehicles and Aircraft"**: This category is for all such vehicles that the agency owns. Vehicles and aircraft acquired under the terms of an operating lease should not be recorded as fixed assets.

D. Agencies may use these fixed asset classifications for the purpose of pooling assets for depreciation, for publication in financial statements, or other management objectives.

#### **2.20.1.10 VALUATION OF ASSETS:**

**A.** All fixed assets should be acquired in compliance with the procurement ("Procurement Code Regulations") and applicable statutes.

**B.** Fixed assets acquired through purchase shall be recorded at cost. In most cases cost is equal to monetary value exchanged, plus associated costs to prepare the asset for its intended use. These costs include freight or shipping, taxes, site preparation and installation, testing, reconditioning and other similar costs. If considerations other than cash are exchanged for the assets, the fair market value of such consideration at the time of the transaction is the proper measure of the cost of the assets so acquired.

**C.** Fixed assets include those assets constructed by agency personnel. Construction costs for such assets include direct labor (salary including overtime), materials, equipment usage (depreciation, rental, supplies, etc.), and overhead that can be distributed on the basis of direct labor such as employee benefits.

**D.** Fixed assets that are donated to the agency should be recorded at fair market value at the time of donation. Fair market value may require a professional appraisal of the property. If there is any doubt about the rights to the property, it should not be recorded until such rights are clearly established. Such doubts include any conditions or restrictions on the use or future disposition of the property. Should any restrictions adversely affect the value, they should be recognized in the final determination of the valuation to be recorded.

**E.** Fixed assets may also be acquired through governmental reorganization (including those that result in residual equity transfers), specific legislation, mutual agreement between agencies, or a capital project. These shall be placed in an agency's fixed asset inventory at the time the assets are transferred to the agency. The transfer will require the entity transferring the fixed asset to provide information that properly identifies the asset(s) being transferred. The information, in addition to the requirements of Section 2.20.1.9 NMAC above should include estimated service life and accumulated depreciation.

**F.** Agencies may acquire fixed assets through a capital project fund. Assets transferred may include land and new construction, renovated or remodeled buildings, furniture, fixtures and equipment. If the assets are transferred from another agency, e.g., the facilities management division of the New Mexico general services department, the transferring agency will provide the capitalized costs to record in the receiving agency's books.

**G.** In certain instances agencies may enter into lease agreements that are properly classified as capital leases. In a capital lease, the result is that the agency either

acquires or has the right to acquire the property at the end of the lease. In addition, for accounting purposes the property is considered to be purchased if:

- (1) the present value of the lease payments is ninety percent or more of the purchase price,
- (2) the lease extends for at least seventy-five percent of the asset's useful life,
- (3) the lease contains a bargain purchase clause, or
- (4) if title passes to the lessee at the end of the lease.

[2.20.1.10 NMAC - Rp, 2.20.1.10 NMAC, 12/31/2019]

#### **2.20.1.11 GENERAL ACCOUNTING PROCEDURES:**

**A.** Property, and equipment acquired by general, special revenue, and capital projects funds are brought under accounting control by the creation of a "general fixed asset account group." In accordance with generally accepted accounting principles, general fixed assets are recorded at acquisition cost. If the cost of fixed assets was not recorded when the assets were acquired and is unknown when accounting control over the assets is established, it is acceptable to record them at estimated cost. The offset to the fixed asset accounts is the set of equity accounts that indicate the sources from which the fixed assets were acquired.

**B.** Internal service funds account for all fixed assets similar to private sector business enterprises. That is, fixed assets are used to generate revenues to be used in their operations; therefore, they are accounted for in the internal service fund in which they reside. Fixed assets are depreciated based on their cost and expected service life. Depreciation methodologies and charges to depreciation expense should be consistent with generally accepted accounting principles.

**C.** Fixed assets in nonexpendable trust funds are accounted for directly in their respective financial statements.

[2.20.1.11 NMAC - Rp, 2.20.1.11 NMAC, 12/31/2019]

#### **2.20.1.12 DEPRECIATION:**

**A.** Depreciation is a set of methods for allocating the cost of an asset over its economic life. Assets owned by proprietary funds and nonexpendable trust funds are required to be depreciated. Assets held in the general fixed assets account group may, at the option of the fund's managers, be depreciated.

**B.** Depreciation normally should not be recorded until the asset is ready for use.

**C.** Depreciation reduces the net book value of an asset as its economic usefulness is consumed. Depreciation expense should normally be closed to fund balance at year-end.

**D.** The offset to the depreciation account is accumulated depreciation. This is a contra-account to assets, whose net value is historical cost less accumulated depreciation.

[2.20.1.12 NMAC - Rp, 2.20.1.12 NMAC, 12/31/2019]

### **2.20.1.13 BETTERMENTS AND REPLACEMENTS:**

**A.** Betterments to assets should be capitalized. If the asset consists of identifiable and separately valued components, and a component is improved, the old component should be removed from the asset account, and the new component added to the asset account.

**B.** Replacements of components, which simply increase the useful life of the asset, should be substituted for the previous component, and the useful life and amount then used for depreciation. The new component should be recorded inclusive of all costs as described in of Section 2.20.1.10 NMAC. For example, an aircraft has its engines replaced at a cost of three hundred thousand (\$300,000). The old engines should be removed from the books along with accumulated depreciation and the gain or loss on disposal. The new engines are then recorded, and added to the asset with a new useful life and basis for depreciation.

**C.** Reinstallation and rearrangement costs of machinery, rearrangement of partitions, renovation of buildings, and similar outlays on fixed assets purchased in used condition should be capitalized as part of the cost. Overhead items such as insurance, taxes, salaries and other incidentals directly related to the asset during a period of renovation also should be capitalized.

[2.20.1.13 NMAC - Rp, 2.20.1.13 NMAC, 12/31/2019]

### **2.20.1.14 EXPENDITURES FOR MAINTENANCE AND REPAIRS:**

**A.** Repairs and maintenance on fixed assets, which are routine and necessary for continued safe and productive operation, should be charged to maintenance expense in the period in which they occur.

**B.** The expense should be recorded in the appropriate expenditure object code based on the nature of the expense. Repairs and maintenance do not increase the value of the asset, nor prolong its life, but the expenses should be matched to the benefits received.

[2.20.1.14 NMAC - Rp, 2.20.1.14 NMAC, 12/31/2019]

#### **2.20.1.15 FIXED ASSET CONTROLS:**

**A.** Each agency shall establish controls over its fixed assets for the primary purposes of safeguarding them and establishing accountability for their custody and use. Such controls will apply to:

**(1)** Authorization to acquire fixed assets: Controls on the acquisition of fixed assets shall include procedures for requesting their purchase, and a requirement for approval to purchase by a representative of agency management who can determine that the requested purchase is consistent with the business objectives of the agency and is economically reasonable.

**(2)** Receiving procedures: The delivery of goods or services should be accepted by an individual who can attest to such delivery and has no access to accounting system records.

**(3)** Tagging the assets and components: Newly received fixed assets shall be tagged at the time they are received. At the time that a request to purchase a fixed asset is approved, the purchase order shall be returned to the requester along with a tag or tags to identify the asset(s).

**(4)** Assigned location: A basic control over fixed assets is information about their physical location. Agencies shall record the original assigned location of fixed assets. When a fixed asset is reassigned, the new location and fixed asset coordinator should be updated in the fixed asset system records.

**(5)** Fund and organizational unit that originally purchased the asset: Fixed assets must be associated with the fund and governmental entity that purchased them for the purpose of accurately reporting financial performance. If an asset is transferred the fixed asset and accounting records should be updated.

**(6)** Individual(s) responsible for tracking their use and location: Agencies shall assign specific individuals within their organizational units to be responsible for tracking the fixed assets in their units.

**B.** All fixed assets shall be marked with tags. Each tag shall identify the agency owning the asset followed by a unique sequential fixed asset number so that each item may be positively identified. An agency may establish blocks of numbers for its sub-units to improve controls and avoid duplication of numbers.

[2.20.1.15 NMAC - Rp, 2.20.1.15 NMAC, 12/31/2019]

#### **2.20.1.16 ANNUAL INVENTORY:**

**A.** At the end of the fiscal year, each agency shall conduct a physical inventory of its fixed assets consisting of those with a historical cost of five thousand dollars (\$5000) or more, under the control of the governing authority.

**B.** This inventory shall include all property procured through the capital projects fund which are assigned to the agency designated by the director of the property control division as the user agency.

**C.** All passenger vehicles must be included in the inventory process. This includes all vehicles leased from the transportation services division of the general services department as required by the "auditor's rule" Paragraph (8) of Subsection A of Section 2.2.2.12 NMAC.

**D.** The inventory process shall produce a list of the property and the date and cost of acquisition. The annual physical inventory checks against losses not previously revealed and brings to light errors in records of accountability, but more importantly, a systematic physical inventory of fixed assets provides an opportunity for surveying their physical condition, with respect to their need for repairs, maintenance or replacement.

**E.** The results of the physical inventory shall be recorded in a written inventory report, certified as to correctness and signed by the governing authority of the agency. In the process of conducting their fieldwork, the state auditor or independent public accountant under a contract approved by the state auditor may test the correctness of the inventory by generally accepted auditing procedures (Section 12-6-10A NMSA 1978).

[2.20.1.16 NMAC - Rp, 2.20.1.16 NMAC, 12/31/2019]

#### **2.20.1.17      IMPAIRMENT:**

**A.** An asset is considered impaired if its estimated life has been reduced, or its ability to generate revenue has been reduced.

**B.** On finding that an asset has been impaired, the accounts for the fund or group to which the asset belongs should be posted with the appropriate entries to adjust its value to the new estimate.

[2.20.1.17 NMAC - Rp, 2.20.1.17 NMAC, 12/31/2019]

#### **2.20.1.18      DISPOSITION OF FIXED ASSETS:**

**A.** Sections 13-6-1 through 13-6-2 NMSA 1978, and the procurement code govern the disposition of fixed assets.

**B.** For property whose fair market value is under five thousand dollars (\$5,000) and obsolete, or unusable, disposition may be made by:

(1) negotiated sale to any governmental unit of an Indian nation, tribe or pueblo in New Mexico, or by negotiated sale or donation to other state agencies, local public bodies, school districts, state educational institutions or municipalities,

(2) sale at public auction,

(3) destruction,

(4) disposal of hazardous materials in compliance with environmental regulations, and

(5) sale through solicitation of written bids through the state purchasing division.

**C.** For property whose fair market value is over five thousand dollars (\$5,000), disposition may be made only through written approval by the state budget division.

**D.** As a prerequisite to the disposition of any items of personal property, state agencies shall designate a committee of at least three officials of the governing authority to approve and oversee the disposition. They must give notification at least 30 days prior to its action of making the deletion by sending a copy of its official finding and the proposed disposition of the property to the office of the state auditor (OSA).

**E.** All dispositions must be recorded in the fixed asset inventory records. Appropriate entries must also be made in the financial accounts to reflect the disposition of the property. Gains or losses on disposal must be recorded in funds where such accounting is required.

**F.** Dispositions of property whose method is found to be theft or embezzlement should be recorded in the inventory and financial accounts. Associated documentation such as police and insurance reports should be kept as part of the audit trail of the disposition.

[2.20.1.18 NMAC - Rp, 2.20.1.18 NMAC, 12/31/2019]

## **PART 2: EXECUTION OF CONTRACTS, VOUCHERS, PURCHASE ORDERS AND OTHER FINANCIAL COMMITMENTS**

### **2.20.2.1 ISSUING AGENCY:**

Department of Finance and Administration.

[2.20.2.1 NMAC - Rp, 2 NMAC 20.2.1, 3/23/2021]

### **2.20.2.2 SCOPE:**

## **[RESERVED]**

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

### **2.20.2.3 STATUTORY AUTHORITY:**

In order to ascertain the authority and legality of contracts, purchase orders, vouchers, travel vouchers and other financial commitments for departments and other state agencies, pursuant to Section 6-5-3 NMSA 1978, it is necessary to determine whether the person executing the contract has been properly delegated the authority to bind the department or state agency. In many instances there is no clear statutory power granted to an officer to sign on behalf of an agency. Generally the person who is ultimately responsible for the administration of the law has the implied power to execute legal documents for a state agency. Generally the power to execute may be delegated; however, some laws may require specific officers to execute contracts and vouchers on behalf of the agency. In such cases, no delegation is allowed by law.

[2.20.2.3 NMAC - Rp, 2 NMAC 20.2.3, 3/23/2021]

### **2.20.2.4 DURATION:**

Permanent.

[2.20.2.4 NMAC - Rp, 2 NMAC 20.2.4, 3/23/2021]

### **2.20.2.5 EFFECTIVE DATE:**

March 23, 2021, unless a later date is cited at the end of a section.

[2.20.2.5 NMAC - Rp, 2 NMAC 20.2.5, 3/23/2021]

### **2.20.2.6 OBJECTIVE:**

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

[2.20.2.6 NMAC - Rp, 2 NMAC 20.2.6, 3/23/2021]

### **2.20.2.7 DEFINITIONS:**

As used in this rule:

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

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

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

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

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

**E. "State agency"** means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities, or institutions required to submit contracts or vouchers to the department of finance and administration for approval.

[2.20.2.7 NMAC - Rp, 2 NMAC 20.2.7, 3/23/2021]

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

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

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

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

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

**D.** No authorized officer shall delegate to any other person authority to sign the authorized officer's signature.

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

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

#### **2.20.2.9 SIGNATURES REQUIRED:**

The two copies of every contract, voucher, travel voucher, purchase order or other financial commitment required to be submitted to the department shall be signed by an authorized officer. The department will retain at least one signed copy of every contract, voucher, travel voucher, purchase order or other financial commitment. Alternatively, agencies may submit a single electronic version, in portable document format (PDF) or a comparable format and in such a manner as the department may direct, of an executed contract, voucher, travel voucher, purchase order or other financial commitment required to be submitted to the department.

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

#### **2.20.2.10 AUTHORIZED OFFICERS - DELEGATION:**

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

<b>STATE AGENCY</b>	<b>OFFICER AUTHORIZED</b>
office of the governor	governor
office of the lieutenant governor	lieutenant governor
office of the attorney general	attorney general
secretary of state	secretary of state
state auditor	state auditor
public regulation commission	commission
state fire marshal	state fire marshal
transportation department	director
office of the superintendent of insurance	superintendent of insurance
state land office	land commissioner
state treasurer	state treasurer
department of agriculture	secretary of department
N.M. livestock board	executive director
corrections department	secretary of department
children, youth and families dept.	secretary of department
public defender department	director
juvenile parole board	board
adult parole board	board
economic development department	secretary of department
state fair commission	commission
state racing commission	commission
energy, minerals and natural resources dept.	secretary of department
state game commission	commission
department of game and fish	director
department of finance and administration	secretary of department
general services department	secretary of department
state personnel board	director
state personnel office	director
department of health	secretary of department
department of environment	secretary of department
transportation department	secretary of department
human services department	secretary of department
commission on the status of women	commission
department of workforce solutions	secretary of department
department of public safety	secretary of department
taxation and revenue department	secretary of department
commission for the blind	commission
crime stoppers commission	commission
crime victims reparation commission	commission

public education department	secretary of department
division of vocational rehabilitation	director
state investment council	state investment officer
department of military affairs	adjutant general
state commission of public records	state records administrator
regulation and licensing department	superintendent
interstate stream commission	commission
office of the state engineer	state engineer
institutions of higher education	boards of regents or controllers
miners hospital	board
department of cultural affairs	secretary of department
office of African American affairs	executive director
tourism department	secretary of department
Indian affairs department	secretary of department
veterans' services department	secretary of department
aging and long-term services department	secretary of department
education commission	commission
higher education department	secretary of department
department of information technology	secretary of department
homeland security and emergency management department	secretary of department
state ethics commission	commission
early childhood education and care department	secretary of department
all executive departments not otherwise listed	secretary of department
all commissions	commission
all boards	board
all other state agencies not otherwise listed	as provided by applicable law, regulation, or governance documents

## LEGISLATIVE BRANCH

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

## JUDICIAL BRANCH

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

judicial standards commission	executive director
judicial council	council

**B.** If the authorized officer set forth in Subsection A of this section is a board or commission, the power to execute contracts, vouchers, purchase orders or other financial commitments may be delegated by a majority of a quorum of the board or commission acting in accordance with the provisions of law.

[2.20.2.10 NMAC - Rp, 2 NMAC 20.2.10, 3/23/2021]

### **PART 3: VOUCHER AND CONTRACT APPROVAL - AUTHORITY TO MAKE EXPENDITURES**

#### **2.20.3.1 ISSUING AGENCY:**

Department of Finance and Administration.

[Recompiled 10/1/01]

#### **2.20.3.2 SCOPE:**

**[RESERVED]**

[Recompiled 10/1/01]

#### **2.20.3.3 STATUTORY AUTHORITY:**

**[RESERVED]**

[Recompiled 10/1/01]

#### **2.20.3.4 DURATION:**

[Permanent.]

[Recompiled 10/1/01]

#### **2.20.3.5 EFFECTIVE DATE:**

[Filed December 20, 1989]

[Recompiled 10/1/01]

#### **2.20.3.6 OBJECTIVE:**

**[RESERVED]**

[Recompiled 10/1/01]

#### **2.20.3.7 DEFINITIONS:**

**STATE AGENCY DEFINED:** As used in this rule, state agency means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities, or institutions but shall not include state educational institutions set forth in Article 12, Section 11 of the New Mexico Constitution. This rule also governs voucher approvals for all divisions of the department of finance and administration.

[Recompiled 10/1/01]

#### **2.20.3.8 VOUCHER APPROVAL:**

Unless otherwise provided by this rule, no expenditure of public funds shall be made by any state agency, including every division of the department of finance and administration, unless approval of the expenditure as to authority and legality has been made by the department of finance and administration.

[Recompiled 10/1/01]

#### **2.20.3.9 VOUCHER APPROVAL-EXCEPTIONS FROM VOUCHERING THROUGH THE DEPARTMENT:**

A. The secretary of finance and administration finds that efficiency and economy require that the following state agencies be excepted from submitting vouchers through the department for approval:

- (1) the state highway and transportation department;
- (2) the inter-tribal Indian ceremonial;
- (3) the human services department for:
  - (a) child support payments;
  - (b) project forward;
  - (c) care and support;
  - (d) financial assistance to clients for dependent children;
  - (e) medical payments to providers of care.
- (4) the state department of labor; and

- (5) taxation and revenue department for refunds on tax returns.

B. The following state agencies are excepted by law from submitting vouchers through the department for approval:

- (1) the state fair pursuant to Section 16-6-8 NMSA 1978;
- (2) the livestock board pursuant to Section 77-2-10 NMSA 1978;
- (3) the peanut commission pursuant to Section 76-17-8 NMSA 1978;
- (4) the New Mexico mortgage finance authority pursuant to Section 58-18-20 NMSA 1978; and
- (5) the New Mexico public school insurance authority pursuant to Section 22-2-6.8 NMSA 1978.

C. State agencies excepted from submitting vouchers through the department for approval shall adhere to all applicable statutes, rules, and regulations.

[Recompiled 10/1/01]

## **PART 4: GOVERNING THE AWARD OF PAYROLL DEDUCTION CODES AND DESIGNATION AND IMPLEMENTATION OF QUALIFIED EMPLOYEE BENEFIT PROGRAMS**

### **2.20.4.1 ISSUING AGENCY:**

Department of Finance and Administration.

[Recompiled 10/1/01]

### **2.20.4.2 SCOPE:**

This rule governs the circumstances under which payroll deductions may be permitted and the method by which vendors, state employees or risk management may initiate requests for a payroll deduction code and by which the department of finance and administration shall process those requests.

[Recompiled 10/1/01]

### **2.20.4.3 STATUTORY AUTHORITY:**

A. Section 10-7-2 NMSA 1978 provides that state employees "shall receive their salaries or wages for services rendered in accordance with regulations issued by the department of finance and administration", placing on the department of finance and

administration the responsibility for determining when discretionary payroll deductions may be permitted.

B. Subsection E of Section 9-6-5 NMSA 1978 permits the department of finance and administration to "adopt such reasonable and procedural rules and regulations as may be necessary to carry out the duties of the department."

C. Subsection C of Section 9-6-5 NMSA 1978 authorizes the department of finance and administration to apply for and receive any public or private funds available to the department to carry out its programs, duties or services.

[Recompiled 10/1/01]

#### **2.20.4.4 DURATION:**

**[RESERVED]**

[Recompiled 10/1/01]

#### **2.20.4.5 EFFECTIVE DATE:**

[Filed December 20, 1989]

[Recompiled 10/1/01]

#### **2.20.4.6 OBJECTIVE:**

The purpose of this rule is to benefit state employees by providing payroll deduction codes for only those high quality employee benefit programs that the group buying power of the large number of state employees and the availability of payment by payroll deduction can obtain at substantial economic savings.

[Recompiled 10/1/01]

#### **2.20.4.7 DEFINITIONS:**

A. "Open and switch enrollment period" is an annual six-week period during which state employees may enroll in a specific qualified employee benefit program or may switch from enrollment in such a program offered by one qualified vendor to that offered by a different qualified vendor.

B. "Payroll deduction code" is a computer code under which a portion of a state employee's salary is automatically diverted from the employee to an account for the entity holding the code.

C. "Qualified employee benefit program" means a program offered by a qualified vendor to state employees:

- (1) which requires a payroll deduction of a stable dollar amount (a change in price during an open and switch enrollment period is permitted) for an unlimited duration (subject to employee cancellation);
- (2) which offers employees a benefit not provided, or not provided in sufficient amount or with adequate specifications, by an existing, state-sponsored program;
- (3) which is determined by risk management to offer significant benefit for the cost; and
- (4) which offers a benefit to employees at substantial savings over what an individual employee could obtain without the benefit of the group-rate savings available through a payroll deduction plan.

D. "Qualified vendor" means a person or business entity:

- (1) which offers a qualified employee benefit program;
- (2) which maintains 100 or more state employees enrolled in the program;
- (3) which is registered and in good standing with the requisite New Mexico business regulatory agency (e.g., the superintendent of insurance);
- (4) which has, and agrees to maintain, a physical and permanent commercial office and staff in New Mexico readily accessible to employees it is servicing; and
- (5) which is willing to abide by rules and regulations promulgated by the department of finance and administration concerning the operation of payroll deduction plans.

E. "Risk management" means the risk management division of the general services department.

F. "Secretary" means secretary of finance and administration.

[Recompiled 10/1/01]

#### **2.20.4.8 PERMITTED PAYROLL DEDUCTIONS:**

A. Payroll deduction codes shall be allowed for the following purposes:

- (1) those required by law (state and federal taxes, FICA);

(2) state-sponsored and required insurance programs where the state shares the cost of the program;

(3) PERA, ERB or other state-sponsored retirement programs mandated by statute;

(4) deferred compensation programs under Chapter 10, Article 7A NMSA 1978;

(5) union dues as permitted by state personnel board rules and regulations;

(6) all financial institutions approved by the department of finance and administration;

(7) charities approved by the department of finance and administration;

(8) qualified employee benefit programs approved by risk management;

(9) vanpool associations approved by the department of finance and administration;

(10) savings bond programs;

(11) exceptional or emergency circumstances which require special consideration and are approved by the department of finance and administration on a case-by-case basis.

B. In order to pay for the ongoing administrative costs of administering payroll deductions for qualified employee benefit programs, the department of finance and administration shall retain three percent from the total deductions made for each qualified employee benefit program under a payroll deduction code each pay period. In order to offset the costs to risk management of evaluating programs of vendors applying for payroll deduction codes, the department of finance and administration shall charge an application fee of five hundred dollars (\$500) to each vendor proposing a program, which fee shall be forwarded to the risk management division of the general services department.

C. Employee benefit programs which had payroll deduction codes prior to the adoption of this rule may not enroll additional state employees unless they fully comply with this rule.

[Recompiled 10/1/01]

#### **2.20.4.9 PROCEDURE FOR ESTABLISHING QUALIFIED EMPLOYEE BENEFIT PROGRAMS FOR PAYROLL DEDUCTION PURPOSES:**

A. A qualified employee benefit program may be initiated by three means:

- (1) by vendor request;
- (2) by state employee request; and
- (3) by risk management initiation.

B. Any vendor wishing to have an employee benefit program considered for implementation shall provide to risk management detailed specifications regarding the program, an application fee and any such additional information as may be requested by risk management.

C. Any twenty-five (25) state employees may suggest to risk management an employee benefit program that they would like to see implemented.

D. Risk management, upon request of a vendor, upon request of state employees or on its own initiative, shall investigate each proposed employee benefit program to determine:

- (1) whether such a program would offer a unique benefit to state employees not already adequately provided through existing employee benefit programs;
- (2) whether the program would provide significant benefit to state employees for the cost indicated;
- (3) whether the estimated cost to state employees for the program represents a substantial savings over what an individual state employee could obtain on his or her own without the benefit of the group rate obtained from providing a payroll deduction plan to the vendor;
- (4) whether the program will require a deduction of a stable dollar amount (except for an annual price change) for a period of unlimited duration (subject to employee cancellation); and
- (5) for employee benefit programs suggested by state employees or risk management, whether any qualified vendors (except for the minimum enrollment requirement) are available who are willing to provide the suggested services.

E. In determining whether a proposed program meets the criteria of for qualified employee benefit program set forth in Subsection D, above, the vendor shall supply a copy of its most recent audited financial statement, a company wide five-year loss experience report, if appropriate, illustrating premiums collected, claims paid and reserves allocated for each year of the five-year period for the type of policy coverage involved and any other information requested by risk management.

F. If risk management determines that the suggested employee benefit program offers unique, quality benefits at substantial savings to employees, it shall conduct a survey of a representative sample of state employees to determine the extent of employee interest.

G. If a minimum of 750 employees are statistically determined to be interested in a program and if the program meets the other criteria in this section, risk management shall certify the program as a qualified employee benefit program. Upon certification, the secretary shall direct the program's implementation as provided in Section 6 [now 2.20.4.10 NMAC].

[Recompiled 10/1/01]

#### **2.20.4.10 IMPLEMENTATION OF A QUALIFIED EMPLOYEE BENEFIT PROGRAM:**

A. Upon certification of a qualified employee benefit program, risk management shall implement the program in the following manner. Risk management shall draw up specifications for the qualified employee benefit program and publish notice of request for proposals through regular state bidding procedures. Upon receipt of proposals with application fees, risk management shall review each proposal, confirm that it meets the criteria and specifications for the qualified employee benefit program and that the vendor is a qualified vendor (except for the minimum enrollment qualification). Risk management shall then select one or more qualified vendors. Risk management may either appoint the single vendor offering the program at the lowest price to be the exclusive vendor of that program under contract for up to three years, or may authorize several vendors offering the best versions of the program to solicit business from state employees during the open and switch enrollment period. If several vendors are authorized, risk management may require each vendor to cooperate in preparation of a comparison of benefits offered by the several vendors of the program.

B. If risk management contracts with an exclusive vendor, the contract shall be rebid by risk management at the end of the term. Risk management shall require as a condition of all bids that any new vendor agree to take over automatically all state employees then enrolled in the program.

C. If risk management authorizes several vendors, those who enroll 100 or more state employees during open or switch enrollment periods shall receive a payroll deduction code. Employees who have enrolled in the program with a vendor who does not meet this minimum enrollment requirement so as to qualify for a payroll deduction code, shall have an immediate opportunity following the open and switch enrollment period which results in elimination of that vendor to switch enrollment to a qualified vendor.

D. Each year thereafter, before the annual open and switch enrollment period, risk management shall review the programs offered by all previously authorized qualified

vendors to ensure that their programs continue to meet the criteria set forth in Section 5 (D) [now Subsection D of Section 2.20.4.9 NMAC] above, except the minimum employee enrollment requirement. Any additional vendor may submit a proposal with application fee to risk management at any time before the annual open and switch enrollment period for each program. Risk management shall determine whether the vendor is qualified and whether the proposal meets the standards for the qualified employee benefit program in question; risk management may authorize new qualified vendors to participate in the succeeding enrollment period. At the end of the open and switch enrollment period, any vendor which does not have the minimum enrollment requirement shall lose its payroll deduction code.

[Recompiled 10/1/01]

#### **2.20.4.11 SOLICITATION OF STATE EMPLOYEES BY VENDORS OF QUALIFIED EMPLOYEE BENEFIT PROGRAMS:**

A. Upon certification that a proposed program is a qualified employee benefit program as provided in Section 5 [now 2.20.4.9 NMAC] and upon selection of qualified vendors as provided in Section 6 [now 2.20.4.10 NMAC], risk management shall specify an annual open and switch enrollment period of six (6) weeks for that program.

B. Vendors may prepare packets of information (fliers, brochures, etc.) for distribution to employees of each agency by the agency personnel officer. The information should specify how employees can contact vendors or their agents. When multiple vendors are soliciting state employees' business for any given employee benefit program, personnel officers should attempt, insofar as possible, to distribute information from all vendors at the same time during the first week of the open and switch enrollment period to facilitate the comparison of programs.

C. Should an agency head deem appropriate, he or she may authorize a meeting of those employees of the agency who so desire with all of the vendors offering a qualified employee benefit program for an explanation of the programs and answering of questions. Agency heads are requested to hold these meetings during the lunch hour or other times which will be nondisruptive of employees' working hours. Such authorization shall be in writing and addressed to each of the qualified vendors. Risk management shall be notified of these meetings and is encouraged to send knowledgeable representatives.

D. Other than the meetings arranged in Subsection C above, vendors and their agents shall not be permitted to contact employees during working hours or at the place of employment.

[Recompiled 10/1/01]

#### **2.20.4.12 TERMINATION OF PROGRAMS:**

If the secretary determines at any time that any qualified employee benefit program places a burden on the department of finance and administration and risk management which is not offset by a corresponding benefit to state employees, the secretary shall have the right to terminate all payroll deduction codes previously granted to vendors for that qualified employee benefit program under this rule upon giving six (6) months written notice to each vendor. Qualified vendors and state employees shall not gain a vested right to use of payroll deduction codes.

[Recompiled 10/1/01]

## **PART 5: RESPONSIBILITY FOR ACCOUNTING FUNCTION**

### **2.20.5.1 ISSUING AGENCY:**

Department of Finance and Administration.

[2.20.5.1 NMAC – N, 08-29-03]

### **2.20.5.2 SCOPE:**

Establishes accountability for accounting function in all state agencies as defined by section 6-5-1 NMSA 1978, as amended, without exception.

[2.20.5.2 NMAC – N, 08-29-03]

### **2.20.5.3 STATUTORY AUTHORITY:**

Section 6-5-2, NMSA 1978, as amended, requires the division to maintain a central system of state accounts and to devise, formulate, approve and control and set standards for the accounting methods and procedures of all state agencies. Section 6-5-2 NMSA 1978, as amended, requires the division prescribe procedures, policies and processing documents for use by state agencies in connection with fiscal matters and may require reports from state agencies as may be necessary to carry out its duties and functions. Section 9-6-5 (E) NMSA 1978, as amended, authorizes the secretary of the department to make and adopt such reasonable and procedural rules and regulations as may be necessary to carry out the duties of the department and its divisions.

[2.20.5.3 NMAC – N, 08-29-03]

### **2.20.5.4 DURATION:**

Permanent

[2.20.5.4 NMAC – N, 08-29-03]

### **2.20.5.5 EFFECTIVE DATE:**

August 29, 2003

[2.20.5.5 NMAC – N, 08-29-03]

**2.20.5.6 OBJECTIVE:**

To establish accountability for the accounting function by establishing, at the state agency level, standards for the proper recording, summarizing, and reporting of financial transactions and designating one state employee at each state agency to be responsible for maintaining those standards.

[2.20.5.6 NMAC – N, 08-29-03]

**2.20.5.7 DEFINITIONS:**

A. "Accounting function" means the methods and procedures, be they manual or automated, used by a state agency to record, summarize, and report its financial transactions.

B. "Accounting system" means the total structure of records and procedures used to record, to classify, to summarize, and to report on the financial position of a governmental entity or any of its funds, fund types, or organizational components.

C. "Chief financial officer" is the working title of the state employee assigned the responsibilities set forth in Subsection C of 2.20.5.8 NMAC.

D. "Department" means the department of finance and administration.

E. "Division" means the financial control division of the department of finance and administration.

F. "State agency" means any department, institution, board, bureau, commission, district or committee of the government of the state and means every office or officer of any of the above.

G. "Timely" means in substantial compliance with the due dates established by the division.

[2.20.5.7 NMAC – N, 08-29-03]

**2.20.5.8 CHIEF FINANCIAL OFFICER AND ASSIGNMENT OF RESPONSIBILITIES:**

A. Statute requires that the administrative head of each agency ensure that the model accounting practices, established by the division, are followed. In order to ensure that model accounting practices are followed, it is incumbent upon the agency head to

carryout the responsibilities of the chief financial officer, outlined in Subsection C of 2.20.5.8 NMAC.

B. An agency head may assign the responsibilities outlined in Subsection C of 2.20.5.8 NMAC to any employee within the agency that has the educational background, knowledge, and experience necessary to supervise, monitor, and control the state agency's accounting function. The delegation must be in writing, must be for a specific fiscal year, and must be approved by the division.

C. It is the responsibility of the chief financial officer to ensure that:

(1) an internal control structure exists at the state agency and is functioning properly.

(2) all transactions are recorded daily in the agency's accounting records.

(3) all transactions are properly classified in the agency's records.

(4) cash account records are reconciled timely each month to the division's reports and to the state treasurer's reports.

(5) all transactions comply with federal and state law.

(6) all expenditures have a public benefit or purpose, are necessary, and are consistent with the appropriation, the expenditure authority from the legislature and comply with Section 6-5-3 NMSA 1978, as amended.

(7) all accounting systems, including subsidiary systems, are recording transactions timely, completely, and accurately.

(8) all payments to vendors are accurate, timely and the state agency has certified they are for services rendered or goods received in accordance with Section 13-1-158 NMSA 1978, as amended.

(9) all information requested by the division from the state agency is provided timely and accurately.

(10) all reporting of financial information must be timely, complete and accurate, to the state agency's management and to oversight agencies and entities.

(11) the state agency's annual financial statement audit is completed by the deadline established by the state auditor and the audit report includes an unqualified opinion.

(12) a budgetary control system, approved by the state budget division of the department of finance and administration, is in place and functioning.

[2.20.5.8 NMAC – N, 08-29-03]

## **PART 6: AUTHORITY TO ISSUE WARRANTS**

### **2.20.6.1 ISSUING AGENCY:**

Department of Finance and Administration.

[2.20.6.1 NMAC - N, 08-29-03]

### **2.20.6.2 SCOPE:**

Applies to all state agencies, as defined by section 6-5-1 NMSA 1978, as amended, seeking authorization to issue warrants or exception from the requirement of prior submission of proposed vouchers, purchase orders or contracts to the division as provided in section 6-5-3 NMSA 1978, as amended.

[2.20.6.2 NMAC - N, 08-29-03]

### **2.20.6.3 STATUTORY AUTHORITY:**

Section 6-5-9 NMSA 1978, as amended, requires the secretary of the department to annually issue a written order granting authorization to a particular state agency to issue warrants or exception from the requirement of prior submission of proposed vouchers, purchase documents, purchase orders or contracts to the division as provided in section 6-5-3 NMSA 1978, as amended when efficiency or economy so requires. Section 9-6-5 (E) NMSA 1978, as amended, authorizes the secretary of the department to make and adopt such reasonable and procedural rules and regulations as may be necessary to carry out the duties of the department and its divisions.

[2.20.6.3 NMAC - N, 08-29-03]

### **2.20.6.4 DURATION:**

Permanent

[2.20.6.4 NMAC - N, 08-29-03]

### **2.20.6.5 EFFECTIVE DATE:**

August 29, 2003

[2.20.6.5 NMAC - N, 08-29-03]

#### **2.20.6.6 OBJECTIVE:**

The object of this rule is to provide the conditions state agencies shall fulfill prior to applying to obtain an authorization to issue warrants or exception from the requirement of prior submission of proposed vouchers, purchase documents, purchase orders or contracts to the division. Also, the object of this rule is to ensure that a state agency that is applying to obtain such authorization or exception is recording and reporting its financial transactions timely, completely, and accurately and that its accounting system follows all the division's current policies and procedures. Reporting includes, but is not limited to: the reporting in audited financial statements; managerial reporting; reporting to oversight agencies including commissions, committees, and the legislature; and detailed transaction reporting to the division.

[2.20.6.6 NMAC - N, 08-29-03]

#### **2.20.6.7 DEFINITIONS:**

A. "Accounting system" means the total structure of records and procedures used to record, to classify, to summarize, and to report on the financial position of a governmental entity or any of its funds, fund types, or organizational components.

B. "Department" means the department of finance and administration.

C. "Division" means the financial control division of the department of finance and administration.

D. "State agency" means any department, institution, board, bureau, commission, district or committee of the government of the state and means every office or officer of any of the above.

E. "Warrant" means a written instrument issued by the division authorizing payment of a specified amount to a designated payee out of the state treasurer's funds.

F. "Timely" means in substantial compliance with the due dates established by the division.

[2.20.6.7 NMAC - N, 08-29-03]

#### **2.20.6.8 APPLICATION PROCEDURES AND CONDITIONS OF APPROVAL OF AUTHORIZATION OR EXCEPTION:**

A. Each and every December 31, a state agency that wishes to issue warrants or exception from the requirement of prior submission of proposed vouchers, purchase orders, or contracts to the division for the following fiscal year (July 1 through June 30) shall apply for authorization or exception by submitting a written request to the secretary of the department explaining in detail the reasons why efficiency or economy will be

better achieved by the state agency issuing warrants or waiving the prior submission requirements. As part of this annual request, the state agency shall include a detailed report outlining how it has complied during the past calendar year (January through December) with the following conditions and standards:

- (1) A well-documented internal control structure shall exist within the state agency and functioning properly.
- (2) All transactions shall be recorded daily in the state agency's accounting records.
- (3) All transactions shall be properly classified in the state agency's records.
- (4) The state agency's cash account records shall be reconciled timely each month to the division's reports and to the state treasurer's reports. If the agency maintains an account directly with a financial institution instead of with the state treasurer, the agency's cash account shall be reconciled timely to the financial institution's statement of account.
- (5) All transactions shall comply with federal and state law.
- (6) All expenditures shall be for a public benefit or purpose, be necessary, and be consistent with the related appropriation (expenditure authority from the legislature).
- (7) All accounting systems, including subsidiary systems, shall record transactions timely, completely, and accurately.
- (8) All payments to vendors shall be accurate and timely and be for services already rendered or goods received and accepted by the state agency as complying with the contract or purchase order.
- (9) All information requested by the division must be provided to the division timely and accurately, and in compliance with the division's current policies and procedures, including, but not limited to, transaction data.
- (10) All reporting of financial information to the state agency's management and to oversight agencies and entities must be timely, complete, and accurate.
- (11) The audit of the state agency's financial statements shall be completed by the deadline established by the state auditor and the audit report shall include an unqualified opinion.

B. Failure to meet any of the standards and conditions above is grounds for the secretary to deny approval to the agency to issue warrants or deny an exception to the prior submission requirements.

C. The secretary may request the division's office of the state controller to verify the maintenance of the above standards and conditions during the annual period for which the authorization is granted. The state agency shall cooperate in providing the division's office of the state controller with the information it requests.

D. If the secretary does grant approval to the state agency for the authorization to issue warrants or exception to the prior submission requirements, that approval is only for the fiscal year beginning July 1 following the request.

E. If the state agency is issuing warrants or is waived from the prior submission requirements at the time it makes the application and the secretary denies the request for the subsequent fiscal year, the agency shall not issue warrants after the June 30th following the denied request.

F. By March 1 following the denied request, the state agency shall make arrangements with the division for the division to issue the warrants for the state agency beginning the July 1 following the denied request. As allowed by law, this shall include the transfer of financial resources to the division to cover the cost of issuing the warrants and administering the prior submission of proposed vouchers, purchase orders and contracts.

[2.20.6.8 NMAC - N, 08-29-03]

## **PART 7: GOVERNING THE AUTOMATIC DIRECT DEPOSIT OF STATE EMPLOYEES' SALARY AND WAGES**

### **2.20.7.1 ISSUING AGENCY:**

Department of Finance and Administration.

[2.20.7.1 NMAC - N, 7/31/2013]

### **2.20.7.2 SCOPE:**

All state agencies utilizing the central payroll system operated by the financial control division of the department of finance and administration, pursuant to Section 6-5-2.1(I) NMSA 1978.

[2.20.7.2 NMAC - N, 7/31/2013]

### **2.20.7.3 STATUTORY AUTHORITY:**

Section 9-6-5(E) and Section 10-7-2(B) NMSA 1978.

[2.20.7.3 NMAC - N, 7/31/2013]

#### **2.20.7.4 DURATION:**

Permanent.

[2.20.7.4 NMAC - N, 7/31/2013]

#### **2.20.7.5 EFFECTIVE DATE:**

July 31, 2013.

[2.20.7.5 NMAC - N, 7/31/2013]

#### **2.20.7.6 OBJECTIVE:**

The objective of this rule is to provide state employees with the convenience of the direct deposit of their salary and wages while minimizing the burden on the state's central payroll system and human resources and protecting the state and state employees from potential fraud.

[2.20.7.6 NMAC - N, 7/31/2013]

#### **2.20.7.7 DEFINITIONS:**

**A. "Direct deposit account"** means a checking or savings account with a financial institution designated by a state employee to receive direct deposits of the state employee's net salary and wages.

**B. "Direct deposit"** means an electronic fund transfer whereby a state employee's net salary and wages are credited to an account designated by the employee.

**C. "Division"** means the financial control division of the department of finance and administration.

**D. "Financial institution"** means a financial institution located within the United States that is part of the electronic fund transfer network used by the division to make direct deposits.

**E. "Net salary and wages"** means the remainder due a state employee after all authorized payroll deductions have been taken from a state employee's gross wages. Authorized payroll deductions include state and federal taxes paid by the state employee, state employee contributions toward retirement programs administered by the public employees retirement association and educational retirement board, and state employee premiums for group benefits offered through the risk management division of the general services department.

**F. "Salary and wages"** means remuneration for personal services rendered by a state employee to a state agency, payment for authorized paid leave taken by a state employee, payment for accumulated annual leave and compensatory time upon separation from employment with the state, and payment for sick leave pursuant to Section 10-7-10 NMSA 1978.

**G. "State agency"** means any department, institution, board, bureau, commission, district or committee of the government of the state and means every office or officer of any of the above that utilizes the central payroll system operated by the division, pursuant to Section 6-5-2.1(l) NMSA 1978.

**H. "State employee"** means an employee of a state agency, including a person holding an elected office.

[2.20.7.7 NMAC - N, 7/31/2013]

#### **2.20.7.8 LIMITATIONS ON DIRECT DEPOSIT ACCOUNTS:**

**A.** A state employee may only have one direct deposit account at a time.

**B.** A state employee must own, in whole or in part, the direct deposit account designated by the state employee.

**C.** One hundred percent of the state employee's net salary and wages must be deposited into the direct deposit account designated by the state employee.

[2.20.7.8 NMAC - N, 7/31/2013]

#### **2.20.7.9 DIRECT DEPOSIT ACCOUNT PROCEDURES AND RESPONSIBILITIES:**

**A.** Upon being hired by a state agency and during such other times as may be required by the division, a state employee must either:

- (1) affirmatively decline to participate in the direct deposit program; or
- (2) designate a direct deposit account.

**B.** State employees shall use forms and agreements prescribed by the division to affirmatively decline to participate in the direct deposit program, designate a direct deposit account, and change their direct deposit account designation.

**C.** State employees shall demonstrate their ownership interest in the direct deposit account designated by them by submitting with their direct deposit account designation form a voided, preprinted check, a current statement from their financial institution, or other acceptable evidence of ownership as determined by the division.

**D.** State employees shall submit direct deposit forms to the designated individual within their state agency employer.

**E.** Pursuant to Subsection C of 2.20.5.8 NMAC, state agency chief financial officers are responsible for ensuring that direct deposit forms are filled out correctly and completely, that the state employee has demonstrated the state employee's ownership interest in the account, and that direct deposit information is properly entered into the central payroll system.

[2.20.7.9 NMAC - N, 7/31/2013]

## **CHAPTER 21-29: [RESERVED]**

## **CHAPTER 30: STATE GOVERNMENT BUDGETS [RESERVED]**

## **CHAPTER 31-39: [RESERVED]**

## **CHAPTER 40: EXPENDITURE OF PUBLIC FUNDS**

### **PART 1: GENERAL PROVISIONS [RESERVED]**

### **PART 2: GOVERNING THE APPROVAL OF CONTRACTS FOR THE PURCHASE OF PROFESSIONAL SERVICES**

#### **2.40.2.1 ISSUING AGENCY:**

Department of Finance and Administration (DFA).

[2.40.2.1 NMAC - Rp, 2.40.2.1 NMAC, 7/24/2018]

#### **2.40.2.2 SCOPE:**

**A.** The contracts review bureau of the department of finance and administration shall review and approve all professional services contracts which result in expenditures greater than five thousand dollars (\$5,000), including applicable gross receipts tax, and all amendments to those contracts for all state agencies except as provided in Subsections B and C of Section 2.40.2.2 NMAC of this rule. Contracts expending public funds in accordance with the Procurement Code, Sections 13-1-28 to 13-1-199 NMSA 1978 as amended are included within the scope of this rule.

**B.** The following state agencies are currently exempt from submitting professional services contracts and amendments through the contracts review bureau of the department of finance and administration:

**(1)** state agencies within the judicial branch of government as defined by the New Mexico Constitution, Article VI;

**(2)** state agencies within the legislative branch of government as defined by the New Mexico Constitution, Article IV;

**(3)** state educational institutions as defined by the New Mexico Constitution, Article XII, Section 11 and Chapter 21, Articles 13, 14, 16 and 17 NMSA 1978;

**(4)** the state fair for only those contracts exempted pursuant to Subsection H of Section 13-1-99 NMSA 1978;

**(5)** the New Mexico public school insurance authority pursuant to Subsection F of Section 22-29-6 and 22-29-8 NMSA 1978 for contracts for procuring goods or services and paying for insurance or insurance-related services;

**(6)** the New Mexico mortgage finance authority pursuant to Section 58-18-20 NMSA 1978; and

**(7)** other state agencies exempt by statute.

**C.** Pursuant to Section 6-5-9 NMSA 1978, the secretary of the department of finance and administration may exempt a state agency's contracts from contracts review bureau review and approval when the secretary of the department of finance and administration determines that efficiency or economy so requires. A state agency seeking an exemption must:

**(1)** apply in writing to the secretary of the department of finance and administration; and

**(2)** meet all of the following requirements:

**(a)** issue its own warrants;

**(b)** be exempt from prior submission of vouchers or purchase orders to the financial control division of the department of finance and administration;

**(c)** receive the majority of its money from non-general fund sources;

**(d)** maintain pre-audit and post-audit fiscal accounting controls;

(e) maintain and operate its own administrative unit for procurement and controls its own encumbrance of funds available for professional service contracts;

(f) provide administrative control and review of professional services contracts through its own administrative unit; and

(g) employs in-house counsel to prepare, review, and approve professional services contracts for form and legal sufficiency and to advise the state agency with respect to all applicable laws and regulations; provided, however, that the attorney general shall also review and approve all contracts subject to Paragraph (1) of Subsection C of 2.40.2.10 NMAC of this rule prior to approval and execution by the state agency.

[2.40.2.2 NMAC - Rp, 2.40.2.2 NMAC, 7/24/2018]

### **2.40.2.3      STATUTORY AUTHORITY:**

**A.** Sections 13-1-118 and 13-1-125 NMSA 1978 authorize the department of finance and administration to review professional services contracts of state agencies as to form, legal sufficiency, and budgetary requirements if required by its regulations.

**B.** Section 6-5-3 NMSA 1978 provides that before any state agency enters into a contract expending public funds, the financial control division of the department of finance and administration shall determine the authority for such proposed expenditure. After the authority for the expenditure is determined, the appropriate fund shall be shown by the financial control division to be encumbered to the extent of the proposed expenditure. The financial control division may request, and the state agency shall provide, such documentation and other information as the financial control division deems necessary to justify the state agency's determination of authority. The financial control division may disapprove the proposed expenditure if it determines that the justification is inadequate or is not substantiated by law.

**C.** Section 6-5-6 NMSA 1978 requires the financial control division of the department of finance and administration to determine that the proposed expenditure does not exceed the state agency's appropriation, does not exceed the periodic allotment made to the state agency or the unencumbered balance of funds at its disposal. The state agency shall determine that a proposed expenditure is for a public benefit and purpose consistent with the related appropriation and is necessary to carry out the statutory mission of the state agency prior to committing the state to the transaction.

**D.** Subsection E of 9-1-5 and Subsection E of 9-6-5 NMSA 1978 provide that after notice and hearing, the secretary of the department of finance and administration may make and adopt such reasonable administrative and procedural rules and regulations as necessary to carry out the duties of the department of finance and administration and its divisions.

[2.40.2.3 NMAC - Rp, 2.40.2.3 NMAC, 7/24/2018]

**2.40.2.4 DURATION:**

Permanent.

[2.40.2.4 NMAC - Rp, 2.40.2.4 NMAC, 7/24/2018]

**2.40.2.5 EFFECTIVE DATE:**

July 24, 2018 unless a later date is cited at the end of a section.

[2.40.2.5 NMAC - Rp, 2.40.2.5 NMAC, 7/24/2018]

**2.40.2.6 OBJECTIVE:**

The purpose of this rule is to establish the procedures state agencies must follow and the requirements state agencies must meet in drafting, entering into, and seeking approval of professional services contracts. These procedures ensure compliance with Sections 6-5-3, 6-5-6, 13-1-118 and 13-1-125 NMSA 1978 as amended.

[2.40.2.6 NMAC - Rp, 2.40.2.6 NMAC, 7/24/2018]

**2.40.2.7 DEFINITIONS:**

**A. "Bureau"** means the contracts review bureau of the department of finance and administration.

**B. "Contract"** means any agreement for the provision of professional services.

**C. "Contract brief"** means the bureau paper form or electronic version which shall accompany all professional services contracts and amendments submitted to the bureau.

**D. "Contractor"** as defined in Section 13-1-43 NMSA 1978 means any business having a contract with a state agency.

**E. "Department or DFA"** means the department of finance and administration.

**F. "Form"** means, at a minimum, that all contracts and amendments contain the provisions required by the bureau, including but not limited to, a scope of work consistent with the request for proposals issued by the state agency if the contract was procured by a request for proposals and performance measures when required and as defined by and in accordance with the Accountability in Government Act, Sections 6-3A-1 through 6-3A-9 NMSA 1978 and subsequent amendments.

**G. "Legal sufficiency"** means, at a minimum, that all contracts and amendments contain the provisions required by law and that all required signatures have been obtained.

**H. "Procurement"** as defined by Section 13-1-74 NMSA 1978 means purchasing, renting, leasing, lease purchasing or otherwise acquiring items of personal property, services or construction and includes all procurement functions, including but not limited to, preparation of specifications, solicitation of sources, qualification or disqualification of sources, preparation and award of the contract, and contract administration.

**I. "Procurement Code"** means Sections 13-1-28 to 13-1-199 NMSA 1978, as amended.

**J. "Professional services"** as defined by Section 13-1-76 NMSA 1978 means the services of architects, archaeologists, engineers, surveyors, landscape architects, medical arts practitioners, scientists, management and systems analysts, certified public accountants, registered public accountants, lawyers, psychologists, planners, researchers, and persons or businesses providing similar services, including information system resources professional services, and other such services which may be designated as professional services by a determination issued by the state purchasing agent or designee.

**K. "Regulation"** as defined by Section 13-1-80 NMSA 1978 means any rule, order, statement or policy, as amended, issued by a state agency or a local public body that affects persons not members or employees of the issuer.

**L. "Retroactive approval to a contract or a contract amendment"** means approval of a contract or contract amendment that was submitted to the bureau and approved by the DFA secretary or designee pursuant to 2.40.2.13 NMAC of this rule after the contractor has begun work pursuant to a request to perform work from a state agency employee or public officer with authority to make such a request.

**M. "DFA secretary"** means the secretary of the department of finance and administration.

**N. "Sole source contract or amendment to sole source contract"** means a contract or amendment which fulfills the requirements of Sections 13-1-118, 13-1-126 and 13-1-126.1 NMSA 1978, as amended.

**O. "State agency"** means any department, agency, commission, council, board, advisory board, committee, or institution of the state of New Mexico, and does not include local public bodies.

[2.40.2.7 NMAC - Rp, 2.40.2.7 NMAC, 7/24/2018]

## **2.40.2.8 DELEGATION OF APPROVAL AUTHORITY:**

**A.** The bureau shall review all contracts and contract amendments for professional services with state agencies as to form, and budgetary requirements.

**B.** The bureau shall consult with the department's legal counsel as needed regarding any issues of legal sufficiency of a state agency's contracts and contract amendments for professional services.

**C.** The DFA secretary shall delegate, in writing to certain members of the bureau, the authority to approve professional services contracts which result in expenditures greater than five thousand dollars (\$5,000), including gross receipts tax, and all amendments to those contracts except retroactive approval to contracts and contract amendments and sole source contracts and amendments to sole source contracts as provided herein.

[2.40.2.8 NMAC - Rp, 2.40.2.8 NMAC, 7/24/2018]

#### **2.40.2.9 FORM AND SUBMISSION:**

**A.** All contracts and subsequent amendments shall be in a form and contain such provisions as required by the bureau, including but not limited to, a scope of work consistent with the request for proposals issued by the state agency if the contract was procured by a request for proposals and performance measures when required and as defined by and in accordance with the Accountability in Government Act, Sections 6-3A-1 through 6-3A-9 NMSA 1978 and subsequent amendments.

**B.** All contracts and amendments shall:

**(1)** be accompanied by a contract brief being in such form and containing such information as may be required by the bureau;

**(2)** be accompanied by a document prescribed by the financial control division of the department showing that funds have been encumbered to the extent of the contract, including any amendments to that contract; if the contract term includes more than one fiscal year, the contract must be accompanied by an encumbrance for the current fiscal year amount or, up to the total amount of the current appropriation available for that contract;

**(3)** be accompanied by a written request for approval from the secretary of the contracting state agency or designee if the contract is subject to Paragraph (1) of Subsection C of 2.40.2.10 NMAC of this rule; and

**(4)** comply with New Mexico law regarding indemnification and insurance.

[2.40.2.9 NMAC - Rp, 2.40.2.9 NMAC, 7/24/2018]

#### **2.40.2.10 REVIEW PROCEDURES:**

**A. State agencies must submit to the bureau for review:**

- (1) sole source contracts;
- (2) amendments to sole source contracts;
- (3) retroactive approval to contracts; and
- (4) retroactive approval to contract amendments.

**B. Bureau review:**

(1) The bureau shall review all contracts or contract amendments for form, budgetary requirements and compliance with the requirements prescribed on the contract brief.

(2) No contract or contract amendment shall become binding or effective until signed and dated by a member of the bureau with contract approval authority.

**C. Other review:**

(1) Prior to the bureau's review and at the bureau's request, the attorney general shall review all contracts which may violate conflict of interest provisions of the Governmental Conduct Act, Sections 10-16-1 to 10-16-18 NMSA 1978.

(2) The bureau may submit any contract or amendment to the attorney general or other legal counsel for review if the bureau is aware of legal issues concerning the contract or the amendment.

[2.40.2.10 NMAC - Rp, 2.40.2.10 NMAC, 7/24/2018]

**2.40.2.11 SMALL PURCHASES:**

A contract for professional services having a value over five thousand dollars (\$5,000) excluding applicable gross receipts taxes, but not exceeding the amount set forth in Section 13-1-125 NMSA 1978 except for the services of architects, landscape architects engineers, or surveyors for state public works projects, may be procured in accordance with the Procurement Code, Sections 13-1-28 to 13-1-199 NMSA 1978.

[2.40.2.11 NMAC - Rp, 2.40.2.11 NMAC, 7/24/2018]

**2.40.2.12 SOLE SOURCE CONTRACT OR AMENDMENT TO SOLE SOURCE CONTRACT:**

**A.** A contract may be awarded without competitive sealed proposals, regardless of the estimated cost, when a central purchasing office of a contracting state agency

makes a written determination, signed by the secretary of the contracting state agency or designee, which states that a good-faith review of available sources has been conducted and that there is only one source for the required professional services. The written determination and the dollar amount of the contract shall be submitted to the bureau for review and approval by the DFA secretary or designee and shall include the following information:

(1) a detailed, sufficient explanation of the reasons, qualifications, proprietary rights, or unique capabilities that make the prospective contractor a sole source;

(2) an explanation of the criteria developed and specified by the state agency as necessary to perform the contract and upon which the state agency reviewed available sources;

(3) a description of the procedures used by the state agency in conducting a good faith review of available sources, including without limitation, a narrative description of all steps taken by the state agency as evidence of the good-faith review performance such as:

(a) researching trade publications and industry newsletters;

(b) reviewing telephone books or other advertisements;

(c) reviewing current contract;

(d) contacting similar service providers; and

(e) reviewing the state purchasing agents vendor list; and

(4) a list of all businesses contacted and an explanation of why those businesses could not perform the contract, or, a reasonable explanation of why the state agency has determined that no businesses, besides the prospective contractor, exist.

**B.** The bureau must obtain written approval of the agency's sole source determination from the DFA secretary or designee prior to approving a sole source contract or amendment to a sole source contract.

[2.40.2.12 NMAC - Rp, 2.40.2.12 NMAC, 7/24/2018]

#### **2.40.2.13 RETROACTIVE APPROVAL FOR A CONTRACT OR CONTRACT AMENDMENT:**

**A.** The Procurement Code, Section 13-1-102, NMSA 1978, as amended, requires that all non-exempt procurement (Section 13-1-98 NMSA 1978) by state agencies shall be achieved by competitive sealed bids or competitive sealed proposals except for

small purchases, sole source procurements, emergency procurements, existing contracts and procurements from antipoverty program business. For professional services, the proposal and procurement process are not complete until a written contract or contract amendment is signed by the agency and the contractor and is approved by the DFA secretary or designee and approved by the bureau.

**B.** For retroactive approval of contracts and contract amendments which fulfill all of the requirements of this rule and the Procurement Code, DFA will approve the date requested in writing by the agency on the brief accompanying the document as long as the requested approval date is within thirty days of the first day of each fiscal year.

**C.** For retroactive approval of contracts and contract amendments apart from the approval given pursuant to the provisions 2.40.2.13 NMAC of this rule, DFA may grant additional retroactive approval to a contract or contract amendment, based upon rare and exceptional circumstances, where all of the following conditions are met:

(1) the professional services performed without DFA's prior approval of the contract did not occur as the result of repeated agency mistakes or willful misconduct;

(2) the failure to obtain DFA's retroactive approval will prevent the state agency from fulfilling its statutory obligations;

(3) the state agency provides to DFA a written, factual, detailed explanation of the matters described in Paragraphs (1) and (2) of Subsection C of 2.40.2.13 NMAC, certified to be true by signature of the head of the state agency;

(4) the state agency requested, through a public officer or employee with authority to make such a request, the contractor to perform professional services that were then actually performed by the contractor in good faith reliance that it would be paid for those professional services.

**D.** The Procurement Code, Section 13-1-182 NMSA 1978, as amended, governs situations in which DFA has denied a request for retroactive approval of a contract or contract amendment due to the state agency's failure to meet the requirements of Subsections B or C of 2.40.2.13 NMAC of this rule.

[2.40.2.13 NMAC - Rp, 2.40.2.13 NMAC, 7/24/2018]

#### **2.40.2.14 EMERGENCY PROCUREMENT:**

An emergency procurement of professional services may be made under the conditions provided in the Procurement Code. Records of any emergency procurement of professional services, including the written determination of the basis for the emergency procurement being relied on by the state agency as justification for the emergency procurement, shall be maintained by the state agency for a minimum of three years and

shall be made available by the state agency to the financial control division upon request.

[2.40.2.14 NMAC - Rp, 2.40.2.14 NMAC, 7/24/2018]

#### **2.40.2.15 COMPLIANCE:**

State agencies must comply with federal and state statutes, rules, regulations and policies and shall have their state agency's legal counsel review all contracts and contract amendments certifying in writing that they are legally sufficient prior to submission to the bureau. Wrongful or mistaken approval by the bureau shall not be a defense to an action brought by or against the state agency on a contract.

[2.40.2.15 NMAC - Rp, 2.40.2.15 NMAC, 7/24/2018]

#### **2.40.2.16 RECORDS:**

**A.** Record inspection, record retention and record destruction relating to contracts shall be conducted in accordance with the Inspection of Public Records Act, Sections 14-2-1 to 14-2-12 NMSA 1978; the Public Records Act, Sections 14-3-1 to 14-3-23 NMSA 1978; and with Section 13-1-128 NMSA pertaining to sole source and emergency procurement; and Section 13-1-116 NMSA 1978 of the Procurement Code.

**B.** The bureau will retain original contracts, any subsequent amendments, and contract briefs in accordance with provisions of the Inspection of Public Records and Public Records Act.

[2.40.2.16 NMAC - Rp, 2.40.2.16 NMAC, 7/24/2018]

#### **2.40.2.17 RULE FILING:**

This rule shall be filed in accordance with the State Rules Act, Sections 14-4-1 to 14-4-11 NMSA 1978 and shall become effective upon publication in the New Mexico Register.

[2.40.2.17 NMAC - Rp, 2.40.2.17 NMAC, 7/24/2018]

### **PART 3: CIVIL LEGAL SERVICES FUND**

#### **2.40.3.1 ISSUING AGENCY:**

Department of Finance and Administration, Local Government Division.

[2.40.3.1 NMAC - N, 1/31/2002]

#### **2.40.3.2 SCOPE:**

All eligible nonprofit organizations within the state of New Mexico applying for civil legal services funds.

[2.40.3.2 NMAC - N, 1/31/2002]

**2.40.3.3 STATUTORY AUTHORITY:**

NMSA 1978, Section 34-14-1 (2001); NMSA 1978, Section 34-6-40; and NMSA 1978, Section 35-6-1.

[2.40.3.3 NMAC - N, 1/31/2002]

**2.40.3.4 DURATION:**

Permanent

[2.40.3.4 NMAC - N, 1/31/2002]

**2.40.3.5 EFFECTIVE DATE:**

January 31, 2002

[2.40.3.5 NMAC - N, 1/31/2002]

**2.40.3.6 OBJECTIVE:**

The objective is to establish procedures for the allocation and disbursement of revenue from the civil legal services fund.

[2.40.3.6 NMAC - N, 1/31/2002]

**2.40.3.7 DEFINITIONS:**

**A.** "Act" means NMSA 1978, Section 34-14-1 (2001), entitled civil legal services commission.

**B.** "Civil legal services" means a full range of free legal services provided by attorneys or attorney-supervised staff in noncriminal matters to low-income persons living in New Mexico. The full range of services is subject to interpretation by the commission.

**C.** "Civil legal services commission" means an appointed five-member commission, all members who must have experience with civil legal matters affecting low-income persons.

**D.** "Civil legal services fund" or "fund" means an account created within the state treasury financed through designated court fees.

**E.** "Code" means the New Mexico Procurement Code, NMSA 1978, Sections 13-1-28 through 13-1-199.

**F.** "Commission" means the civil legal services commission.

**G.** "Contract" means the signed legal agreement between fund recipients and the division outlining specific requirements for use of fund monies.

**H.** "DFA" means the executive agency department of finance and administration.

**I.** "Division" means local government division within the department of finance and administration.

**J.** "Impoverished New Mexicans" means low-income persons.

**K.** "Low income person(s)" means a person(s) living in New Mexico lacking the financial ability to secure needed civil legal services. The specific financial criteria to define low-income persons shall be based on federal poverty guidelines and determined by the commission at intervals not to exceed three years.

**L.** "New Mexicans living in poverty" means low-income persons.

**M.** "New Mexican" means a person living in New Mexico at the time that person needs civil legal services.

**N.** "Person(s) living in poverty" means a low-income person(s).

**O.** "Request for proposal (RFP)" means a solicitation for a competitive proposal for services subject to the state Procurement Code.

[2.40.3.7 NMAC - N, 1/31/2002]

#### **2.40.3.8 INTRODUCTION AND PURPOSE:**

The 2001 New Mexico Legislature enacted Laws of 2001, Chapter 277, now codified as the act, creating the civil legal services fund and the civil legal services commission. The fund has been established in the state treasury and is to be used to pay for civil legal services to low-income persons living in New Mexico. The fund is appropriated to the department of finance and administration local government division and the civil legal services commission. Disbursements from the fund shall be by warrant drawn by the secretary of DFA. The commission is required to establish and adopt rules and procedures for the fund, solicit proposals for the provision of civil legal services, and enter into contracts with eligible providers. The division, pursuant to the rules of the

commission, shall administer the contracts and programs of the fund, and require an annual accounting from each recipient of disbursements from the fund. All commission rules, disbursements and expenditures involving the fund must be within the purview of the state code.

[2.40.3.8 NMAC - N, 1/31/2002]

#### **2.40.3.9 ELIGIBLE SERVICE PROVIDERS:**

To be eligible to contract for monies with the commission service providers shall provide to the division documentation that they:

A. are nonprofit organizations, tax exempt under the Internal Revenue Code, Section 501(c) or its successor or organized and operated exclusively for non-profit activities within the categories recognized as such by the Internal Revenue Code, Section 501(c) or its successor; and

B. are registered with the state of New Mexico as a non-profit organization and listed on the state's web site; and

C. are organized and operated to provide free legal services to low income persons residing in New Mexico and do not engage in any other except related activity or are organized and operated as a separate department within a larger organization that has as its purpose the provision of free legal services to low income persons residing in New Mexico and that employs at least one full-time attorney dedicated solely to providing these services; and

D. are willing and able to cooperate with state and local bar associations, pro bono legal service programs, private attorneys, and similar persons or entities to increase the availability of free legal services to low income persons residing in New Mexico; or are willing and able to increase and coordinate statewide access to civil legal services to low income persons residing in New Mexico through innovative technology, subject to the limitations on appropriations set forth in 2.40.3.10 NMAC.

[2.40.3.9 NMAC - N, 1/31/2002; A, 7/31/2007]

#### **2.40.3.10 ELIGIBLE SERVICES OR ACTIVITIES:**

All disbursements from the fund shall be used for the sole purpose of providing civil legal services to low income persons in accordance with the act, except to the extent that any statutory authorized fee for administrative costs shall be paid to DFA. No more than fifty percent of net appropriations (less the required administrative fee to DFA for operation of the civil legal services commission) shall be spent on activities solely directed to adapting innovative technology to increase access to free legal services for low income persons residing in New Mexico. Appropriations shall only be disbursed to service providers who meet the eligibility requirements set forth in 2.40.3.9 NMAC.

Services provided to eligible persons must be in accordance with the New Mexico supreme court access to justice commission civil legal services plan and the critical legal needs of low income persons residing in New Mexico identified in the April 2006 New Mexico supreme court order, including, but not necessarily limited to, housing, consumer, domestic violence, family law, employment, and government benefits issues.

[2.40.3.10 NMAC - N, 1/31/2002; A, 7/31/2007]

#### **2.40.3.11 INELIGIBLE SERVICES OR ACTIVITIES:**

Money disbursed from the fund cannot be used to:

- A.** bring suit against the state of New Mexico;
- B.** acquire land or buildings;
- C.** accumulate or transfer cash;
- D.** provide legal advice or representation on criminal matters; or
- E.** support lobbying, as defined in the Lobbyist Regulation Act, NMSA 1978, Sections 2-11-1 through 2-11-9.

[2.40.3.11 NMAC - N, 1/31/2002]

#### **2.40.3.12 APPLICATION PROCEDURES:**

Under direction from the commission and pursuant to the state Procurement Code, the division will issue request for proposals (RFPs) for the provision of civil legal services to low-income persons. The form and content of the RFP(s) will be determined by the commission, with assistance from the division. The evaluation criteria used by the commission in determining RFP awards will be contained in the RFP. Civil legal service providers will be selected as fund recipients by the commission based on review and rating of submissions by the division. Service providers will be required to formalize the award through a contract with the division, as required by state law.

[2.40.3.12 NMAC - N, 1/31/2002]

#### **2.40.3.13 ADMINISTRATIVE PROCEDURES:**

All funded service providers will be required to adhere to state procurement laws, regulations and other procedures established by the division to ensure that all funds are expended in accordance with state law. The division shall require an annual accounting from each organization receiving funds. Funds will be distributed to recipients as specified in the contract. Fund disbursements must be included in the service provider's budget process and financial reports. Fund expenditure documentation must

be provided to the division as outlined in the contract. The commission may request additional oral or written reports from service providers as deemed necessary.

[2.40.3.13 NMAC - N, 1/31/2002]

#### **2.40.3.14 LIMITATIONS OF FUND:**

All disbursements from the fund are contingent upon sufficient revenue credited to the fund. Unexpended or unencumbered balances in the fund at the end of a fiscal year remain in the fund to carry out provisions of the Act in the next fiscal year.

[2.40.3.14 NMAC - N, 1/31/2002]

#### **2.40.3.15 SUPPLEMENTAL FUNDING:**

Should additional fund monies become available, the commission may call for and act on additional RFPs from eligible service providers.

[2.40.3.15 NMAC - N, 1/31/2002]

#### **2.40.3.16 SANCTIONS:**

Sanctions may include any administrative action, including contract termination, authorized by the commission against a fund recipient for improper, inadequate performance or noncompliance with one or more condition(s) of the contract. Examples of deficient performance by a service provider include but are not limited to: failure to correct monitoring or audit findings; failure to document and report to the division all expenditures of fund monies; failure to implement legal services in a timely manner; failure to execute activities in accordance with the contract; and implementation of a program change without prior approval of the commission.

[2.40.3.16 NMAC - N, 1/31/2002]

#### **2.40.3.17 COMMISSION AUTHORITY:**

The commission may at any time waive or adjust any state imposed regulation relative to the fund rules and administration as long as the waiver or adjustment does not penalize or favor any eligible service provider or violate any state law or other regulation.

[2.40.3.17 NMAC - N, 1/31/2002]

#### **2.40.3.18 PARTICIPATION IN COMMISSION MEETINGS:**

A commissioner may participate in a meeting of the commission by means of a conference telephone or other similar communications equipment when it is otherwise

difficult or impossible for the commissioner to attend the meeting in person, and participation by such means shall constitute presence in person at the meeting. When a commissioner participates in a meeting by conference telephone or other similar communications equipment, (1) each commissioner participating by telephone must be able to be identified when speaking, (2) all participants must be able to hear each other at the same time, and (3) members of the public attending the meeting must be able to hear any commissioner who speaks during the meeting. Arrangements to attend a meeting by telephone must be made sufficiently in advance to allow LGD to secure the necessary equipment to provide for a suitable telephonic connection.

[2.40.3.18 NMAC - N, 11/26/2003]

## **PART 4: [RESERVED]**

## **PART 5: PURCHASING OF SERVICES FROM PERSONS WITH DISABILITIES**

### **2.40.5.1 ISSUING AGENCY:**

New Mexico Council for Purchasing from Persons with Disabilities, 435 Saint Michael's Drive, Building D, Santa Fe, New Mexico.

[2.40.5.1 NMAC - N, 03/30/2007]

### **2.40.5.2 SCOPE:**

All state agencies and local public bodies.

[2.40.5.2 NMAC - N, 03/30/2007]

### **2.40.5.3 STATUTORY AUTHORITY:**

NMSA 1978, Section 13-1C-1 through Section 13-1C-7.

[2.40.5.3 NMAC - N, 03/30/2007]

### **2.40.5.4 DURATION:**

Permanent.

[2.40.5.4 NMAC - N, 03/30/2007]

### **2.40.5.5 EFFECTIVE DATE:**

03/30/2007, unless a later date is cited at the end of a section.

[2.40.5.5 NMAC - N, 03/30/2007]

**2.40.5.6 OBJECTIVE:**

This regulation establishes certain procedures with respect to purchasing of services from persons with disabilities and clarifies which services provided by persons with disabilities are suitable for sale to state agencies and local public bodies.

[2.40.5.6 NMAC - N, 03/30/2007]

**2.40.5.7 DEFINITIONS:**

A. "Appreciable contribution" means significant labor of individuals with disabilities applied to a service.

B. "Brokering" means negotiating contracts, as an agency, between organizations or individuals, for compensation.

C. "Central nonprofit agency" means a nonprofit agency approved pursuant to rules of the council to facilitate the equitable distribution of orders and services of:

- (1) qualified individuals; and
- (2) community rehabilitation programs.

D. "Council" means the New Mexico council for purchasing from persons with disabilities.

E. "Community rehabilitation program" means a nonprofit entity:

(1) that is organized under the laws of the United States or this state, operated in the interest of person with disabilities and operated so that no part of the income which inures to the benefit of any shareholder or other person;

(2) that complies with applicable occupational health and safety standards as required by federal or state law; and

(3) that, in the provision of services, whether or not procured under the State Use Act, employs during the state fiscal year at least seventy-five percent (75%) persons with disabilities in direct labor for the provision of services. Hours of work shall be used to calculate number of persons working in order to determine compliance to the seventy-five percent (75%) ratio, based on standard full time equivalent of 2080 hours per year equating to one person.

F. "Integration" means equal access for non-disabled and individuals with disabilities: the process of ensuring employment opportunities to all regardless of disability.

G. "Local public body" means a political subdivision of the state and political subdivision agencies, instrumentalities and institutions.

H. "Persons with disabilities" means persons who have a mental, intellectual or physical impairment that constitutes or results in substantial impediment to employment as defined by the federal Rehabilitation Act of 1973, and shall be certified eligible for participation by completing council approved documentation through the central nonprofit agency, unless the person has prior presumptive eligibility as follows. A person who is receiving services pursuant to an individualized plan for employment from the vocational rehabilitation division of the public education department or from the commission for the blind or the federal veterans affairs administration shall be presumed to be a person with a disability, as shall a person who is receiving supplemental security income or social security benefits based on disability.

I. "Provider" means a community rehabilitation program or qualified individual who has been approved to offer services under contract to the central nonprofit agency.

J. "Qualified individual" means a person with a disability who is a business owner, or a business that is primarily owned and operated by persons with disabilities that employs at least seventy-five percent (75%) persons with disabilities in the provision of direct labor, which has been approved by the council to provide services to state agencies and local public bodies.

K. "State use eligible services" means all services which are to be provided by persons with disabilities and which the council determines are suitable for sale to state agencies and local public bodies.

L. "State purchasing agent" means the director of the state purchasing division of the general services department.

M. "State Use Act program" means a program enacted through legislation by the New Mexico state legislature that allows meaningful employment opportunities through state and local government contracts to persons with disabilities.

N. "Value added" means direct labor involved in delivering services performed by persons with disabilities.

[2.40.5.7 NMAC - N, 03/30/3007; A, 01/15/2011]

**2.40.5.8 DETERMINATION OF WHICH SERVICES PROVIDED BY PERSONS WITH DISABILITIES ARE SUITABLE FOR SALE TO STATE AGENCIES AND LOCAL PUBLIC BODIES:**

A. Services provided by persons with disabilities suitable for sale to state agencies and local public bodies:

- (1) must be within the competency of the prospective provider;
- (2) must have potential to provide positive, integrated employment outcome for persons with disabilities;
- (3) may be approved as statewide, or by specific contract offering by a state agency or local public body;
- (4) require the approval by the council prior to being offered.

B. Council determination of suitability extends to specific individual contracts procured under a given service; the council may accept or reject a given contract as suitable based on criteria established under rule and statute, such as meeting appreciable contribution requirements, ratio requirements, impact or fair market pricing requirements.

C. Any potential contract that entails brokering solely on the part of the community rehabilitation program is not suitable for the State Use Act program. An appreciable contribution to the services must be made by persons with disabilities.

D. The decision that the labor of persons with disabilities constitutes appreciable contribution shall be at the discretion of the council.

[2.40.5.8 NMAC - N, 03/30/2007; A, 01/15/2011]

#### **2.40.5.9 ESTABLISHING, MAINTAINING AND PUBLISHING OF A LIST OF ALL SUITABLE SERVICES:**

A. The council shall establish, approve and revise a list of suitable services through a contract with a central nonprofit agency on an as needed basis.

B. Copies of the list shall be published at the state purchasing office and on-line at appropriate state websites, on a website maintained by the central nonprofit agency, and may also be advertised in New Mexico business publications.

C. The council requires that the central nonprofit agency to establish procedures to submit a given service for council approval. The central nonprofit agency shall be responsible for providing the council with information to substantiate the conditions for service determination.

D. Once approved by the council, services shall be included in a master list of approved services.

E. New services may be added to the list upon a majority vote at any council meeting.

[2.40.5.9 NMAC - N, 03/30/2007; A, 01/15/2011]

#### **2.40.5.10 ESTABLISHING AND VERIFYING FAIR MARKET PRICE:**

A. The council shall verify and revise the fair market prices on an as needed basis.

B. The council shall revise the fair market prices in accordance with the changing market conditions to ensure that contracted services offer the best value for state agencies and local public bodies.

C. The pricing standard for services should be as close as possible to prevailing market price not including the central nonprofit agency fee.

D. The council shall set the price within a range submitted by the central nonprofit agency taking into consideration the benefits associated with employment of persons with disabilities.

E. Fair market price may be established based on:

(1) prices paid for similar services by federal, state and local public bodies and by private businesses; or

(2) the actual cost of performing the services at a community rehabilitation program, determined by use of a council approved cost analysis worksheet, taking into consideration the benefits associated with employing persons with disabilities; or

(3) any other accepted business method acceptable to the council.

F. When considering a contract award, in order to ensure that services offer the best value for state agencies and other public bodies, the central nonprofit agency shall determine suitability of individual contracts to be provided under each service, including, but not necessarily limited to:

(1) external requirements that proscribe the use of a specific provider, such as:

(a) contracts which must be awarded to providers who are sanctioned by the federal corporation for national and community services;

(b) mandated projects that must be awarded to an area agency on aging pursuant to federal law;

(2) significant adverse impact to a state agency or local public body, when contracting for professional services, resulting in the loss of content knowledge associated with confidential, proprietary, or attorney/client privileged information; in such instances the government's central purchasing office shall notify the central nonprofit in writing prior to contract award.

G. The council chairperson shall have the authority to give tentative approval for specific contracts for work by the central nonprofit agency, between council meetings, subject to ratification by the full council at its next scheduled meeting, when time is of the essence for the purchaser.

H. The council shall establish procedures for verifying fair market price, which shall be published on the central nonprofit agency's website.

[2.40.5.10 NMAC - N, 03/30/2007; A, 01/15/2011]

#### **2.40.5.11 PROCEDURE TO CERTIFY ELIGIBLE COMMUNITY REHABILITATION PROGRAMS AND QUALIFIED INDIVIDUALS:**

The certification procedure to determine eligible provider members shall consist of a two part process:

A. Certification of eligibility as a qualified individual with a disability or community rehabilitation program as defined by statute.

B. Verification of ability to perform the service.

[2.40.5.11 NMAC - N, 03/30/2007; A, 01/15/2011]

#### **2.40.5.12 PROCEDURE FOR APPROVAL OF CENTRAL NON-PROFIT AGENCY:**

A. The council shall establish a procedure for approval of a central nonprofit agency that shall hold contracts, facilitate the equitable distribution of orders for services to be procured by state agencies and local public bodies and market approved services to state agencies and local public bodies.

B. The council shall request proposals from applicants which provide evidence that the central non-profit agency is a private, nonprofit entity within the state which:

- (1) has a mission which includes employment of persons with disabilities;
- (2) is not a direct-service provider;
- (3) can negotiate contracts;

(4) has knowledge of state and local governmental contracting policies and procedures;

(5) can demonstrate independence to equitably distribute contracts for procured services;

(6) can manage the scale of operations required; and

(7) has an approved operations manual which details all policies and procedures for operation of the central nonprofit agency.

C. Approval of the central nonprofit agency shall be by a minimum of two-thirds majority vote of the council.

[2.40.5.12 NMAC - N, 03/30/2007]

#### **2.40.5.13 PROCEDURES FOR OPERATION OF CENTRAL NON-PROFIT AGENCY, INCLUDING FEE STRUCTURE:**

A. The council shall ensure that the central nonprofit agency has an approved operations manual that details all policies and procedures for operation of the central nonprofit agency.

B. The council shall establish a fee to be paid to the central nonprofit agency on the basis of contracts procured from state agencies and other local public bodies. The fee will be added to the fair market price paid by the state agencies and local public bodies.

[2.40.5.13 NMAC - N, 03/30/2007]

#### **2.40.5.14 OTHER MATTERS RELATED TO THE STATE USE ACT:**

A. It is the council's responsibility to identify, respond to, and equitably distribute, to as broad a base of eligible participants as possible, all relevant contract opportunities.

B. The council reserves the authority to make final contract distribution decisions based on the above policy and process, as well as any other unique factors or special circumstances. The central non-profit agency shall establish an appeals process for contract distribution or disputes, and for resolving price and quality-related disputes between parties in the exercise and administration of the State Use Act program, with the council being the final determining body. This process shall be applicable to state and local public body purchasers obtaining services under the State Use Act program, and nonprofit agencies and qualified individuals with a disability who own businesses certified by New Mexico abilities and providing services under state use contracts.

C. All regular meetings of the council shall include an agenda item for an open public forum. The council shall set aside a specific time at each meeting for the public,

government officials, and businesses to address the council regarding any issues and concerns related to the State Use Act and its implementation. The council shall use this ongoing mechanism to solicit ongoing feedback, to promote the intention of the State Use Act to create employment opportunities for persons with disabilities, while promoting efficiency and best value for state and local government purchasing entities.

D. Meetings shall be conducted according to requirements of the Open Meetings Act.

E. The council shall address any other matter necessary to the proper administration of the State Use Act.

[2.40.5.14 NMAC - N, 03/30/2007; A, 01/15/2011]

#### **2.40.5.15 INTEGRATION, FAIR PAY AND ADDED VALUE:**

A. The council shall ensure that the:

- (1) work provides opportunities for integration with non-disabled persons;
- (2) work provides fair pay based on prevailing wages;
- (3) work provides equitable opportunities for the employment of people with disabilities; and
- (4) services provide added value.

B. Community rehabilitation programs and qualified individuals must employ during the state fiscal year at least seventy-five percent (75%) persons with disabilities in the provision of direct labor. In determining ratio calculation, all employees providing direct labor on all state use contracts shall be counted. Hours of work shall be used to calculate the ratio.

C. In the event of failure to meet the ratio requirement, the council may request a remediation plan from the provider specifying actions and timelines to meet requirement, which the council must approve. In the event of provider failure to provide an adequate remediation plan, or meet remediation plan commitments, the council may place a moratorium on new state use work by that provider, or assign the contract to another provider, or in the event of persistent ratio problems, ban the provider from eligibility to participate in the State Use Act program for up to a two year period.

[2.40.5.15 NMAC - N, 03/30/2007; A, 01/15/2011]

### **PART 6-29: [RESERVED]**

### **PART 30: INFRASTRUCTURE BANK**

#### **2.40.30.1 ISSUING AGENCY:**

New Mexico State Highway and Transportation Department, P.O. Box 1149 Santa Fe, New Mexico 87504-1149, (505) 827-5522.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.2 SCOPE:**

This rule will apply to all entities seeking from the state infrastructure bank funding.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.3 STATUTORY AUTHORITY:**

Adoption of these regulations is pursuant to authority granted to the state highway commission and state highway and transportation department under NMSA 1978, Sections 9-1-5, 67-3-11, 67-3-28, 67-3-69, 67-3-70.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.4 DURATION:**

Permanent.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.5 EFFECTIVE DATE:**

May 31, 1999, unless a later date is cited at the end of a section or paragraph.

[5/31/99; Recompiled 10/1/01]

[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

#### **2.40.30.6 OBJECTIVE:**

A. There exists an account in the custody of the state treasurer known as the state infrastructure bank. The department shall use money deposited in the bank to encourage investment in transportation systems, including facilities that contribute to the multimodal and intermodal transportation capabilities of the state.

B. The department, and when appropriate, the New Mexico finance authority, shall develop financing techniques designed to expand the availability of funding for transportation projects, reduce direct state costs, maximize private and local

participation in financing projects, and improve the efficiency of the state transportation system.

C. This rule specifies the procedures and conditions by which an eligible public entity may apply for and obtain financial assistance from the bank.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.7 DEFINITIONS:**

A. "Bank" means the state infrastructure bank account in the state road fund.

B. "Commission" means the New Mexico state highway commission.

C. "Construction" means construction as defined by Title 23, United States Code, Section 101 which includes preliminary studies required to determine the feasibility of an eligible project.

D. "Department" means the New Mexico state highway and transportation department.

E. "Design manual" means the latest edition of and successor to the department's standard specifications for highway and bridge construction.

F. "Expected financing period" means the time taken to fully pay any and all liabilities incurred to finance an eligible project, including all extensions of time through refunding or restructuring.

G. "Federal Act" means Section 350 of the National Highway System Designation Act of 1995 (Pub. L. No. 104-59) and all regulations adopted under the act.

H. "Federal-aid highway" means a highway defined in Title 23, United States Code, Section 101.

I. "Financial assistance" means extending credit by direct loan, providing credit enhancements, serving as a capital reserve for bond or debt instrument funding, subsidizing interest rates, insuring the issuance of a letter of credit or credit instrument, financing a purchase or lease agreement in connection with a transit project, providing security for bonds and other debt instruments, or providing methods of leveraging money that have been approved by the United States secretary of transportation and which relate to the project for which the assistance is provided.

J. "Investment grade" means creditworthiness sufficient to qualify a debt as eligible for commercial bank investment under regulations issued by the United States comptroller of the currency. For bonds, these debts are limited to ratings of AAA, AA, A,

and BBB by standard and poor rating services or corresponding ratings used by other nationally recognized rating services.

K. "Secondary funds" means the repayment of a loan, including interest, principal, fees, charges, or other assistance that is provided with money deposited to the credit of the bank; and the investment income generated by secondary funds deposited to the credit of the bank.

L. "Secretary" means the secretary of the department or his or her designee.

M. "Transportation system" means facilities used for the transportation of natural resources, manufactured products or passengers and includes communication and transportation structures and other facilities necessary for the operation of the transportation facilities.

N. "Transit project" means capital expenditures, excluding expenditures for commuter rail, eligible for funding under Title 49, United States Code, Sections 5307, 5309 and 5311.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.8 GENERAL POLICIES:**

A. Financial assistance is given by the bank based on application.

B. All actions of the bank will be in accordance with applicable federal and state laws, rules and regulations. Grant financing will not be considered. No actions will be knowingly taken which would result in the bank's credit rating falling below investment grade. If the bank's credit rating falls below investment grade, the commission shall take actions necessary or appropriate to return the bank's credit rating as practicable to investment grade.

C. Repayment of financial assistance from the bank will commence at the earliest reasonable date consistent with applicable federal and state laws, rules and regulations. The term for repaying any financial assistance will not exceed fifteen (15) years after the date of the first payment.

D. The federal highway administration, the federal transit administration, the comptroller general of the United States, the New Mexico department of finance and administration, and the department, or any of their authorized representatives, shall have the right of access to any books, documents, papers, or other records of the applicant which are pertinent to financial assistance, in order to make audits, examinations, excerpts, and transcripts.

E. If financial assistance is given, the parties shall enter into an agreement in a form provided by the department.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.9 ELIGIBILITY:**

A. A public entity authorized by law to construct, maintain, or finance an eligible project is eligible to apply to the department for financial assistance.

B. The following projects are eligible for financial assistance: Construction of a federal-aid highway, including required preliminary studies; a transit project; including a project eligible for assistance under Title 49, United States Code, Section 5310, or the planning, development, construction, maintenance, or operation of a public road, provided that the project is eligible for assistance under Title 23 or Title 49, United States Code, or the department is authorized by state law to provide assistance for the project.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.10 PROCEDURES:**

A. The secretary will designate a contact within the department for the purpose of providing information and assistance to potential applicants. Assistance may include non-binding advice, counsel, and consultation regarding all aspects of a possible eligible project. If the secretary determines that the project is otherwise eligible for assistance, that the department is authorized by state law to provide assistance, and that department resources are available, the department may provide engineering and other technical assistance to aid potential applicants in developing an application. Any advice, assistance, or aid provided shall not constitute a commitment or liability on the part of the department or the commission. Potential applicants are encouraged to communicate with the contact at the earliest possible date.

B. An applicant may request any form of financial assistance authorized by this regulation. In general, all requests for financial assistance shall be treated as requests for the use of specific sums of money from the bank for certain periods of time, at stated interest rates, with scheduled repayments of principal, interest, and any appropriate charges or fees.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.11 APPLICATION PROCEDURE:**

A. An eligible entity shall submit an application to the secretary in a form prescribed by the department. The application must be accompanied by an overview of the project, which shall include a description of the project, the total cost of the project and the proposed use of the requested financial assistance, the amounts of money required to supply the requested financial assistance (including the needs of any reserve funds which must be established and held by the bank for the applicant's benefit, but which

may not be expended from the bank), any proposed pledge of collateral or security and priority of claim to those items, a description of the need for the project, and the latest bond rating obtained by the applicant when using the sources of revenue to be pledged, or if not applicable, other evidence of creditworthiness similar to that required to obtain a bond rating.

B. For public roadway projects, the application must also be accompanied by a preliminary design study which includes an initial route and potential route alignments, termini, length, and junctions; the project's logical termini; any necessary utility relocation; the location of all right-of-way, facilities and equipment required to make the project functional; and revisions or changes to state highway system facilities necessitated by the project.

C. For transit projects, the application must also be accompanied by a preliminary scope study which shall include preliminary layouts, architectural drawings, equipment specifications, and an operations plan for the life of the equipment or facility, and other information necessary to fully describe the project and to comply with all requirements of the federal transit administration.

D. Depending upon, the complexity and size of the project, the type of infrastructure or asset involved, the type of financial assistance requested, the secretary may require supplemental information and data.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.12 REQUIRED STUDIES:**

A. The applicant shall submit a financial feasibility study which must include:

(1) a project construction or asset acquisition schedule identifying the timing, amount, and source of all cash required; and

(2) a description of the methods used in preparing the financial feasibility study, the assumptions contained in the study, and persons and entities responsible for the preparation of the study.

B. The study shall include an analysis based on cash basis accounting for the expected financing period of the project. The analysis must show cash revenues to be used for repayment or security by source, cash disbursements by category (including disbursements for operations), maintenance, replacement, and the length of time the amounts will be outstanding or obligated.

C. The applicant shall conduct studies analyzing the impact of the project, including any required by the National Environmental Policy Act or state laws relating to archaeological and cultural properties preservation. The studies must include how the project will be consistent with the department's statewide transportation improvement

program, and if the project is in a Clean Air Act non-attainment area, how the project will be consistent with the statewide transportation improvement program.

D. The applicant shall submit:

(1) official written approval of the [sic] by the governing body of each entity which may authorize becoming liable for repaying or securing financial assistance;

(2) a binding commitment that the environmental consequences of the proposed project will be fully considered, and that the proposed project will comply with all applicable local, state, and federal environmental laws, regulations, and requirements; and

(3) appropriate documentary evidence of community involvement in development of the proposed project.

E. The secretary may waive submission of individual items of information or data required by this section if the information or data is not relevant to or required by the project, or the department already possesses information or data in a format which may be substituted for the required information or data.

F. The secretary may require the applicant to submit explanations and expansions of information or data required by this section which are relevant to the project, applicant, or financial assistance requested. In determining when additional relevant explanations and expansions of information or data are required, the secretary will consider the complexity and size of the project, the type of infrastructure or asset involved, and the type, complexity, and amount of financial assistance requested.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.13 DEPARTMENT AND COMMISSION ACTION:**

A. The department will review the application submitted. When the application is complete, the department will so notify the applicant.

B. The secretary will perform an analysis of the application to support findings and recommendations for the commission. The secretary shall then submit the application together with findings and recommendations to the commission.

C. The commission will determine the sufficiency of the information, the probable reliability of the projections, and the anticipated financial condition of the applicant and the project.

D. Prior to granting preliminary approval of an eligible project for financial assistance, the commission will consider whether the project is on the state highway system; transportation need for and anticipated public benefit of the project; the present

and projected financial condition of the bank; potential social, economic, and environmental impacts; conformity with the purposes of the bank; and evidence of local public support.

E. By granting preliminary approval, the commission authorizes the secretary to negotiate the project's limits, scope, definition and design; the amount, type and timing of disbursements of financial assistance; interest rates, fees, charges, repayment schedules, and term to maturity of any financial assistance, collateral securing the financial assistance, appropriate covenants applicable to the financial assistance, default provisions; and all other provisions necessary to complete a financial assistance agreement.

F. The commission may grant final approval if it determines that providing financial assistance will prudently provide for the protection of public funds while furthering the purposes of this rule; and the project will provide for all reasonable and feasible measures to avoid, minimize, or mitigate adverse impacts.

G. The commission may postpone final approval of an application if it finds that the current or projected financial condition of the bank warrants this action.

H. The commission may make its preliminary or final approval contingent upon the applicant making changes, performing other acts, or maintaining certain conditions necessary to provide for repayment of final approval.

I. Approval or disapproval of the project, whether preliminary or final, shall be by formal action of the commission, based upon findings and conclusions submitted to the commission by the secretary.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.14 FINANCIAL ASSISTANCE AGREEMENTS:**

A. The secretary will negotiate the terms of agreements deemed necessary to comply with any requirements of preliminary approval, and to prudently provide for the protection of public funds while furthering the purposes of this rule.

B. These agreements shall include, but not be limited to, terms provided for in this rule.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.15 PERFORMANCE OF WORK:**

A. The department may, at its discretion and consistent with state law, provide all or part of the work connected with the project. For work performed by the department, the following provisions apply:

(1) The department shall account for all costs of the project in the normal course of business as it does for all federal-aid eligible projects.

(2) The department shall make progress payments or set aside funds from the bank on behalf of the applicant as the department deems necessary. Such actions shall bind the applicant to repayment or release of security according to the terms of the agreement(s). Interest shall accrue from the date of the payment or setting aside of funds.

B. The department's actions and decisions regarding the project shall be final.

C. The applicant shall provide the department, the federal highway administration, and the federal transit administration, or their authorized representatives, with right of entry or access to all properties or locations necessary to perform activities required to execute the work, inspect the work or otherwise aid in the prompt pursuit of the work.

D. The department may, in its discretion and consistent with state law, provide that the applicant conduct all or part of the work connected with the project. For work performed by the applicant, the following provisions apply:

(1) The applicant shall comply with the Federal Act, Title 23, United States Code, Title 49, United States Code, other applicable state and federal laws, and all terms and conditions of any agreements.

(2) Where approval or concurrence of the federal highway administration, the federal transit administration, or other federal agency is required, the applicant shall seek such action through the department.

(3) The applicant shall reimburse the department for any loss of federal funds to the department resulting from the actions of the applicant.

E. The applicant shall maintain project records and accounts in accordance with generally accepted accounting principles, and all applicable federal and state requirements. The applicant shall, at the applicant's cost, have a full audit performed annually of the project records and accounts by an independent certified public accountant. The applicant shall cause the auditor to provide a full copy of the audit report and any other management letters or auditor's comments directly to the department.

F. The applicant shall hold all project records, accounts, and supporting documents open for state or federal audits. The applicant shall retain these files until all financial assistance has been repaid or released and necessary audits have been performed.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.16 DESIGN AND CONSTRUCTION STANDARDS:**

For federal-aid and state highway improvement projects, plans and specifications must be in compliance with the latest version of the department's design manual. For non federal-aid projects, the applicant shall certify that the project complies with the design manual. All construction plans shall be signed and dated by a professional engineer registered in New Mexico. The department may require that certain standards and procedures be used in making any change orders.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.17 MAINTENANCE AND OPERATIONS:**

When funds for repayment are derived from fees or tolls on the project, or the project or asset is collateral for the financial assistance, the department may require that certain standards and procedures be used in maintenance of the project.

[5/31/99; Recompiled 10/1/01]

#### **2.40.30.18 FINANCIAL AND CREDIT REQUIREMENTS:**

A. The applicant shall agree to provide collateral and security for repayment, or other protections as the secretary may deem necessary; repay the financial assistance at specified interest rates over specified time periods according to repayment schedules, including agreed upon bank fees or compensation; abide by provisions governing default; have periodic audits in compliance with all applicable federal and state requirements; and reimburse the department for all costs or losses of funds resulting from a failure to perform by the applicant.

B. Depending on the facts and circumstances of each project, the applicant, and type of financial assistance provided, the secretary may require additional terms and conditions necessary to protect the public welfare, prudently provide for the protection of public funds, and further the purposes and requirements of this rule.

[5/31/99; Recompiled 10/1/01]

## **CHAPTER 41: [RESERVED]**

## **CHAPTER 42: TRAVEL AND PER DIEM**

### **PART 1: GENERAL PROVISIONS [RESERVED]**

### **PART 2: REGULATIONS GOVERNING THE PER DIEM AND MILEAGE ACT**

#### **2.42.2.1 ISSUING AGENCY:**

Department of Finance and Administration.

[2.42.2.1 NMAC - Rp, 2.42.2.1 NMAC, 1/16/2024]

#### **2.42.2.2 SCOPE:**

In accordance with Section 10-8-1 to 10-8-8 NMSA 1978, 2.42.2 NMAC governs the payment of per diem rates and mileage and the reimbursement of expenses for all salaried and non-salaried public officers and employees of all state agencies and local public bodies, except:

**A.** state legislators; and

**B.** public officials and employees of state educational institutions specified in Article 12, Section 11 of the New Mexico Constitution and institutions defined in Chapter 21, Articles 13, 14, 16 and 17 NMSA 1978 (hereinafter "public postsecondary educational institutions"). If an official or employee of a public postsecondary educational institution is also a salaried or non-salaried public officer or employee of any other state agency or local public body, these regulations shall apply when the person seeks payment of per diem rates and mileage or reimbursement of expenses in the capacity of a salaried or non-salaried public officer or employee of a governmental entity other than a public postsecondary educational institution.

[2.42.2.2 NMAC - Rp, 2.42.2.2 NMAC, 1/16/2024]

#### **2.42.2.3 STATUTORY AUTHORITY:**

These regulations are promulgated pursuant to authority granted in Subsection A of Section 10-8-5 and Subsection E of Section 9-6-5 NMSA 1978.

[2.42.2.3 NMAC - Rp, 2.42.2.3 NMAC, 1/16/2024]

#### **2.42.2.4 DURATION:**

Permanent.

[2.42.2.4 NMAC - Rp, 2.42.2.4 NMAC, 1/16/2024]

#### **2.42.2.5 EFFECTIVE DATE:**

January 16, 2024, unless a later date is cited at the end of a section.

[2.42.2.5 NMAC - Rp, 2.42.2.5 NMAC, 1/16/2024]

#### **2.42.2.6 OBJECTIVE:**

To govern the payment of per diem rates and mileage and the reimbursement of expenses for all salaried and non-salaried public officers and employees of all state agencies and local public bodies except those set forth in Subsections A and B of 2.42.2.2 NMAC.

[2.42.2.6 NMAC - Rp, 2.42.2.6 NMAC, 1/16/2024]

#### **2.42.2.7 DEFINITIONS:**

As used in this rule:

**A. "Agency head" means:**

- (1) the cabinet secretary of departments and their administratively attached boards and commissions;
- (2) the director for other agencies and institutions and their administratively attached boards and commissions;
- (3) the superintendent of regulation and licensing for boards and commissions attached to the regulation and licensing department;
- (4) the chairperson, president or executive secretary for remaining boards and commissions; and
- (5) the chief executive, chief administrative officer, or governing body for local public bodies.

**B. "Attend" has the same meaning as ascribed to it in Section 10-8-3 NMSA 1978.**

**C. "Board or committee meeting"** means the formal convening of public officers who comprise a board, advisory board, commission or committee even if no further business can take place because of the lack of a quorum.

**D. "Designated post of duty"** means the address of a public officer's or employee's assignment as determined by the agency.

**E. "Employee"** means any person who is in the employ of any New Mexico state agency or local public body within New Mexico whose salary is paid either completely or partially from public money but does not include jurors or jury commissioners.

**F. "Governmental entity"** means a New Mexico state agency or local public body within New Mexico.

**G. "Home" means:**

(1) for per diem purposes, the area within a 50-mile radius of the place of legal residence as defined in Section 1-1-7 NMSA 1978;

(2) for mileage purposes, the place of legal residence as defined in Section 1-1-7 NMSA 1978.

**H. "Local public body"** means every political subdivision of the state, whether created under general or special act including, but not limited, to counties, municipalities, drainage, conservancy, irrigation, school or other districts, that receives or expends public money from whatever source derived.

**I. "Non-salaried public officer"** means a public officer serving as a member of a board, advisory board, committee or commission who is not entitled to compensation, but is entitled to payment of per diem rates and mileage.

**J. "Normal work day"** means eight hours within a nine-hour period for all public officers and employees both salaried and non-salaried, regardless of the officers' or employees' regular work schedule.

**L. "Out of state"** means beyond the exterior boundaries of the state of New Mexico.

**M. "Public officer"** means every elected or appointed officer of a governmental entity, including but not limited to:

(1) officers of the judicial branch of state government, including judges;

(2) officers of the legislative branch of state government, except legislators;  
and,

(3) all board, advisory board, committee and commission members elected or appointed to a board, advisory board, committee or commission specifically authorized by law or validly existing as an advisory committee pursuant to Section 9-1-9 NMSA 1978.

**N. "Secretary"** means the secretary of finance and administration.

**O. "Travel"** means: for per diem purposes, being on official business away from home as defined in Subsection F above and at least 50 miles from the designated post of duty of the public officer or employee. However, non-salaried public officers are eligible for per diem for attending meetings in accordance with Subsection C of 2.42.2.8 NMAC.

**P. "Travel voucher"** means a payment voucher submitted for the purpose of claiming reimbursement for travel expenditures.

#### **2.42.2.8 PER DIEM RATES PRORATION:**

**A. Applicability:** Per diem rates shall be paid to public officers and employees only in accordance with the provisions of this section. Per diem rates shall be paid without regard to whether expenses are actually incurred. Where lodging or meals are provided or paid for by the agency, the governing body, or another entity, the public officer or employee is entitled to reimbursement only for actual expenses under 2.42.2.9 NMAC.

**B. Per diem rate computation:** Except as provided in Subsections C through I of this section, per diem rates for travel by public officers and employees shall be computed as follows:

(1) Partial day per diem rate: Public officers or employees who occasionally and irregularly travel shall be reimbursed for travel which does not require overnight lodging, but extends beyond a normal work day as published on the department of finance and administration website on May 1 for the preceding fiscal year.

(2) Overnight travel: Regardless of the number of hours traveled, travel for public officers and employees where overnight lodging is required shall be reimbursed as published on the department of finance and administration website on May 1 for the preceding fiscal year or actual lodging and meal expenses under 2.42.2.9 NMAC.

(3) Return from overnight travel: On the last day of travel when overnight lodging is no longer required, partial day reimbursement shall be made. To calculate the number of hours in the partial day, begin with the time the traveler initially departed. Divide the number of hours traveled by 24. The hours remaining constitute the partial day which shall be reimbursed as published on the department of finance and administration website on May 1 for the preceding fiscal year.

(4) Special area designations: For all officers and employees, the in state special area shall be Santa Fe county.

**C. Board, commission and committee members:** Non-salaried public officers may receive per diem as follows:

(1) Official board, commission and committee meetings:

(a) State non-salaried public officers: Non-salaried public officers of the state may elect to receive:

(i) \$95.00 if the officer physically attends the meeting for four hours or more during a single calendar day; or

(ii) \$45.00 if the officer physically attends the meeting for less than four hours or the officer attends a virtual meeting of any duration during a single calendar day; or

(iii) per diem rates in accordance with Subsection B of this section.

(b) Local non-salaried public officers: Non-salaried public officers of local public bodies may elect to receive:

(i) \$95.00 if the officer physically attends the meeting for four hours or more during a single calendar day; or

(ii) \$45.00 if the officer physically attends the meeting for less than four hours or the officer attends a virtual meeting of any duration during a single calendar day; or

(iii) per diem rates in accordance with Subsection B of this section provided that the local governing body has not established a lesser rate.

(c) Municipal non-salaried public officers: Non-salaried public officers of municipalities may elect to receive either:

(i) \$95.00 if the officer physically attends the meeting for four hours or more during a single calendar day; or

(ii) \$45.00 if the officer physically attends the meeting for less than four hours or the officer attends a virtual meeting of any duration during a single calendar day; or

(iii) per diem rates in accordance with Subsection B of this section, provided that the board or commission meeting is held outside of the municipal boundaries.

(2) Other official meetings: Non-salaried public officers may receive per diem rates for travel on official business that does not constitute a board, advisory board, committee or commission meeting only in accordance with Subsection B of this section.

(3) Members serving in dual capacities: Non-salaried public officers who also serve as public officers or employees of state agencies or local public bodies may receive mileage or per diem rates from only one public entity for any travel or meeting attended. Furthermore, non-salaried public officers who are also public officers or employees may not receive per diem rates for attending meetings held in the place of their home or at their designated posts of duty unless they are on leave from their positions as public officers or employees. Local public bodies may adopt regulations with respect to the receipt of per diem rates by employees or officers of local public bodies who also serve on boards or commissions subject to this rule.

**D. Temporary assignment:** Public officers and employees may be reassigned temporarily to another duty station.

(1) Routine reassignment: Public officers and employees subject to periodic reassignment of duty stations or districts as a normal requirement of their employment will not be eligible for per diem rates after the time of arrival at the new duty station or district.

(2) Non-routine reassignment: Public officers or employees not normally subject to periodic reassignments who are temporarily assigned to another office of a state agency away from home will receive per diem for the first 30 calendar days of their assignment only, unless approval of the secretary is given to extend per diem payments upon showing that the assignment is necessary and temporary. Except in such extraordinary circumstances, after 30 calendar days, the place where the employee or officer is assigned will be regarded as the designated post of duty.

**E. New Mexico department of transportation:** The New Mexico department of transportation may adopt special policies pertaining to payment of per diem rates for temporary assignments. Such policies shall be subject to the annual approval of the secretary.

**F. Department of public safety:** The department of public safety may adopt special policies pertaining to payment of per diem rates, mileage and subsistence allowances authorized by law for commissioned officers. Such policies shall be subject to the annual approval of the secretary.

**G. Travel for educational purposes:** A public officer or employee shall not be reimbursed for more than 30 calendar days of per diem in any fiscal year for attending educational or training programs unless approval has been obtained from the secretary.

**H. Per diem in conjunction with other leave:** While traveling, if a public officer or employee takes sick, annual or authorized leave without pay for more than four hours of the normal work day, per diem shall not be allowed for that day unless authorized in writing by the agency head.

**I. Illness or emergency:** Agency heads may grant permission, in writing, to pay per diem rates and travel reimbursement to an employee or public officer who becomes ill or is notified of a family emergency while traveling on official business and must either remain away from home or discontinue the official business to return home.

[2.42.2.8 NMAC - Rp, 2.42.2.8 NMAC, 1/16/2024]

#### **2.42.2.9 REIMBURSEMENT OF ACTUAL EXPENSES IN LIEU OF PER DIEM RATES:**

**A. Applicability:** Upon written request of a public officer or an employee, agency heads may grant written approval for a public officer or employee of that agency or local public body to be reimbursed actual expenses in lieu of the per diem rate where overnight travel is required.

**B. Overnight travel:** For overnight travel for state officers and employees where overnight lodging is required, the public officer or employee will be reimbursed as follows:

(1) Actual reimbursement for lodging: A public officer or an employee may elect to be reimbursed actual expenses for lodging not exceeding the single occupancy room charge (including tax) in lieu of the per diem rate set forth in 2.42.2.8 NMAC. Whenever possible, public officers and employees should stay in hotels which offer government rates. Agencies, public officers or employees who incur lodging expenses in excess of \$215.00 per night must obtain the signature of the agency head or chairperson of the governing board on the travel voucher prior to requesting reimbursement and on the encumbering document at the time of encumbering the expenditure.

(2) Actual reimbursement for meals: Actual expenses for meals are limited by Paragraph (2) of Subsection K of Section 10-8-4 NMSA 1978 to the rates published on the department of finance and administration website on May for the preceding fiscal year.

(3) Receipts required: The public officer or employee must submit receipts for the actual meal and lodging expenses incurred. Under circumstances where the loss of receipts would create a hardship, an affidavit from the officer or employee attesting to the expenses may be substituted for actual receipts. The affidavit must accompany the travel voucher and include the signature of the agency head or governing board.

**C. Return from overnight travel:** On the last day of travel when overnight lodging is no longer required, partial day reimbursement shall be made. To calculate the number of hours in the partial day, begin with the time the traveler initially departed on the travel. Divide the total number of hours traveled by 24. The hours remaining constitute the partial day which shall be reimbursed as published on the department of finance and administration website on May 1 for the preceding fiscal year. No reimbursement for actual expenses will be granted in lieu of partial day per diem rates.

[2.42.2.9 NMAC - Rp, 2.42.2.9 NMAC, 1/16/2024]

#### **2.42.2.10 TRAVEL ADVANCES:**

**A. Authorizations:** Upon written request accompanied by a travel voucher, agency heads and governing boards of local public bodies or their authorized designees may approve a public officer's or employee's request to be advanced up to eighty percent of per diem rates and mileage cost or for the actual cost of lodging and meals pursuant to

2.42.2.8 NMAC and 2.42.2.9 NMAC and for other travel expenses that may be reimbursed under 2.42.2.12 NMAC. Requests for travel advances shall not be submitted to the financial control division of the department of finance and administration more than two weeks prior to travel unless, by processing the request earlier, significant savings can be realized for travel by common carrier or for registration fees for seminars and conferences.

**B. Travel period:** A travel advance may be authorized either for a single trip or on a monthly basis for public officers and employees who travel continually throughout the month. Payment shall be made only upon vouchers submitted with attached authorization for each travel period.

(1) Single trip advances: Where a travel advance is made for a single trip, the officer or employee shall remit, within 5 working days of the return from the trip, a refund of any excess advance payment to the agency. The agency or local public body shall deposit the refund and reduce the disbursement recorded when the money was advanced.

(2) Monthly advances: Where monthly advances are made, employees shall remit to the agency, at the end of each month, any excess advance payments together with a thorough accounting of all travel advances and expenditures as required by the secretary. Where a travel advance is approved for the next month, the agency head may authorize the use of excess advance payments from the previous month as part of the advance for the next month in lieu of having the employee remit the excess funds.

**C. Agency records:** Each agency is responsible for maintaining records of travel advances authorized by the agency head or the agency head's authorized designee.

(1) Employee ledgers: Each state agency shall keep individual employee ledgers for travel advances. The ledger shall include the following information to provide an adequate audit trail:

- (a) employee;
- (b) no;
- (c) division;
- (d) fiscal year;
- (e) date of travel advance;
- (f) date of destination;
- (g) per diem advance;

(h) earned;

(i) additional per diem or refund due.

(2) Year-end closing: Each state agency shall review all travel advances prior to the end of the fiscal year and collect or pay all outstanding amounts if possible. Any receivables or payables outstanding at year-end must be recorded on the books and records of the agency.

**D. Local public bodies:** Local public bodies may grant prior written approval for travel advances as authorized by regulation of the governing body of the local public body.

[2.42.2.10 NMAC - Rp, 2.42.2.10 NMAC, 1/16/2024]

#### **2.42.2.11 MILEAGE-PRIVATE CONVEYANCE:**

**A. Applicability:** Mileage accrued in the use of a private conveyance shall be paid only in accordance with the provisions of this section.

**B. Rate:** Public officers and employees of state agencies shall be reimbursed for mileage accrued in the use of a private automobile or aircraft in the discharge of official duties as follows:

(1) unless the secretary has reduced the rates set for mileage for any class of public officials and for employees of state agencies pursuant to Subsection D of Section 10-8-5 NMSA 1978, one hundred percent of the internal revenue service standard mileage rate set January 1 of the previous year for each mile traveled in a privately owned vehicle;

(2) privately owned airplane, eighty-eight cents (\$0.88) per nautical mile.

**C. Local public bodies:** Public officers and employees of local public bodies may be reimbursed for mileage accrued in the use of a private conveyance in the discharge of official duties, at the statutory rates unless such rates have been reduced by the governing bodies of the local public body pursuant to Subsection D of Section 10-8-5 NMSA 1978.

**D. Privately owned automobile:** For conveyance in the discharge of official duties by privately owned automobile, mileage accrued shall be reimbursed at the rate set forth in this section as follows:

(1) pursuant to the mileage chart of the official state map published by the state highway and transportation department for distances in New Mexico and the electronic mileage calculator as approved by the department of finance and administration for distances outside of New Mexico; or

(2) pursuant to actual mileage if the beginning and ending odometer reading is certified as true and correct by the traveler; and

(a) the destination is not included on the official state map or on the approved electronic mileage calculator; or,

(b) at the destination(s) of the public officer or employee, the public officer or employee was required to use the private conveyance in performance of official duties.

**E. Privately owned airplane:** Mileage accrued in the use of a privately owned airplane shall be reimbursed at the rate set forth in this section as follows:

(1) pursuant to the New Mexico aeronautical chart published by the state highway and transportation department, aviation division, for distances in New Mexico and other states' air maps for distances outside of New Mexico; or

(2) pursuant to actual air mileage if certification is provided by the pilot, or a beginning and ending reading of actual mileage if the reading is certified as true and correct by the traveler, and the destination is not included on an air map.

**F. Reimbursement limit for out of state travel:** Total mileage reimbursement for out of state travel by privately owned automobile or privately owned airplane shall not exceed the total coach class commercial airfare that would have been reimbursed those traveling had they traveled by common carrier. This subsection shall not apply to a public school when transporting students.

**G. Additional mileage provision:** Mileage accrued while on official business shall be reimbursed for travel on official business. An agency head or designee may authorize by memorandum reimbursement for mileage from a point of origin farther from the destination than the designated post of duty in appropriate circumstances. The memorandum must accompany the payment voucher. If official business is transacted while commuting from home to post of duty or from post of duty to home, mileage shall not be paid for the number of miles between post of duty and home. Odometer readings showing additional miles accrued for official business must be provided to the agency for payment.

[2.42.2.11 NMAC - Rp, 2.42.2.11 NMAC, 1/16/2024]

## **2.42.2.12 REIMBURSEMENT FOR OTHER EXPENSES:**

Public officers and employees may be reimbursed for certain actual expenses in addition to per diem rates.

**A.** Public officers and employees may be reimbursed for the following expenses provided that receipts for all such expenses are attached to the reimbursement voucher:

- (1) taxi or other transportation fares at the destination of the traveler;
- (2) gratuities as allowed by the agency head or designee, not to exceed twenty percent per transaction;
- (3) parking fees;
- (4) actual costs for travel by common carrier, provided such travel is accomplished in the most economical manner practical;
- (5) rental cars or charter aircraft, provided less expensive public transportation is not available or appropriate;
- (6) registration fees for educational programs or conferences, provided, if the fee includes lodging or meals, then no per diem rates shall be paid and only actual expenses paid by the officer or employee and not included in the fee shall be reimbursed within the limits of 2.42.2.9 NMAC; and
- (7) professional fees or dues that are beneficial to the agency's operations or mission.
- (8) Under circumstances where the loss of receipts would deny reimbursement and create a hardship, an affidavit from the officer or employee attesting to the expenses may be substituted for actual receipts. The affidavit must accompany the travel voucher and include the signature of the agency head or governing board.

**B. Local public bodies:** Local public bodies may adopt regulations governing the reimbursement of actual expenses incurred in addition to per diem rates and mileage.

[2.42.2.12 NMAC - Rp, 2.42.2.12 NMAC 1/16/2024]

#### **2.42.2.13 TRAVEL VOUCHERS:**

Travel vouchers and supporting schedules and documents shall conform to the policies and procedures manuals issued by the financial control division of the department of finance and administration.

[2.42.2.13 NMAC - Rp, 2.42.2.13 NMAC 1/16/2024]

#### **2.42.2.14 EFFECTIVE DATES:**

All sections shall be effective upon publication in the *New Mexico Register*.

[2.42.2.14 NMAC - Rp, 2.42.2.14 NMAC 1/16/2024]

**APPENDIX A:** 1-1-7 NMSA 1978, Residence; rules for determining.

**APPENDIX B:**

DEPARTMENT OF FINANCE AND ADMINISTRATION

FINANCIAL CONTROL DIVISION

AFFIDAVIT FOR LOST RECEIPTS

Travel and Per Diem

I, \_\_\_\_\_ certify that actual receipts for expenses in the amount of

(print name)

\$ \_\_\_\_\_. incurred while in the conduct of business for the State of New Mexico, were lost.

Travel Dates	Lodging Expenses	Meal Expenses	Other Expenses

\_\_\_\_\_  
Employee Signature\_\_\_\_\_  
Date\_\_\_\_\_  
Agency Head Signature\_\_\_\_\_  
Date**PART 3: RELATING TO THE REIMBURSEMENT OF MOVING EXPENSES****2.42.3.1 ISSUING AGENCY:**

Department of Finance and Administration, Bataan Memorial Building, Room 180 Santa Fe, New Mexico 87503.

[5/15/97; Recompiled 10/1/01]

**2.42.3.2 SCOPE:**

Governs the reimbursement of actual and reasonable moving expenses for all public officers and employees of state agencies, as defined by Section 10-8-3, NMSA 1978, other than state educational institutions designated in Article 12, Section 11, of the New Mexico Constitution.

[5/15/97; Recompiled 10/1/01]

#### **2.42.3.3      STATUTORY AUTHORITY:**

Section 10-8-8 NMSA 1978 authorizes the department of finance and administration to promulgate by regulation reimbursement for the actual and reasonable moving expenses incurred by public officers and employees of state agencies.

[5/15/97; Recompiled 10/1/01]

#### **2.42.3.4      DURATION:**

Permanent.

[5/15/97; Recompiled 10/1/01]

#### **2.42.3.5      EFFECTIVE DATE:**

May 15, 1997, unless a later date is cited at the end of a section or paragraph.

[5/15/97; Recompiled 10/1/01]

[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

#### **2.42.3.6      OBJECTIVE:**

To establish uniform rules relating to the reimbursement of actual and reasonable moving expenses incurred by public officers and employees of state agencies.

[5/15/97; Recompiled 10/1/01]

#### **2.42.3.7      DEFINITIONS:**

A. "Authorized mover" means a mover authorized by the state corporation commission or its successor agency to operate as a mover in the state of New Mexico.

B. "Authorized trailer rental firm" and "authorized truck rental firm" mean, respectively, a trailer rental firm or truck rental firm authorized by the state corporation

commission or its successor agency to rent trucks and/or trailers to consumers in the state of New Mexico.

C. "Designated post of duty" means the location a public officer or employee is assigned to work by a state agency.

D. "Former residence" means a public officer's or employee's principal residence immediately before departure to a new designated post of duty.

E. "May" means that an agency can, within its discretion, but is not obligated to, reimburse public officers or employees for any actual and reasonable moving expenses.

F. "New residence" means the public officer's or employee's principal residence after assignment to a new designated post of duty and departure from a former designated post of duty.

G. "State agency" means the state of New Mexico or any of its executive agencies, departments, boards, instrumentalities or institutions but shall not include state educational institutions set forth in Article 12, Section 11, of the New Mexico Constitution.

H. "Reimburse" means to make payment for actual and reasonable moving expenses:

(1) to a public officer or state employee; or

(2) to an independent contractor who has provided moving services to a public officer or state employee provided that:

(a) a contract exists between the public officer or state employee and the independent contractor; and

(b) the public officer or state employee would otherwise be entitled to reimbursement for the moving expenses.

I. "Manufactured home" means, as defined by the Motor Vehicle Code, Section 66-1-4.11 B. NMSA 1978, as amended, a moveable or portable housing structure that exceeds either a width of eight feet or a length of forty feet, constructed to be towed on its own chassis and designed to be installed with or without a permanent foundation for human occupancy.

[5/15/97; Recompiled 10/1/01]

#### **2.42.3.8 ACTUAL AND REASONABLE MOVING EXPENSES - ELIGIBILITY:**

A. A state agency may reimburse a public officer or employee for actual and reasonable moving expenses if all of the following conditions are met:

- (1) the public officer or employee is assigned or transferred to a new designated post of duty for reasons clearly benefitting the state agency;
- (2) the secretary of the department of finance and administration or his designee has approved in writing the payment of moving expenses pursuant to this rule;
- (3) the assignment to the new designated post of duty will require the public officer or employee to commute at least thirty-five miles more from the former residence to the new designated post of duty than to the former designated post of duty;
- (4) the reimbursement is limited to the actual and reasonable moving expenses allowed by this rule;
- (5) the actual and reasonable moving expenses are incurred within six months after the date the transfer or reassignment becomes effective; and
- (6) the voucher submitted for reimbursement explains the reason for the transfer or reassignment.

B. A state agency shall not reimburse a public officer or employee for the actual and reasonable moving expenses of any public officer or employee who is not presently appointed, elected or in the employ of the state and being paid with public money at the time the moving expense is incurred.

C. The secretary of the department of finance and administration may approve actual and reasonable moving expenses for any public officer or employee who may not be eligible pursuant to paragraphs 8.1.2 through 8.1.5 of Section 8 [now Paragraphs 2 through 5 of Subsection A of 2.42.3.8 NMAC] upon a written showing by the head of the state agency of unusual circumstances and that a hardship will result if reimbursement is not made. However, reimbursement shall not be made to a public officer or employee who is not eligible pursuant to Subsection 8.2 [now Subsection B of 2.42.3.8 NMAC] of this rule.

[5/15/97; Recompiled 10/1/01]

#### **2.42.3.9 ACTUAL AND REASONABLE MOVING EXPENSES ALLOWED:**

A. If a public officer or employee uses an authorized mover to move his or her household goods and personal effects from a former residence to a new residence, the public officer or employee may be reimbursed for the following actual and reasonable moving expenses:

(1) the cost of packing the public officer's or employee's household goods and personal effects;

(2) the cost of crating the public officer's or employee's household goods and personal effects;

(3) the cost of any in-transit storage charges, not exceeding three months, of the public officer's or employee's household goods and personal effects;

(4) the cost of insurance for loss or damage to the public officer's or employee's household goods and personal effects while in-transit from the public officer's or employee's former residence to the public officer's or employee's new residence; and

(5) the cost of actual and reasonable household and personal effects moving expenses from the former residence to the new residence.

B. As used in paragraph 9.1.5 of this rule [now Paragraph 5 of Subsection A of 2.42.3.9 NMAC], "reasonable household and personal effects moving expenses" shall not include any expenses or other costs incurred in the packing, crating, storing, moving or insuring of the following items:

(1) firewood;

(2) building materials;

(3) play sand;

(4) explosives;

(5) flammables, oily mops, rags, or acid;

(6) boats;

(7) animals, birds, or other live creatures;

(8) potted plants or shrubbery;

(9) automobiles, trucks, recreational vehicles and travel trailers; and

(10) storage sheds.

C. If a public officer or employee does not use an authorized mover to move his household goods and personal effects from a former residence to a new residence, the public officer or employee may be reimbursed for:

(1) the actual cost of renting a truck from an authorized truck rental firm to move his or her household goods and personal effects; and

(2) the actual cost of renting a trailer from an authorized trailer rental firm and one-way mileage for the use of a personal vehicle at the rate set forth in the Per Diem and Mileage Act and DFA Rule 95-1 [now 2.42.2 NMAC], as amended, from the former residence to the new residence.

D. Vouchers submitted pursuant to this section must be accompanied by receipts for all money claimed, except for reimbursement for mileage.

E. The maximum amount of reimbursement and expenses for any eligible public officer or employee pursuant to Section 9 [now 2.42.3.9 NMAC] is limited to four thousand dollars (\$4,000) per move, subject to the following exception: eligible public officers or employees may also be reimbursed for the actual and reasonable expense of moving a manufactured home if the following conditions are met:

(1) the manufactured home was the public officer or employee's former residence;

(2) the move is completed by an authorized mover.

[5/15/97; 9/15/00; Recompiled 10/1/01]

#### **2.42.3.10 OTHER ACTUAL AND REASONABLE MOVING EXPENSES ALLOWED:**

A. A public officer or employee who is eligible for reimbursement of actual and reasonable moving expenses pursuant to this rule may also be reimbursed for per diem and mileage at the rates prescribed by the Per Diem and Mileage Act and DFA Rule 95-1 [now 2.42.2 NMAC], as amended, as follows:

(1) for one round-trip not exceeding four days from the former residence to the general location of the new designated post of duty to look for a new residence; and

(2) for a one-way trip from the former residence to the new residence to move the public officer or employee and his or her household members from the former residence to the new residence unless reimbursed pursuant to Section 9.3 [now Subsection C of 2.42.3.9 NMAC].

B. Additionally, a public officer or employee may be reimbursed for actual lodging costs incurred for temporary quarters at a new designated post of duty for up to thirty (30) days with prior written approval of the head of the state agency. Under extraordinary circumstances, where temporary quarters do not include kitchen facilities, a daily allowance for food up to \$22.50 may be authorized.

C. Vouchers submitted for reimbursement pursuant to this section shall be:

(1) certified as true and correct by the public officer or employee requesting reimbursement;

(2) approved for payment and certified as true and correct by a public officer or employee of the reimbursing state agency designated to approve payment for the state agency.

[5/15/97; Recompiled 10/1/01]

#### **2.42.3.11 MOVING EXPENSES NOT ALLOWED:**

A public officer or employee shall not be reimbursed for any of the following moving expenses:

A. taking down or installing draperies or mirrors attached to the wall;

B. refitting rugs or draperies;

C. assembling or disassembling outdoor gym sets or swing sets;

D. disconnecting and servicing for moving major appliances such as dishwashers, refrigerators, washing machines, dryers, air conditioners, gas or electric ranges and television sets;

E. insuring:

(1) any jewelry, money, trading stamps, bills, deeds, drafts or other valuable papers;

(2) any stamp or coin collections of inherent value;

(3) any precious metals;

(4) any valuable collectors items; or

(5) silverware.

F. losses sustained on the disposal of memberships in clubs, tuition fees, and similar items; and,

G. losses not covered by insurance.

[5/15/97; Recompiled 10/1/01]

#### **2.42.3.12 MANUFACTURED HOME ACTUAL AND REASONABLE MOVING EXPENSES ALLOWED:**

A. A public officer or employee whose former residence is a manufactured home may be reimbursed for the following actual reasonable moving expenses incurred in moving the manufactured home from a former residence to a new residence by an authorized mover:

- (1) costs for moving a freezer;
- (2) costs of packing household and personal effects;
- (3) costs for removing and installing collapsible underpinning (skirting) and stairways and for reinstalling the skirting and stairways, provided no modifications are required;
- (4) costs of unblocking and blocking;
- (5) other costs incurred to prepare the manufactured home to be moved;
- (6) escort fees;
- (7) costs incurred in separating, boxing, and reconnecting;
- (8) costs of moving the trailer by an authorized mover or mileage for personal vehicle at the rate set forth in the Per Diem and Mileage Act and DFA Rule 95-1 [now 2.42.2 NMAC]; and
- (9) reasonable costs of connecting or disconnecting utilities.

B. Payment shall be made only upon vouchers submitted with attached receipts for all money claimed.

[5/15/97; Recompiled 10/1/01]

#### **2.42.3.13 MANUFACTURED HOME MOVING EXPENSES NOT ALLOWED:**

A public officer or employee will not be reimbursed for the following expenses or costs incurred in moving, from a former residence to a new residence, a manufactured home which was the employee's principal residence:

A. any costs set forth in Subsection 9.2 [now Subsection B of 2.42.3.9 NMAC] of this rule;

B. storage sheds and any other items which are not part of the initial move of the manufactured home or the contents of the manufactured home;

- C. transportation of wood or concrete blocks;
- D. costs of moving fuel or butane tanks;
- E. costs of moving fencing or walkways;
- F. costs of moving non-collapsible underpinnings (skirting) and stairways;
- G. costs incurred for "acts of God" insurance or other extra insurance;
- H. costs of moving two connected manufactured homes (a "double wide" manufactured home) originally built and designed as two separate dwelling units;
- I. the dismantling, transporting or constructing of porches, patios or any add-on type of rooms other than tilt-out or slide rooms that were original components of the manufactured home and that were manufactured by the manufactured home company;
- J. the mounting or dismounting of wheels, tires, tongues, replacement and/or tire repairs.

[5/15/97; Recompiled 10/1/01]

#### **2.42.3.14 REFUND OF REIMBURSEMENT:**

Any public officer or employee who voluntarily terminates employment with the state of New Mexico within six months after receipt of reimbursement pursuant to this rule for actual and reasonable moving expenses shall refund the amount of reimbursement to the state agency which paid the reimbursement, unless the termination was caused by the death or disability of the public officer or employee.

[5/15/97; Recompiled 10/1/01]

#### **2.42.3.15 REIMBURSEMENT OF PUBLIC OFFICER'S OR EMPLOYEE'S SPOUSE:**

A public officer or employee shall not be reimbursed for moving expenses for which the spouse of the public officer or employee is reimbursed by the spouse's employer.

[5/15/97; Recompiled 10/1/01]

## **CHAPTER 43-59: [RESERVED]**

## **CHAPTER 60: INVESTMENT AND DEPOSIT OF PUBLIC FUNDS**

## **PART 1: OPEN MEETINGS RESOLUTION**

### **2.60.1.1 ISSUING AGENCY:**

New Mexico Venture Capital Investment Advisory Committee, New Mexico State Investment Council.

[Recompiled 10/01/01]

### **2.60.1.2 SCOPE:**

**[RESERVED]**

[Recompiled 10/01/01]

### **2.60.1.3 STATUTORY AUTHORITY:**

**[RESERVED]**

[Recompiled 10/01/01]

### **2.60.1.4 DURATION:**

[Permanent.]

[Recompiled 10/01/01]

### **2.60.1.5 EFFECTIVE DATE:**

[Filed November 23, 1990]

[Recompiled 10/01/01]

### **2.60.1.6 OBJECTIVE:**

**[RESERVED]**

[Recompiled 10/01/01]

### **2.60.1.7 DEFINITIONS:**

**[RESERVED]**

### **2.60.1.8 OPEN MEETINGS RESOLUTION:**

A. WHEREAS, Section 10-15-1 (B) of the Open Meetings Act (Sections 10-15-1 through 10-15-4 NMSA 1978) states that, except as may be otherwise provided in the Constitution or the provisions of the Open Meetings Act, all meetings of a quorum of members of any board, commission or other policy-making body of any state agency held for the purpose of formulating public policy, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of such board, commission or other policy-making body. Are declared to be public meetings open to the public at all times; and

B. WHEREAS, any meeting subject to the Open Meetings Act at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs shall be held only after reasonable notice to the public; and

C. WHEREAS, Section 10-15-1 (C) of the Open Meetings Act requires the venture capital investment advisory committee (the "committee") to determine annually what constitutes reasonable notice of its public meetings;

D. NOW, THEREFORE, BE IT RESOLVED by the committee on this 25th day of October 1990, that: The committee ordinarily shall hold meetings as exigencies may demand. The following shall constitute reasonable public notice of the committee's meetings.

**(1) REGULAR MEETINGS:**

(a) At each regular meeting of the committee, the committee shall announce the proposed date, time and place of its next regular meeting. At least 10 days before a regular meeting is held the committee shall also distribute, in the following manner, a written notice listing the time, date, and place of the meeting, and a date upon which copies of the proposed agenda will be available upon request at the state investment office:

(b) The committee will deliver copies of the notice to the governor's press boxes for distribution to the news media; and

(c) The committee will mail copies of the notice to those broadcast stations licensed by the federal communications commission and newspapers of general circulation and to other entities and persons which have made written request of the committee for notice of public meetings.

**(2) SPECIAL MEETINGS:** The chairman may call a special meeting upon at least 72 hours notice.

(a) If a special meeting is called seven (7) or more days in advance of the date of the special meeting, notice will be given at least seven days in advance by the means specified above for a regular meeting.

(b) If a special meeting is called less than seven (7) days before it is to be held, notice of the special meeting will be given in the manner provided below for emergency meetings.

**(3) EMERGENCY MEETINGS:**

(a) Emergency meetings may be called upon at least eight (8) hours notice. An emergency meeting may be called by the chairman under those circumstances in which the committee must take expeditious action because a situation exists which may be considered dangerous to the health, safety or welfare of the public or may cause irreparable loss if immediate action is not taken.

(b) Notice of an emergency meeting shall be met by posting notice in the committee's office. The committee shall also provide telephonic notice to those broadcast stations licensed by the federal communications commission and newspapers of general circulation that have made a written request of the committee for notice of public meetings.

**(4) CLOSED MEETINGS:** Pursuant to Section 10-15-1(E) NMSA 1978, the committee may close a meeting to the public if the subject matter of such discussion or action is included in Subsection E of the Open Meetings Act, Section 10-15-1 NMSA 1978. If any committee meeting is closed pursuant to Section 10-15-1(E) NMSA 1978, such closure:

(a) if made in an open meeting, shall be approved by a majority vote of a quorum of the committee and authority for the closure shall be stated in the motion calling for the vote on a closed meeting. The vote on a closed meeting shall be taken in an open meeting and the vote of each individual member is to be recorded in the minutes. Only those subjects announced or voted upon prior to closure by the committee may be discussed in a closed meeting; and

(b) if called for when the committee is not in an open meeting, the closed meeting shall not be held until public notice, appropriate under the circumstances, stating the specific provision of law authorizing the closed meeting is given to the members and to the general public.

[Recompiled 10/01/01]

**2.60.1.13 ADOPTION:**

Adopted by the venture capital investment advisory committee in an open meeting on October 25, 1990. VENTURE CAPITAL INVESTMENT ADVISORY COMMITTEE

By: P. J. Archibeck, State Investment Officer

Date: November 5, 1990

[Recompiled 10/01/01]

## **PART 2: AUTHORIZATION, OPERATIONS AND REPORTING OF STATE AGENCY BANK ACCOUNTS AND INVESTMENTS**

### **2.60.2.1 ISSUING AGENCY:**

Office of the State Treasurer, State Cash Manager.

[3/2/84; 4/30/96; Recompiled 10/01/01]

### **2.60.2.2 SCOPE:**

All state agency deposits of investments unless the agency has been specifically exempted by law. As used in this policy, the term state agency "shall mean the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions other than state educational institutions designated by Article 12, Section 11 of the Constitutions of New Mexico and the investments made by the state treasurer or the state investment council.

[3/2/84; 4/30/96; Recompiled 10/01/01]

### **2.60.2.3 STATUTORY AUTHORITY:**

Article V, Section 1, New Mexico Constitution; Section 6-1-13 NMSA 1978; Sections 6-10-24.1, 6-10-26 and 6-10-29 NMSA 1978.

[4/30/96; Recompiled 10/01/01]

### **2.60.2.4 DURATION:**

Permanent.

[4/30/96; Recompiled 10/01/01]

### **2.60.2.5 EFFECTIVE DATE:**

3-2-84, unless a later date is cited at the end of a section or paragraph.

[3/2/84; 4/30/96; Recompiled 10/01/01]

[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

### **2.60.2.6 OBJECTIVE:**

The objective of Part 2 Chapter 6 [now 2.60.2 NMAC] is to establish standards and procedures for uniform investing of state funds and proper reporting procedures.

[4/30/96; Recompiled 10/01/01]

#### **2.60.2.7      DEFINITIONS:**

**[RESERVED]**

[3/2/84; 4/30/96; Recompiled 10/01/01]

#### **2.60.2.8      AUTHORIZATION OF CHECKING AND SAVINGS ACCOUNTS:**

Procedures: A state agency may not open a new deposit account or deposit money in an existing deposit account unless it has submitted a request to the office of the state cash manager in writing on forms prescribed by the cash manager and received written authorization from the cash manager for each account.

A. In the written authorization, the cash manager will establish for each account those conditions and reports appropriate to that account. Reports to the cash manager are required at least monthly for all accounts.

B. Any accounts operating without authorization will be reported to the state board of finance on a monthly basis. All unauthorized accounts may be closed by the cash manager.

C. Authorizations are valid for one-year period. All state agencies, operating accounts, are required to certify in writing the need for each account on an annual basis beginning January 1, 1985 and every January 1st thereafter.

[3/2/84; 4/30/96; Recompiled 10/01/01]

#### **2.60.2.9      INVESTMENT ACCOUNTS:**

A. As used in this policy, the term "investment account" shall mean all in-state certificates of deposit, money market accounts and repurchase agreements.

B. **REPORTING PROCEDURES:** It is the responsibility of each state agency to provide written constitutional or statutory authority permitting the investments. Investment authority must be submitted to the cash manager on an annual basis beginning January 31, 1984 and each January 1st thereafter. All investment accounts must be reported monthly in writing to the cash manager detailing the type, location and amount of investments held.

[3/2/84; 4/30/96; Recompiled 10/01/01]

#### **2.60.2.10 DEPOSIT LIMITATION:**

[Section 1, 6-10-24.1 chapter 9, Laws of 1982]: "No person depositing or investing state funds in banks or savings and loan associations in New Mexico shall deposit or invest funds if that deposit or investment when added to state funds already in that bank or savings and loan association would be in excess of four hundred percent of equity capital of the bank or four hundred percent of net worth of the savings and loan association or more than twenty-five percent of the total of that financial institution's deposits, whichever is less, as shown by the most recent quarterly statement of financial condition required by federal or state financial authorities as certified by an authorized officer of that institution..."

[3/2/84; 4/30/96; Recompiled 10/01/01]

#### **2.60.2.11 REPORT SUBMISSION:**

State agencies including the state treasurer and state investment council are required to submit a report on each checking, savings and investment account at least monthly or as otherwise specified by the cash manager. Monthly reports must be submitted and received by the office of the state cash manager on or before the 25th day of the month following the reporting period. Each report must contain a signed certification that the account has been reconciled. A summary of all reports not received by the cutoff date will be submitted to the state board of finance on a monthly basis.

[3/2/84; 4/30/96; Recompiled 10/01/01]

#### **2.60.2.12 TRANSFER POLICY:**

The transfer of funds to the state treasurer from checking or savings accounts must not be made less frequently than agency transfer as authorized by the cash manager. Any significant changes in deposit volume should be reported as soon as possible. Any requested changes in transfer policy must be submitted in writing and requires approval of the cash manager prior to implementation.

[3/2/84; 4/30/96; Recompiled 10/01/01]

#### **2.60.2.13 CLOSING OF CHECKING OR SAVINGS ACCOUNTS:**

When closing a checking or savings account, each state agency shall submit a written certification stating the account is closed, the circumstances necessitating the closing of the account, and a final bank or savings and loan statement indicating a zero balance.

[3/2/84; 4/30/96; Recompiled 10/01/01]

#### **2.60.2.14 CONSOLIDATION OF ACCOUNTS:**

The cash manager shall combine accounts where feasible and instruct state agencies on deposit and reconciliation procedures.

[3/2/84; 4/30/96; Recompiled 10/01/01]

#### **2.60.2.15 INTEREST AND BEARING ACCOUNTS:**

All state fund deposit accounts should be placed in interest bearing accounts when feasible. All state agencies maintaining demand deposit accounts are encouraged to establish interest bearing accounts whenever possible. A written explanation as to why the account is not in an interest bearing account will be required by the cash manager.

[3/2/84; 4/30/96; Recompiled 10/01/01]

### **PART 3: DEPOSITS**

#### **2.60.3.1 ISSUING AGENCY:**

Office of the State Treasurer.

[7/10/72, 4/30/96; Recompiled 10/01/01]

#### **2.60.3.2 SCOPE:**

All state agencies, boards and commissions making deposits at the state treasurer's office, cashier's office.

[4/30/96; Recompiled 10/01/01]

#### **2.60.3.3 STATUTORY AUTHORITY:**

Article V, Section 1, New Mexico Constitution; Section 6-1-13 NMSA 1978.

[4/30/96; Recompiled 10/01/01]

#### **2.60.3.4 DURATION:**

Permanent.

[4/30/96; Recompiled 10/01/01]

#### **2.60.3.5 EFFECTIVE DATE:**

8/1/72, unless a later date is cited at end of a section or paragraph.

[4/30/96; Recompiled 10/01/01]

[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

#### **2.60.3.6 OBJECTIVE:**

The objective of Part 2 Chapter 6 is to establish the times deposits will be accepted by the cashiers office.

[4/30/96; Recompiled 10/01/01]

#### **2.60.3.7 DEFINITIONS:**

**[RESERVED]**

[4/30/96; Recompiled 10/01/01]

#### **2.60.3.8 DEADLINE TO MAKE DEPOSITS:**

Effective 8-1-72 the cashier's door will be closed at 4 p.m. to give personnel time to get their work completed.

A. Any deposits not at the cashier's office, room 156, by 4 p.m. will not be accepted until the following day.

B. Deposits cannot be delivered to any other department of the treasurer's, and MUST be made at room 156.

[7/10/72; 4/30/96; Recompiled 10/01/01]

### **PART 4: DEPOSITORY BANK REQUIREMENTS, COLLATERAL LEVEL REQUIREMENTS, AND CUSTODIAL BANK REQUIREMENTS**

#### **2.60.4.1 ISSUING AGENCY:**

State Board of Finance, 181 Bataan Memorial Building, Santa Fe, NM 87501.

[4-30-97; 2.60.4.1 NMAC - Rn, 2 NMAC 60.4.1, 11-15-2001; A, 12-1-2009]

#### **2.60.4.2 SCOPE:**

State treasurer and financial institutions holding deposits of public money or collateral pledged to secure those deposits under the state board of finance authority.

[4-30-97; 2.60.4.2 NMAC - Rn, 2 NMAC 60.4.2, 11-15-2001; A, 2-1-2007]

#### **2.60.4.3      STATUTORY AUTHORITY:**

A. Section 6-1-1 Part E NMSA 1978 states that the state board of finance has general supervision of the fiscal affairs of the state and of the safekeeping and depositing of all money and securities belonging to or in custody of the state.

B. Section 6-10-10 Part C NMSA 1978 provides that the state treasurer may deposit money in one or more accounts with any bank, savings and loan association, or credit union whose deposits are insured by an agency of the United States to receive public money or deposits.

C. Sections 6-10-16 and 6-10-16.1 NMSA 1978 provide for the type of securities of the United States and the state of New Mexico, including surety bonds as provided in Section 6-10-15, to be used as collateral for deposits of public funds.

D. Section 6-10-17 NMSA 1978 provides that any financial institution designated as a depository of public money shall deliver securities having an aggregate value of at least one-half the amount of public money to be deposited to a custodial bank and shall deliver a joint safekeeping receipt issued by the custodial bank to the public official from whom the public money is received for deposit.

E. Section 6-10-17.1 NMSA 1978 provides that when a depository bank has not maintained qualifying securities as collateral for deposits of public money, the state treasurer or board shall request the depository bank to provide additional qualifying securities to meet those requirements within ten (10) calendar days. If the depository bank does not comply, the board or state treasurer shall withdraw all deposits of public money within the next ten (10) calendar days without penalty to the public depositor.

F. Section 6-10-18 NMSA 1978, requires any financial institution designated as a depository of public money to enter into a written agreement to assure that collateral it pledges as security remains secure throughout the term of the designation.

G. Section 6-10-20 NMSA 1978 provides that the board may at any time within its discretion require any depository financial institution to furnish additional security for deposit of the kind specified in Section 6-10-16 NMSA 1978.

H. Section 6-10-21 NMSA 1978, authorizes and directs the board to regulate the safekeeping of securities pledged as collateral by depository banks and requires the board to designate the third-party custodial banks charged with safekeeping that collateral pursuant to contracts between the two financial institutions and the state.

I. Section 6-10-24.1 NMSA 1978, bars the state treasurer from depositing public money in a financial institution in an amount that exceeds 400 percent of the total equity capital in the case of banks or 400 percent of the net worth in case of savings and loan associations, or 25 percent of the total of the financial institution's deposits, whichever is less.

[4-30-97; 2.60.4.3 NMAC - Rn & A, 2 NMAC 60.4.3, 11-15-2001; A, 8-1-2006; A, 2-1-2007; A, 12-1-2009]

#### **2.60.4.4 DURATION:**

Permanent.

[4-30-97; 2.60.4.4 NMAC - Rn, 2 NMAC 60.4.4, 11-15-2001]

#### **2.60.4.5 EFFECTIVE DATE:**

April 30, 1998, unless a later date is cited at the end of a section.

[4-30-97, 4-30-98; 2.60.4.5 NMAC - Rn & A, 2 NMAC 60.4.5, 11-15-2001]

#### **2.60.4.6 OBJECTIVE:**

This rule provides general guidance regarding the financial and legal requirements to be followed by the state treasurer to minimize risks to existing and future deposits of public money under the authority of the board.

[4-30-97; 2.60.4.6 NMAC - Rn & A, 2 NMAC 60.4.6, 11-15-2001; A, 12-1-2009]

#### **2.60.4.7 DEFINITIONS:**

A. "Board" means state board of finance.

B. "Custodial bank" means a federal reserve bank or branch thereof or any bank designated by the board as described in this rule.

C. "Deposit" means the amount of state funds held by the financial institution in an account owned by the state, or any funds deposited (including CD deposits) by the state with that financial institution. For purposes of computing the deposit ratio or the amount of collateral to be posted, the amount insured by the federal deposit insurance company, the federal savings and loan insurance corporation or the national credit union administration shall not be included.

D. "Deposit ratio" means the amount of state funds on deposit or invested with a financial institution divided by the total amount of deposits at the financial institution, excluding, however, funds held by the fiscal agent bank, as the state's fiscal agent bank, and demand deposits held by state checking depository banks when determining the amount of state funds.

E. "Depository bank" means a financial institution certified or designated by the state treasurer to hold deposits of public money.

F. "Equity ratio" means the amount of state funds on deposit or invested with a financial institution divided by the total equity capital of the financial institution, excluding, however, funds held by the fiscal agent bank, as the state's fiscal agent bank, and demand deposits held by state checking depository banks when determining the amount of state funds.

G. "FDIC" means federal deposit insurance corporation.

H. "Financial institution" means any bank, savings and loan association or credit union whose deposits are insured by an agency of the United States.

I. "Letters of credit" means those letters of credit that are eligible to be pledged to the state to secure state funds pursuant to Section 6-10-16, NMSA 1978, as it may be amended from time to time.

J. "Non-performing loans" means loans that are at least 90 days past due and accruing or non-accruing.

K. "Securities" means those securities eligible as collateral for public funds under Section 6-10-16 NMSA 1978.

L. "Surety bond" means a bond substantially in the form prescribed in 6-10-15 NMSA 1978, issued by a surety company that is continually rated in the highest category by at least one nationally recognized statistical rating agency and licensed to do business in New Mexico.

[2.60.4.7 NMAC - N, 11-15-2001; A, 2-1-2007; A, 12-1-2009]

#### **2.60.4.8 DESIGNATION AS A DEPOSITORY BANK:**

A. A financial institution requesting to become a depository bank must submit the following information to the state treasurer:

(1) a letter from the financial institution requesting to become a depository bank;

(2) copy of FDIC certification or the national credit union administration certification;

(3) financial reports for the preceding four quarters; a newly chartered financial institution must provide its most recent financial report; and

(4) other public information requested by the state treasurer.

B. Initial and continued appointment of financial institutions to serve as depository banks for the state of New Mexico is determined by the financial institution's risk

assessment ratios and required collateral levels as specified in 2.60.4.9 below, and entry into and maintenance of a depository agreement consistent with Section 6-10-18 NMSA 1978.

[4-30-97, 4-30-98; 2.60.4.8 NMAC - Rn & A, 2NMAC 60.4.8, 11-15-2001; A, 8-1-2006; A, 2-1-2007; A, 12-1-2009]

#### **2.60.4.9 COLLATERAL REQUIREMENTS FOR DEPOSITORY BANK SERVICES AND RISK ASSESSMENT RATIOS:**

A. The board directs the state treasurer to conduct risk assessment analysis of depository banks holding deposits of public money under the board's authority. The risk assessment will include a determination of each depository bank's primary capital-to-asset ratio, net operating income to total average asset ratio and non-performing loans to primary capital ratio for the past four (4) consecutive quarters. These risk assessment ratios will determine collateral level requirements for financial institutions holding deposits of public money as listed below.

(1) If a depository bank's primary capital-to-asset ratio as defined by the FDIC is:

(a) 6.1 percent or greater, the depository bank shall be required to maintain collateral with an aggregate market value equal to 50 percent of the amount of the deposit;

(b) 5.0 percent to 6.0 percent, the depository bank shall be required to maintain collateral with an aggregate market value equal to 75 percent of the amount of the deposit;

(c) less than 5.0 percent, the depository bank shall be required to maintain collateral with an aggregate market value equal to 102 percent of the amount of the deposit.

(2) If the ratio of a depository bank's net operating income after taxes to its total average assets is:

(a) .61 percent or greater, the depository bank shall be required to maintain collateral with an aggregate market value equal to 50 percent of the amount of the deposit;

(b) .51 percent to .60 percent, the depository bank shall be required to maintain collateral with an aggregate market value equal to 75 percent of the amount of the deposit;

(c) less than .51 percent, the depository bank shall be required to maintain collateral with an aggregate market value equal to 102 percent of the amount of the deposit;

(d) a newly chartered depository bank is exempt from this ratio requirement for its first year of its operation; for its second year of operations, the depository bank shall annualize its net operating income beginning with the first quarter of the second year; if this ratio is less than .61 percent, the state treasurer shall review the depository bank's financial condition and may request additional collateral.

(3) If the depository bank's non-performing loans to primary capital ratio; is:

(a) 34.9 percent or less, the depository bank shall be required to maintain collateral with an aggregate market value equal to 50 percent of the amount of the deposit;

(b) 35.0 percent to 49.9 percent, the depository bank shall be required to maintain collateral with an aggregate market value equal to 75 percent of the amount of the deposit;

(c) greater than 49.9 percent, the depository bank shall be required to maintain collateral with an aggregate market value equal to 102 percent of the amount of the deposit.

(4) If a depository bank's deposit ratio is:

(a) less than 10 percent, the depository bank shall be required to maintain collateral with an aggregate market value equal to 50 percent of the amount of the deposit;

(b) 10 percent or greater, the depository bank shall be required to maintain collateral with an aggregate market value equal to 102 percent of the amount of the deposit.

(5) If a depository bank's equity ratio is:

(a) less than 200 percent, the depository bank shall be required to maintain collateral with an aggregate market value equal to 50 percent of the amount of the deposit;

(b) 200 percent or greater, the depository bank shall be required to maintain collateral with an aggregate market value equal to 102 percent of the amount of the deposit.

B. Should the risk assessment ratios established in this section result in different levels of collateral for a depository bank, the state treasurer shall request the highest collateral level required by any ratio.

C. Collateral levels shall be required until the risk assessment ratios of the depository bank return to a level which allows collateral to be kept at a lower level or at statutory minimum level as appropriate.

D. State funds shall not be deposited or invested in a depository bank in an amount that, when added to state funds already on deposit in that depository bank, exceeds 200 percent of the total equity capital in case of banks or 200 percent of the net worth in the case of savings and loan associations or 10 percent of the total of the bank's or the saving and loan association's deposits, whichever is less, unless and until the bank or savings and loan association has pledged and maintains collateral with an aggregate market value equal to 102 percent of the aggregate amount on deposit. **In no event** shall state funds be deposited or invested in any amount that, when added to state funds already on deposit and invested in that depository bank, exceeds 400 percent of the total equity capital in case of banks or 400 percent of the depository bank's net worth in case of savings and loan associations or 25 percent of the total of the bank's or the savings and loan association's deposits, whichever is less, provided, however, the 25 percent of total deposits limitation shall not apply during the first year of operation of a newly chartered bank or savings and loan association. In the event state funds in a bank or savings and loan association exceed the 400 percent/25 percent limitations set out herein, the state treasurer shall not renew any maturing certificates of deposit and shall provide for the staged withdrawal of the amount in excess of these limitations over a reasonable period of time to avoid causing failure of the depository bank unless immediate withdrawal is necessary to prevent loss of funds pursuant to 2.60.4.12 NMAC. Further, the state treasurer shall not deposit state funds in credit unions in excess of the amount insured by an agency of the United States. The amount of state funds deposited and invested as described above shall exclude funds held by the state's fiscal agent bank, as the fiscal agent bank, and demand deposits held by state checking depository banks.

[4-30-97, 4-30-98; 2.60.4.9 NMAC - Rn & A, 2 NMAC 60.4.8, 11-15-2001; A, 8-1-2006; A, 2-1-2007; A, 12-1-2009]

#### **2.60.4.10 REQUIRED TYPES OF COLLATERAL:**

A. Deposits of public money shall be secured by the following.

(1) Securities of the United States, its agencies or instrumentalities which shall be accepted at market value.

(2) Securities of the state of New Mexico, its agencies, instrumentalities, counties, municipalities or other subdivisions, which shall be accepted at par value.

(3) Securities, including student loans, guaranteed by the United States or the state of New Mexico which shall be accepted at market value.

(4) Revenue bonds that are underwritten by a member of the national association of securities dealers, known as "N.A.S.D.", and are rated "BAA" or above by a nationally recognized bond rating service, which shall be accepted as security at market value.

(5) Bonds of the New Mexico mortgage finance authority, a state instrumentality.

(6) Farmers' home administration loans, which are fully guaranteed by the federal government.

(7) Letters of credit issued by a federal home loan bank in the same amount that would be required if securities were being posted as collateral pursuant to Subsection A of 2.60.4.9 NMAC, which shall be accepted at par value.

(8) Surety bonds in the same amount that would be required if securities were being posted as collateral pursuant to Subsection A of 2.60.4.9 NMAC, which shall be accepted at par value. Additionally, each surety bond must receive prior approval from the board and a district judge of the first judicial district.

B. Mutual funds may not be pledged as collateral for deposits of public funds.

[2.60.4.10 NMAC - N, 11-15-2001; A, 2-1-2007; A, 12-1-2009]

#### **2.60.4.11 DEPOSITORY BANK REPORTING TO THE STATE TREASURER:**

A. The figures to be used by the state treasurer in completing the risk assessment analysis for a depository bank shall be calculated from the quarterly call statements, thrift reports, or national credit union administration reports of the financial institution and on the state treasurer's generated report "New Mexico financial institution quarterly report". Both reports shall be furnished by the financial institution to the state treasurer no later than on the tenth day of the second month following the end of each calendar quarter. If the tenth day falls on a weekend or a legal holiday, the figures shall be submitted on the next business day.

B. By the tenth day, a depository bank shall submit a monthly collateral (including surety bonds and letters of credit) level report to the state treasurer on the state treasurer's generated form "state treasurer collateral compliance monthly report". If the tenth falls on a weekend or a legal holiday, the figures shall be submitted on the next business day.

C. The reports provided to the state treasurer by the depository bank shall be certified in writing by the president, an executive officer, or a person authorized by a corporate resolution certifying the information of the financial institution.

D. The state treasurer may, at any time between quarterly reporting periods, request any additional certified public information from the depository bank as needed to assess its risk level.

E. The state treasurer is directed to require each depository bank to provide a copy of any regulatory enforcement decisions or orders issued by a state or federal regulatory agency having authority to issue such enforcement decisions or orders that have a material impact on the depository bank or on financial ratios required of it by its respective regulatory agencies or this rule to the state treasurer within ten (10) business days of any such document becoming public.

[2.60.4.11 NMAC - N, 11-15-2001; A, 8-1-2006; A, 2-1-2007; A, 12-1-2009]

#### **2.60.4.12 COLLATERAL LEVEL NON-COMPLIANCE AND APPROPRIATE ADJUSTMENTS:**

A. If a depository bank is unable to meet the risk assessment qualifications for a minimum level of collateral required, the state treasurer is directed to cease making any additional deposits of public money into the depository bank and to withdraw deposits in the order they would otherwise mature to an amount which can be collateralized at an appropriate level of collateral in accordance with the risk assessment ratios.

B. If a depository bank has not maintained qualifying securities as collateral, the state treasurer shall request the depository bank to substitute or provide additional qualifying securities to meet collateral requirements within ten (10) calendar days. If the depository bank does not comply with the request within ten (10) calendar days, the state treasurer shall withdraw from that depository bank within the next ten (10) calendar days all deposits of public money under the state treasurer's control without penalty.

C. Upon receipt of notice by a depository bank of an adverse event or final administrative enforcement action imposed upon it.

(1) If the state treasurer believes such action indicates a high level of risk in maintaining public deposits in that depository bank, the state treasurer shall report to the board and the board shall decide whether additional collateral shall be required.

(2) The state treasurer may require the pledging of additional collateral or make an emergency withdrawal of state deposits prior to maturity and prior to obtaining board direction when such action is necessary in the state treasurer's judgment in the exercise of reasonable care to protect state funds.

(3) If the depository bank believes that exceptional circumstances exist which indicate that it is or was not appropriate for the state treasurer to take any action pursuant to this subsection:

(a) the depository bank shall appear at the next regularly scheduled board meeting and present its position;

(b) the board shall determine what action should be taken or if deposits should be reinstated.

(4) If a surety company that has issued the surety bond ceases to be rated in the highest rating category by at least one nationally recognized statistical rating agency, the surety bond issued by the company shall no longer be valid for use as collateral for state deposits and alternative collateral must be pledged immediately.

D. The withdrawal of state deposits from a depository bank shall not be subject to the assessment of a penalty for early withdrawal except to the extent required to be imposed by federal law and in that event, only the minimum penalty required to be imposed shall be imposed by the depository bank.

E. Nothing herein shall restrict the state treasurer or the board from the lawful exercise of rights and duties conferred upon them by law.

[2.60.4.12 NMAC - N, 11-15-2001; A, 8-1-2006; A, 2-1-2007; A, 12-1-2009]

#### **2.60.4.13 REQUIREMENTS TO PROVIDE CUSTODIAL BANK SERVICES:**

A. A financial institution requesting to become a custodial bank must submit the following information to the state treasurer:

(1) a letter from the federal reserve bank or branch thereof or any bank qualified to perform custodial functions in the state of New Mexico requesting to become a custodial bank;

(2) copy of FDIC certification;

(3) financial reports for the preceding four quarters; newly chartered financial institutions must provide their most recent financial report;

(4) for banks that are not federal reserve banks or branches thereof, information and documentation demonstrating their qualifications to perform custodial functions in the state; and

(5) other public information requested by the state treasurer.

B. Initial and continued appointment for a financial institution to serve as a custodial bank for the state of New Mexico is determined by the risk assessment ratios of the financial institution. A qualified financial institution requesting initial and continued appointment as a custodial bank must certify that the financial institution has continuously maintained a primary capital-to-asset ratio of greater than 6.0 percent, a net operating income-to-total average asset ratio of .61 percent or higher, and non-performing loans-to-primary capital ratio of 34.9 percent or lower for the preceding four quarters. A newly chartered financial institution, at the time of appointment, must certify that it has maintained a primary capital-to-asset ratio of greater than 6.0 percent, a net operating income-to-total average asset ratio of .61 percent or higher, and non-performing loans-to-primary capital ratio of 34.9 percent or lower for the current quarter.

C. No custodial bank shall be a member of the same holding company as the financial institution whose securities the custodial bank is holding as the state's agent. In addition, any financial institution that owns 5 percent or more of another financial institution may not hold collateral for that financial institution.

D. If the state treasurer seeks and cannot find an adequate number of financial institutions that meet all of the requirements in Subsection B of 2.60.4.13 NMAC to act as custodial banks, the state treasurer may, with the approval of the state treasurer's investment committee, lower any one of, but only one of, the requirements to qualify as a custodial bank to: a primary capital-to-asset ratio of greater than 5.0 percent, a net operating income-to-total average asset ratio of .51 percent or higher, or non-performing loans-to-primary capital ratio of 49.9 percent or lower. The lower requirements would only be honored for a period not to exceed one quarter, and such exception can be revoked at anytime by the state treasurer, at the state treasurer's discretion. After this period, the custodial bank would have to meet the regular requirements set out in 2.60.4.13 NMAC to remain a custodial bank or will become disqualified as a custodial bank.

[2.60.4.13 NMAC - N, 11-15-2001; A, 2-1-2007; A, 12-1-2009]

#### **2.60.4.14 CUSTODIAL BANK REPORTING TO THE STATE TREASURER:**

A. The figures to be used by the state treasurer in completing the risk assessment analysis for a custodial bank shall be calculated from the quarterly call statements of the custodial bank and from the treasurer's generated report "New Mexico financial institution quarterly report". Both reports shall be furnished by the custodial bank to the state treasurer no later than on the tenth day of the second month following the end of the calendar quarter. If the tenth day falls on a weekend or a legal holiday, the figures shall be submitted on the next business day.

B. A custodial bank shall report monthly to the state treasurer the collateral amounts held for each depository bank for which it holds collateral.

C. The figures provided to the state treasurer by the custodial bank shall be certified in writing by the president, an executive officer, or a person authorized by a corporate resolution certifying the information of the custodial bank.

D. The state treasurer is directed to require each custodial bank to provide a copy of any regulatory enforcement decisions or orders issued by a state or federal regulatory agency having authority to issue such enforcement decisions or orders that have a material impact on the custodial bank or on financial ratios required of it by its respective regulatory agencies or this rule to the state treasurer within ten (10) business days of any such document becoming public.

E. The state treasurer may, at any time between quarterly reporting periods, request any additional public certified information from a custodial bank as needed to assess its risk level.

[2.60.4.14 NMAC - N, 11-15-2001; A, 2-1-2007; A, 12-1-2009]

#### **2.60.4.15 CUSTODIAL BANK NON-COMPLIANCE:**

A. Unless a waiver is granted by the state treasurer pursuant to Subsection D of 2.60.4.13.NMAC, a financial institution will be disqualified from serving as custodial bank for state deposits when any one of the following three conditions occur:

(1) any one of the following risk assessment ratio conditions occur for three consecutive quarters:

(a) primary capital-to-asset ratio falls below 6.1 percent;

(b) net operating income-to-total average asset ratio falls below .61 percent;  
or

(c) the non-performing loans-to-primary capital ratio rises above 34.9 percent;

(2) any two of the following risk assessment ratio conditions occur for two consecutive quarters:

(a) primary capital-to-asset ratio falls below 6.1 percent;

(b) net operating income-to-total average assets ratio falls below .61 percent;  
or

(c) the non-performing loan-to-primary capital ratio rises above 34.9 percent;  
or

(3) any one of the following risk assessment ratio conditions occur for more than one quarter:

- (a) primary capital-to-asset ratio falls below 5.0 percent;
- or
- (b) net operating income-to-total average asset ratio falls below .51 percent;
- (c) the non-performing loans-to-primary capital ratio rises above 49.9 percent.

B. The state treasurer shall notify the custodial bank in writing of revocation of its designation as custodial bank stating the reason for revocation. The financial institution shall notify depository banks of termination of the custodial agreement within three (3) business days and shall cooperate in the expeditious and orderly transfer of collateral.

[2.60.4.15 NMAC - N, 11-15-2001; A, 12-1-2009]

## **PART 5-6: [RESERVED]**

## **PART 7: PROCEDURES FOR DESIGNATING A FISCAL AGENT AND CUSTODY BANK OF NEW MEXICO**

### **2.60.7.1 ISSUING AGENCY:**

State Board of Finance.

[2.60.7.1 NMAC - N, 12-1-2009]

### **2.60.7.2 SCOPE:**

Banks, savings and loan associations, and custody banks submitting proposals to be the fiscal agent or custody bank for the state of New Mexico.

[2.60.7.2 NMAC - N, 12-1-2009]

### **2.60.7.3 STATUTORY AUTHORITY:**

Section 6-10-35, NMSA, 1978 Comp., provides that the state board of finance may designate a bank or savings and loan association doing business in this state and having an unimpaired capital and surplus of at least \$20,000,000 as the fiscal agent of New Mexico. The statute also provides that after designation of the state fiscal agent, the board shall apprise the legislature of its designation and shall include a brief description of the designee's particular qualifications.

[2.60.7.3 NMAC - Rn, Directive 87-4 & A, 12-1-2009]

### **2.60.7.4 DURATION:**

Permanent

[2.60.7.4 NMAC - N, 12-1-2009]

**2.60.7.5 EFFECTIVE DATE:**

July 1, 1987, unless a later date is cited at the end of a section.

[2.60.7.5 NMAC - Rn, Directive 87-4 & A, 12-1-2009]

**2.60.7.6 OBJECTIVE:**

Establishes designation procedures for selecting a fiscal agent bank and custody bank for the state of New Mexico.

[2.60.7.6 NMAC - N, 12-1-2009]

**2.60.7.7 DEFINITIONS:**

A. "Fiscal agent" is that bank or savings and loan association selected by the board to provide services such as:

- (1) collection for the state of all checks or other items received by the state on any account;
- (2) handling of the checking account of the state treasurer;
- (3) handling of all transfers of money in connection with the sale or retirement of bonds or obligations of the state;
- (4) the rate of interest to be paid upon average daily balances of state funds;  
and
- (5) acting as the agent of the state in fiscal matters generally, except as to those matters for which the custody bank provides custodial service to the state, subject always to supervision and approval of the state board of finance.

B. "Custody bank" is that bank selected by the board to provide services such as:

- (1) executing intructions from the investing agencies as to investments of permanent or other funds of the state, except for certain investments made by the state treasurer through the fiscal agent;
- (2) safekeeping of bonds or other securities belonging to or held by the state or any official thereof; and
- (3) acting as an agent of the state in matters involving custodial services, except as to those matters for which the fiscal agent provides services to the state, subject always to the supervision and approval of the state board of finance.

## **2.60.7.8 DESIGNATION PROCEDURES:**

**FISCAL AGENT:** The state board of finance may accept and review proposals from banks and savings and loan associations to be fiscal agent for the state of New Mexico, submitted in response to a request for proposals issued in conformance with the state Procurement Code and the applicable regulations.

A. The board's request for proposals for designation of a fiscal agent shall include the following minimum qualifications and requirements.

(1) The bank or savings and loan association must have an unimpaired capital and surplus, tier 1 core capital as defined by federal regulations, of at least twenty million dollars (\$20,000,000) and must be doing business in New Mexico.

(2) The bank or savings and loan association must agree that it shall maintain and furnish at its expense throughout the term of the agreement a banker's blanket bond per occurrence coverage in a minimum amount of ten million dollars (\$10,000,000) containing terms and conditions acceptable to the state board of finance.

(3) The bank or saving and loan must agree that it will maintain at an approved custodial financial institution throughout the term of the agreement securities of the amount and kind specified by Sections 6-10-35, 6-10-16 and 6-10-17 NMSA 1978, and approved by the board as security for the safekeeping of money of the state of New Mexico and the faithful performance of its duties as the fiscal agent. The amount of securities shall be (a) twenty-five million dollars (\$25,000,000), or (b) the amount of collateral as required by the state treasurer to comply with the state board of finance collateral policy, whichever is greater. The board may, by resolution, adjust these security requirements as it deems necessary to protect the interest of the state.

(4) The bank or savings and loan association must agree to wholly indemnify the state, for any and all loss, damage, cost, damages, expenses (including, without limitation, legal fees and expenses) and liability to the state (collectively hereinafter "loss") resulting from errors, omissions, fraud, embezzlement, theft, negligence or neglect (collectively hereinafter "actions or omissions") by the bank or savings and loan association, and its employees, officers, agents and directors in performing their duties hereunder or under agreement, as applicable. The bank or savings and loan association must also acknowledge and agree that any loss to the state shall, unless such loss can be demonstrated by the fiscal agent to have been due to a cause or causes beyond its reasonable control (such as acts of God, acts of the public enemy, insurrections, riots, fires, explosions, orders or acts of civil or military authority and other cataclysmic events, to the extent all reasonable and diligent precautions by the fiscal agent could not have prevented the damage or loss resulting from any such event) be conclusively presumed to be the result of actions or omissions on the part of the fiscal agent. Limited exceptions to this indemnification requirement may be permitted in any agreement

entered into by the board with the bank or savings and loan association as to information supplied to the fiscal agent by the state treasurer, pursuant to any funds transfer, ach, safekeeping or other collateral agreement, or any other state agency, or such other exception as may be required in order to enable the provision of a particular service by the bank or savings and loan association. Any such limited exception must be included in the fiscal agent agreement and be acceptable to and specifically approved by the board.

(5) The bank or savings and loan association must agree to comply with requirements of the financial institutions Reform, Recovery, and Enforcement Act and any other applicable law to avoid seizure by federal regulators of any assets the fiscal agent pledges to secure state deposits in accordance with Paragraph (3) of Subsection A of 2.60.7.8 NMAC.

B. Designation of the fiscal agent shall be in the form of an agreement with the state board of finance for a term not to exceed the term allowed under the Procurement Code as deemed appropriate by the board.

[2.60.7.8 NMAC - Rn, Directive 87-4 & A, 12-1-2009; A, 9-30-2013]

## **2.60.7.9 DESIGNATION PROCEDURES:**

**CUSTODY BANK:** The state board of finance may accept and review proposals from banks to be custody bank for the state of New Mexico, submitted in response to request for proposals issued in conformance with the state procurement code and the applicable regulations.

A. The board's request for proposals for designation of a custody bank shall include the following minimum qualifications and requirements:

(1) The bank must have an unimpaired capital and surplus, tier 1 core capital as defined by federal regulations of at least twenty million dollars (\$20,000,000) and must be doing business in New Mexico.

(2) The bank must agree that it shall maintain and furnish at its expense throughout the term of the agreement a banker's blanket bond per occurrence coverage in a minimum amount of fifty million dollars (\$50,000,000) and additional coverage for electronic computer crime losses in the minimum amount of twenty-five million dollars (\$25,000,000) per occurrence. Each such coverage must contain terms and conditions acceptable to the state board of finance.

(3) The bank must agree to wholly indemnify the state for any and all loss, damage, cost, damages, expenses (including, without limitation, legal fees and expenses) and liability (collectively hereinafter "loss") resulting from errors, omissions, fraud, embezzlement, theft, negligence or neglect by the custody bank, its employees, officers, agents and directors in performing their duties under the custody bank

agreement. The custody bank must also acknowledge and agree that any loss shall, unless such loss can be demonstrated by the custody bank to have been due to a cause or causes beyond the reasonable control of the custody bank (such as acts of God, acts of the public enemy, insurrections, riots, fires, explosions, orders or acts of civil or military authority and other cataclysmic events, to the extent all reasonable and diligent precautions by the custody bank could not have prevented the damage or loss resulting from any such event) be conclusively presumed to be the result of errors, omissions, fraud, embezzlement, theft, negligence or neglect on the part of the custody bank. Limited exceptions to this indemnification requirement may be permitted in any agreement entered by the board with the custody bank as to information supplied by the state treasurer or any other investing agency (i.e. public employees retirement association, education retirement board, state investment council) pursuant to any safekeeping or other collateral agreement or such other limited exception as may be required in order to enable the provision of a particular service by the custody bank. Any such limited exception must be included in the custody bank agreement and be acceptable to and specifically approved by the board.

B. Designation of the custody bank shall be in the form of an agreement with the state board of finance for a term not to exceed the term allowed under the Procurement Code as deemed appropriate by the board.

[2.60.7.9 NMAC - N, 12-1-2009; A, 9-30-2013]

## **PART 8: ACCEPTANCE OF PAYMENT CARDS AND USE OF ELECTRONIC FUND TRANSFERS**

### **2.60.8.1 ISSUING AGENCY:**

State Board of Finance, 181 Bataan Memorial Building, Santa Fe, NM 87501.

[2.60.8.1 NMAC - N, 8/31/2000; A, 8/14/2015]

### **2.60.8.2 SCOPE:**

State agencies with respect to acceptance of payment cards and all public bodies with respect to electronic fund transfers. These regulations do not apply to procurement cards issued to agencies for procurement of goods and services or to travel cards issued by the state general services department.

[2.60.8.2 NMAC - N, 8/31/2000; A, 8/14/2015]

### **2.60.8.3 STATUTORY AUTHORITY:**

A. Article IV, Section 30 of the New Mexico state constitution states that no money shall be paid out of the treasury except upon warrant drawn by the proper officer.

**B.** Section 6-10-1.2 NMSA 1978 provides that a state agency may accept payment by credit card or electronic means of any amount due the state under any law or program administered by the agency and that the state board of finance shall adopt rules on the terms and conditions of accepting payments by credit card or electronic transfer. A state agency may charge a uniform convenience fee to cover the approximate costs imposed by a financial institution that are directly related to processing a credit card or electronic transfer transaction. The fee shall be charged to the person using the credit card or electronic transfer, and amounts collected are appropriated to the state agency to defray the cost of processing the transaction.

**C.** Section 6-10-35 NMSA 1978 provides that the state board of finance may designate a bank or savings and loan association as the "fiscal agent of New Mexico" and to act as the agent of the state in fiscal matters generally, subject to the supervision and approval of the state board of finance.

**D.** Section 6-10-46 NMSA 1978 states that all payments and disbursements of public funds of the state shall be made upon warrants drawn by the secretary of finance and administration, upon the treasury of the state, based upon itemized vouchers in a form approved by the secretary of finance and administration.

**E.** Section 6-10-63 NMSA 1978 provides that any public money may be transferred by means of electronic fund transfer between any public body and a public or private entity and that the state board of finance shall adopt rules and regulations to carry out this purpose.

[2.60.8.3 NMAC - N, 8/31/2000; A, 8/14/2015]

#### **2.60.8.4 DURATION:**

Permanent.

[2.60.8.4 NMAC - N, 8/31/2000]

#### **2.60.8.5 EFFECTIVE DATE:**

August 31, 2000, unless a later date is cited at the end of a section.

[2.60.8.5 NMAC - N, 8/31/2000]

#### **2.60.8.6 OBJECTIVE:**

This rule provides general guidance regarding the financial and legal requirements for acceptance of payment cards through the state's fiscal agent bank and any approved third-party processor and the use of electronic fund transfers.

[2.60.8.6 NMAC - N, 8/31/2000; A, 11-27-2002; A, 8/14/2015]

#### **2.60.8.7 DEFINITIONS:**

**A. "Agency"** means each department, agency, branch, commission, and board of government of the state of New Mexico.

**B. "Board"** means state board of finance.

**C. "Electronic fund transfer"** means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account.

**D. "Fiscal agent"** means the bank or savings and loan association designated as the fiscal agent of New Mexico by the board.

**E. "Fiscal agent agreement"** means the agreement between the board and the fiscal agent that defines the terms, conditions, and procedures of the fiscal agent designation. The fiscal agent agreement includes a merchant agreement that addresses the terms and conditions for use of payment cards.

**F. "Payment card"** means a card, code, or other means of access to a consumer's account for the purpose of initiating electronic fund transfers when the person to whom such card or other means of access was issued has requested and received or has signed or has used, or authorized another to use, such card or other means of access for the purpose of transferring money between accounts or obtaining money, property, labor, or services. Cards must be authorized and accepted by the fiscal agent per the state's fiscal agent agreement and pursuant to current contracts between payment card companies and the board. Payment cards are linked to a cardholder's deposit account, credit account, or loan account. Payment cards may include credit cards, debit cards, stored-value cards, and other similar cards.

**G. "Payment gateway"** means a service of the fiscal agent that allows members of the public to make payments by payment card to an agency using the agency's website, via touch-tone or, where available, voice commands over the telephone.

**H. "Public body"** means any department, board, agency or instrumentality of the state, any county, city, town, village, school district, other district, educational institution or any other governmental agency or political subdivision of the state.

**I. "Third-party processor"** means a payment card processor of transactions on behalf of an agency that is not the fiscal agent.

[2.60.8.7 NMAC - N, 8/31/2000; A, 11-27-2002; A, 8/14/2015]

#### **2.60.8.8 AGENCY RESPONSIBILITIES AND REQUIREMENTS FOR BOARD APPROVAL OF PAYMENT CARD ACCEPTANCE:**

**A.** Payment card services will be provided through the fiscal agent subject to the terms and conditions as set out in the fiscal agent agreement and the board's agreements with individual payment card companies, through an agreement between an agency and a third-party processor if approved by the board, or through a statewide payment card acceptance system, if established.

**B.** Agencies requesting payment card acceptance shall submit to the director of the board a written request that contains the following:

(1) reason for payment card services and the specific fees, taxes, or other amounts to be collected using payment cards;

(2) confirmation that the agency has read and will follow the terms and conditions for payment card acceptance as set out in the fiscal agent agreement or statewide payment card acceptance system agreement, if established, and the board's agreements with individual payment card companies;

(3) confirmation that the agency will pay all costs associated with the acceptance of payment card services, including purchases or leases of merchant equipment, as set out in the fiscal agent agreement and any agreement with an approved third-party processor, and including any assessment charged by the state to cover the cost of compliance with payment card industry data security standards;

(4) confirmation that the agency will be responsible for tracking, researching and recording all payment card transactions for reconciliation purposes;

(5) confirmation that any acceptance of payment cards through the internet shall be done in a secure fashion and on a secure system;

(6) confirmation in writing from the department of information technology that the agency's acceptance of payment cards will meet data security standards of the payment card industry;

(7) confirmation that the agency's chief financial officer and chief information officer will cooperate with the board to ensure compliance with payment card industry data security standards;

(8) whether the agency will absorb fees for acceptance of payment cards or cardholders will be assessed a convenience fee. If fees are to be paid by the cardholder, provide the procedures used to charge and collect convenience fees from cardholders and confirmation that the convenience fee will be in compliance with Subsection B of 6-10-1.2 NMSA 1978, as amended;

(9) if the agency wishes to use a third-party processor, a copy of the third-party processor agreement with the agency and the reasons why use of a third-party processor is more advantageous for the agency than using the fiscal agent. If the third-

party processor agreement with the agency is not yet available at the time board approval for acceptance of payment cards is requested, the board director may condition any approval on the board director's later review and approval of the third-party processor agreement;

(10) if the agency wishes to use payment gateway through the fiscal agent agreement, a comparison of the costs and benefits of using payment gateway to traditional payment card services, including breakdown of fees to be paid by the board, the agency, and cardholders.

C. The board, in consultation with the fiscal agent, may, at any time, deny acceptance of payment cards by or revoke approval to an agency through the fiscal agent agreement. The reasons for denial or revocation may include, but are not limited to, the following:

(1) cost effectiveness;

(2) illegal or misuse of payment card transactions;

(3) failure to adhere to the terms and conditions of these regulations, the fiscal agent agreement payment card industry data security standards, or the board's agreements with individual payment card companies;

(4) repeated lapses in compliance or security.

D. Reasons for denial of use of a third-party processor may include, but are not limited to, the reasons specified in Subsection C of 2.60.8.8 NMAC. In addition, upon approval, the agency's agreement with the third-party processor must be approved by the board's director to ensure compliance with the fiscal agent agreement and the board's agreements with individual payment card companies. In the event there is no current agreement between the board and a particular payment card company, the board's director may authorize an agency's third-party processor to process payment cards issued by that company under the terms and conditions of the third-party processor's own contract with the company as long as there is no discount imposed on or deduction from the entire amount due and owing to the agency and paid by the cardholder (except for any convenience fee paid by the cardholder in addition to the amount owed), which amount shall be transferred by the third-party processor to the agency.

[2.60.8.8 NMAC - N, 8/31/2000, A, 11/27/2003; A, 7/15/2003; A, 8/14/2015; A, 1/16/2018]

## **2.60.8.9 RESPONSIBILITIES FOR PAYMENT CARD ACCEPTANCE:**

A. The fiscal agent shall provide payment card services, upon written request by the director of the board, to any agency so requesting subject to the terms and conditions

set out in the fiscal agent agreement and individual payment card company agreements with the board.

**B.** The charge to an agency for payment card services will be the fee designated in the fiscal agent agreement or that set out in the approved third-party processor's agreement. The fiscal agent shall bill the appropriate agency through separate invoices for card processing fees and applicable treasury management fees, if any prepared by the fiscal agent in accordance with the relevant provisions of the fiscal agent agreement. At the end of each fiscal year, the fiscal agent shall submit a report to the board director summarizing the payment card fees and merchant equipment costs charged to each agency for that fiscal year. Each agency will be responsible for all fees as set out in any approved third-party processor's agreement with the agency. Each agency will ensure payments to service providers are timely and compliant with the service agreement.

**C.** Agencies may be assessed an incremental charge to cover the cost of compliance with payment card industry data security standards.

**D.** Agencies shall comply with the following payment card industry data security standards vendor management requirements:

**(1)** Maintain a current list of service providers handling cardholder data, including a description of the services provided;

**(2)** Maintain a written agreement with service providers that includes an acknowledgement that the service providers are responsible for the security of cardholder data that the service providers maintain in possession or otherwise store, process or transmit on behalf of the agency. The written agreement must also acknowledge any action or procedure that the provider undertakes that may impact the security of the agency's cardholder data environment;

**(3)** Establish and maintain a program to monitor the third-party service provider's payment card industry data security standards compliance status at least annually. This function will be performed by the State Treasurer's Office for services provided under the fiscal agent agreement;

**(4)** Maintain documentation describing which payment card industry data security standards requirements are managed by each service provider and which are managed by the agency. The State Treasurer's Office will maintain documentation regarding payment card industry data security standards requirements for payment card services provided by the fiscal agent; and

**(5)** Ensure compliance with any additional vendor management requirements mandated under subsequent releases of payment card industry data security standards requirements.

[2.60.8.9 NMAC - N, 8/31/2000; A, 11/27/2003; A, 8/14/2015; A, 1/16/2018]

#### **2.60.8.10 ELECTRONIC FUND TRANSFERS:**

**A.** Public bodies requesting authorization for use of electronic fund transfers must submit to the directors of the financial control division of the department of finance and administration and the board a letter explaining the reason for the use of electronic fund transfers and the fund for which it is to be used. Public bodies may only initiate electronic fund transfers after receiving written authorization by the financial control division of the department of finance and administration.

**B.** Electronic fund transfers can only occur after notification of the state treasurer's office of the amount of the transfer.

**C.** The state treasurer and each public body is responsible for the tracking of and the accounting for all electronic fund transfers. The reconciliation process is the responsibility of the public body and the financial control division of the department of finance and administration.

[2.60.8.10 NMAC - N, 8/31/2000; A, 8/14/2015]

### **PART 9: INVESTING AGENCIES RECONCILING AND REPORTING POLICY**

#### **2.60.9.1 ISSUING AGENCY:**

State Board of Finance.

[Recompiled 10/01/01]

#### **2.60.9.2 SCOPE:**

**[RESERVED]**

[Recompiled 10/01/01]

#### **2.60.9.3 STATUTORY AUTHORITY:**

**[RESERVED]**

[Recompiled 10/01/01]

#### **2.60.9.4 DURATION:**

[Permanent.]

[Recompiled 10/01/01]

**2.60.9.5 EFFECTIVE DATE:**

[Filed December 4, 1989]

[Recompiled 10/01/01]

**2.60.9.6 OBJECTIVE:**

To protect funds and assets of the state deposited or held in custody with the fiscal agent bank and the correspondent bank of the fiscal agent by establishing requirements for reconciling securities and cash balances of investing agencies.

[Recompiled 10/01/01]

**2.60.9.7 DEFINITIONS:**

- A. "Board" means the state board of finance.
- B. "SBF" means the board of finance division, department of finance and administration, which administers the fiscal agent contract.
- C. "Investing agencies" means the state investment council (SIC), the educational retirement board (ERB), the public employees retirement association (PERA) and the state treasurer's office (STO) overnight investment program.
- D. "Cash manager" means the cash manager division of the STO.
- E. "Fiscal agent bank" means the fiscal agent operating under the current fiscal agent contract with the board.
- F. "Correspondent bank" means the correspondent bank providing correspondent banking services to the fiscal agent bank, approved by the board.
- G. "Exceptions" means any differences between balances and transactions on the records of investing agencies and the records of the fiscal agent and the correspondent bank.
- H. "Investment exception/resolution report" means the reconciliation form prescribed by the state treasurer's office to be completed by the investing agencies in order to comply with this directive.
- I. "Reconcile" means a determination of items necessary to bring the records of investing agencies and the fiscal agent and correspondent bank balances into agreement for the prior business day.

[Recompiled 10/01/01]

## **2.60.9.8 REPORTING EXCEPTIONS:**

### **A. Daily Reconciliation and Reporting Requirements:**

(1) All investing agencies shall reconcile their respective investment transactions and investment, account cash balances daily to the records of the fiscal agent bank and correspondent bank for the prior business day.

(2) All investing agencies shall report the following day by submitting an investment exception/resolution report to the cash manager:

(a) any bank-caused exceptions;

(b) any exceptions that have not been reconciled within fourteen (14) days;  
and

(c) any resolution of an exception reported in Paragraph A, Section 2.b, [now Subparagraph (b) of Paragraph (2) of Subsection A of 2.60.9.8 NMAC] above.

### **B. Monthly:**

(1) By the tenth (10<sup>th</sup>) day of the month all investing agencies shall submit to the cash manager division of the STO a signed certification indicating all custodial accounts and all investment cash accounts for the previous month were reconciled and the status of pending adjustments and corrections of any unreconciled exceptions.

(2) By the tenth (10<sup>th</sup>) day of the month, the cash manager division shall notify SBF of any exceptions or errors caused by the fiscal agent bank or the correspondent bank during the previous month. The SBF shall ensure bank-caused errors do not result in increases to the compensating balances required or erroneous bank charges.

(3) Monthly the state treasurer's office may report to the board any reconciliation exceptions of investing agencies. Included in this report may be any exception not corrected by the investing agencies within thirty (30) days from the date the exception occurred or any exceptions deemed material or substantive at the discretion of the state treasurer.

C. Quarterly: Within sixty (60) days after the end of each calendar quarter, the state treasurer's office shall report to the board a summary of all exceptions not reconciled, including aggregate exceptions for a single investing agency, in the amount of \$10,000 or more, which have remained unreconciled for a period of at least thirty (30) days. This report shall be as of the end of the last business day of the last month of the previous calendar quarter. At the discretion of the state treasurer's office, the report may also include any and all exceptions deemed material or substantive, which exceptions may

be for single or aggregate amounts less than \$10,000 and unreconciled for a period of less than 30 days.

[Recompiled 10/01/01]

#### **2.60.9.9 BACK-UP PROCEDURES:**

Investing agencies shall establish procedures by 3/31/90 to be utilized if the communications software system used by the fiscal agent bank and investing agencies is not available. The designated personnel administering the procedures and a copy of the procedures will be reported to the director of the SBF, contract administrator of the fiscal agent contract.

[Recompiled 10/01/01]

#### **2.60.9.10 DOCUMENTATION AND AUDIT:**

A. All documentation and statements are subject to audit by the state auditor and external auditors. The state auditor may not [sic] any failure to comply with this policy and the amount of any outstanding reconciliation exceptions in the annual audits of investing agencies.

B. Failure of any investing agencies to comply with this policy may result in a determination of the state treasurer to refuse to pay a warrant pursuant to Section 8-6-7, NMSA 1978. Investing agencies not complying with this policy will be responsible for any losses, expenses, overdraft charges or interest charges incurred by the investing agency or the STO, including, but not limited to, so-called "failed" investment agency.

C. Investing agencies shall maintain sufficient collected available *uninvested balances* in their respective investment cash accounts maintained through the STO at the fiscal agent and correspondent bank to reimburse the state general fund for any overdraft charges of the fiscal agent bank and correspondent bank on behalf of an investing agency.

D. Investing agencies shall submit for audit to the state auditor or external auditors exceptions not cured within ninety (90) days from the date of the quarterly report submitted by the STO to the board.

E. In no event shall overdraft charges or the expenses of any audit to cure discrepancies described in this policy by [sic] borne by the state general fund.

[Recompiled 10/01/01]

#### **2.60.9.11 ADOPTION:**

A. Approved by State Board of Finance on November 28, 1989.

B. This rule is effective November 28, 1989.

C. Rosina Boyd, Director, State Board of Finance

D. Date signed. November 28, 1989

[Recompiled 10/01/01]

## **PART 10-12: [RESERVED]**

## **PART 13: OPEN MEETINGS RESOLUTION**

### **2.60.13.1 ISSUING AGENCY:**

State Investment Council, 2055 South Pacheco Street, Suite 100 Santa Fe, New Mexico 87505.

[8/27/90...6/29/96; 9/30/99; Recompiled 10/1/01]

### **2.60.13.2 SCOPE:**

General public, all state agencies.

[6/29/96; A, 9/30/99; Recompiled 10/1/01]

### **2.60.13.3 STATUTORY AUTHORITY:**

Section 10-15-1 (B) of the Open Meetings Act (Sections 10-15-1 through 10-15-4 NMSA 1978) states that, except as may be otherwise provided in the Constitution or the provisions of the Open Meetings Act, all meetings of a quorum of members of any board, council, commission, or other policy-making body of any state agency held for the purpose of formulating public policy, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of such a body, are declared to be public meetings open to the public at all times.

[8/31/84...6/29/96; A, 9/30/99; Recompiled 10/1/01]

### **2.60.13.4 DURATION:**

Permanent.

[8/31/84...6/29/96; Recompiled 10/1/01]

### **2.60.13.5 EFFECTIVE DATE:**

July 29, 1996, unless a later date is specified at the end of a section or paragraph.

[6/29/96; A, 9/30/99; Recompiled 10/1/01]

[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

#### **2.60.13.6 OBJECTIVE:**

Any meetings subject to the Open Meetings Act at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs shall be held only after reasonable notice to the public.

[6/29/96; A, 9/30/99; Recompiled 10/1/01]

#### **2.60.13.7 DEFINITIONS:**

**[RESERVED]**

#### **2.60.13.8 MEETINGS:**

Whereas, Section 10-15-1 (D) of the Open Meetings Act requires the New Mexico state investment council to determine annually what constitutes reasonable notice of its public meetings. Now, therefore, be it resolved by the New Mexico state investment council that:

A. Notice to the public of all regular meetings will be given at least ten (10) calendar days in advance of the meeting date. The notice shall include information on how the public may obtain a copy of the agenda. The agenda shall be available to the public at least twenty-four (24) hours prior to the regular meeting from the state investment office, whose office is located at 2055 South Pacheco Street, Suite 100, in Santa Fe, New Mexico.

B. Meetings of the board may be recessed and continued to a subsequent day if the board specifies the date, time and place for continuation of the meeting and posts a notice of the date, time and place for the reconvened meeting on or near the door of the place where the original meeting was held and in at least one other location appropriate to provide public notice of the continuation of the meeting.

C. Special meetings may be called by the chair or a majority of the members of the council upon three (3) days notice. The notice for all special meetings shall include the agenda or information on how the public may obtain a copy of the agenda. The agenda shall be available to the public at least twenty-four (24) hours before the special meeting.

D. Emergency meetings will be called only under unforeseen circumstances, which demand immediate action to protect the health, safety or property of citizens or to

protect the public body from substantial financial loss. The council will avoid emergency meetings whenever possible. Emergency meetings may be called by the chair or a majority of the members upon twenty-four (24) hours notice, unless threat of personal injury, substantial financial loss, property damage requires less notice. Notice shall include an agenda or information on how the public may obtain a copy of the agenda.

E. For the purposes of regular meetings described in 8.1 [now Subsection A of 2.60.13.8 NMAC] of this resolution, notice requirements to the public are met if notice of the date, time, place and general subject matter is placed in a newspaper of general circulation in the state. The New Mexico state investment council shall also disseminate copies of the written notice to those broadcast stations and newspapers, which have made written requests for notice of public meetings.

F. For the purposes of special and emergency meetings described in paragraphs 6.3 and 6.4 [now Subsections C and D of 2.60.13.8 NMAC] of this resolution, notice requirements shall be met if notice of the date, time place and general subject matter to be discussed at the meeting is provided by telephone to newspapers of general circulation in the state and posted at the state investment office, whose office is located at 2055 South Pacheco Street in Santa Fe, New Mexico. Telephone notice also shall be given to those broadcast stations licensed by federal communications commission and newspapers of general circulation that have made a written request for notice of public meetings.

G. Further, all notices, shall include language to the following effect: Individuals with disabilities in need of a reader, amplifier, sign language interpreter, or other form of auxiliary aid or service to attend or participate in the meeting, please contact the state investment office at 424-2500 at least one week prior to the meeting, or as soon thereafter as possible. Individuals with disabilities who need documents such as agendas or minutes, in an accessible format also should contact the state investment office at 424-2500.

H. If it is otherwise difficult or impossible for a member of the New Mexico state investment council to attend a regular, emergency or special meeting in person and if necessary to achieve a quorum at such a meeting, member (s) may participate in a meeting by means of a conference telephone or other similar communications equipment, provided that each member participating by conference telephone can be identified when speaking, all participants are able to hear each other at the same time and members of the public attending the meeting are able to hear any member who speaks during the meeting.

I. The New Mexico state investment council may close a meeting to the public only if the subject matter of such discussion or action is exempted from the open meeting requirement under Section 10-15-1 (H) of the Open Meetings Act.

(1) Closure shall be approved by a majority vote of a quorum of the New Mexico state investment council taken during the open meeting. The authority for the

closure and the subjects to be discussed shall be stated with reasonable specificity in the motion for closure and the vote on closure of each individual member shall be recorded in the minutes. Only those subjects specified in the motion may be discussed in a closed meeting.

(2) Made when the New Mexico state investment council is not in an open meeting, the closed meeting shall not be held until public notice, in accordance with this resolution is given, stating the specific provision of law authorizing the closed meeting and reasonably specifying the subjects to be discussed.

(3) Following completion of any closed meeting or closed portion of a meeting, the minutes shall state whether the matters discussed in the closed meeting were limited to those specified in the motion for closure or the notice of the meeting.

(4) Except as provided in Section 10-15-1 (H) of the Open Meetings Act, any action taken as a result of discussions in a closed meeting shall be made by vote of the New Mexico state investment council in an open public meeting.

[3/31/88...6/29/96; 9/30/99; Recompiled 10/1/01]

[Subsection F of 2.60.13.8 NMAC contains a reference to *paragraphs 6.3 and 6.4* that is inaccurate and its origin is unknown. The reader is referred to material in a subsequent subsection that contains material mentioned.]

#### **2.60.13.9 [RESERVED]**

[3/31/88...6/29/96; 9/30/99; Recompiled 10/1/01]

#### **2.60.13.10 [RESERVED]**

[3/31/88...6/29/96; 9/30/99; Recompiled 10/1/01]

#### **2.60.13.11 [RESERVED]**

[3/31/88...6/29/96, 9/30/99; Recompiled 10/1/01]

### **PART 14: BROKER POLICY**

#### **2.60.14.1 ISSUING AGENCY:**

New Mexico State Investment Council, 2055 South Pacheco Street, Suite 100, Santa Fe, New Mexico 87505, (505) 424-2500.

[6/15/99; Recompiled 10/1/01]

#### **2.60.14.2 SCOPE:**

Institutional broker/dealers.

[6/15/99; Recompiled 10/1/01]

#### **2.60.14.3     STATUTORY AUTHORITY:**

The state investment office recognizes the value of outside research, quantitative support, and other services provided by the brokerage firms with which it transacts securities trades. The state investment office attempts to compensate brokers fairly and in approximate proportion to the overall utility of each brokerage firm to the funds' internal management activities. Brokerage firms with offices in New Mexico will be given preference in the award of commission business within a best price and execution context where all other factors are judged equal.

[6/15/99; Recompiled 10/1/01]

#### **2.60.14.4     DURATION:**

Permanent.

[6/15/99; Recompiled 10/1/01]

#### **2.60.14.5     EFFECTIVE DATE:**

June 15, 1999 unless a later date is specified at the end of a section or paragraph.

[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

[6/15/99; Recompiled 10/1/01]

#### **2.60.14.6     OBJECTIVE:**

The state investment office recognizes the value of outside research, quantitative support, and other services provided by the brokerage firms with which it transacts securities trades. The state investment office attempts to compensate brokers fairly and in approximate proportion to the overall utility of each brokerage firm to the funds' internal management activities. Brokerage firms with offices in New Mexico will be given preference in the award of commission business within a best price and execution context where all other factors are judged equal. The state investment office is responsible for the management of the assets of the land grant permanent fund, the severance tax permanent fund, and a number of funds managed for other state agencies. As a part of that responsibility, a portion of the funds are managed in-house by the state investment council staff. In order to fulfill that responsibility, it is essential that the staff have access to the necessary market information, research, services, and

securities trading capabilities provided by those brokerage firms that emphasizes institutional capabilities. In addition, it is necessary that those brokers who are professionally trained to service large institutions such as the state investment council provide sales coverage. The broker/dealer selection process must, therefore, focus on obtaining the services needed by the staff in the management of the in-house portion of the portfolios.

[6/15/99; Recompiled 10/1/01]

#### **2.60.14.7 DEFINITIONS:**

**[RESERVED]**

#### **2.60.14.8 GENERAL REQUIREMENTS FOR INSTITUTIONAL BROKER/DEALERS:**

- A. Trading must be done either with the New York trading desk or a regional office with direct lines into the New York trading desk.
- B. Sales/research coverage must be provided by institutional salespersons that report to the institutional department.
- C. Brokers must provide access to all research information disseminated by the firm, including the ability to access the information electronically.
- D. Brokers must provide access to research conference calls of interest to the staff.
- E. Brokers must provide ability for staff to talk directly with their institutional analysts, strategists, and economists on a periodic basis. In addition, brokers are expected to arrange for periodic face-to-face meeting in Santa Fe with their research staff.

[6/15/99; Recompiled 10/1/01]

#### **2.60.14.9 BROKER/DEALER APPROVED LISTS:**

- A. GENERAL - Brokers desiring to conduct business with the state investment council should contact the appropriate member of the investment staff. This could be the state investment officer, deputy state investment officer or the portfolio managers. The institutional firms will be evaluated on the breadth of their capabilities. Firms will be added to the approved list based upon the collective judgment of those investment staff members most affected. New Mexico based firms, defined, as a brokerage firm that maintains at least one active retail office in the state, should contact the state investment officer or the deputy state investment officer. New Mexico based firms must have the ability to execute institutional-sized orders.

B. **EQUITIES** - The approved list shall consist of institutional firms and New Mexico based firms. The list of institutional firms shall be limited to ten firms and shall receive approximately 90 percent of the commissions generated by equity trades. Those institutional firms that have offices in New Mexico will be included in the institutional list. The remaining commissions will be divided among those New Mexico firms that provide primarily retail coverage for individuals and that have indicated an interest in doing business with the SIC.

C. The primary focus of equity trading is to obtain the best [sic] net price, consisting of both commission cost and execution cost. Considerations involved in selecting the brokerage firm with which to place the order include but are not limited to:

- (1) Marketability of the stock. Some stocks are more liquid than others are.
- (2) speed of execution necessary. A brokerage firm may be required to commit capital to accommodate the order.
- (3) location of execution. OTC and international exchange trades tend to be more difficult than trades executed on national U.S. exchanges.

D. It is the SIC trader's responsibility to determine the difficulty of the trade and match it with the execution services necessary for best execution.

E. Frequently there may be several institutional brokerage firms that could provide best execution particularly related to liquid, large capitalization stocks. An additional factor in the selection of a brokerage firm to execute a trade is the value of the additional services provided to the SIC staff, such as input related to market strategy, research on individual companies, and quality of the sales coverage. The institutional brokerage firms shall be ranked according to the value-added to the SIC investment process. Semi-annually, the equity staff, including the state investment officer and the deputy state investment officer, shall individually rank the institutional firms in the categories of strategy, research, sales coverage, and trading. The results shall be tabulated and a list created for use by the trader for the following six months. The top half of the firms shall receive approximately 60 percent of the total commissions and the remaining firms shall receive approximately 30 percent. In no case will best net price be sacrificed.

F. **FIXED INCOME** - The approved list shall consist of both institutional firms and New Mexico based firms. The list of institutional firms shall be limited to ten firms. Trades shall be executed on a best efforts basis with any discretionary commissions (primarily new issue designation) being awarded to those firms who have added the most value to the SIC investment process.

G. **COMPETITIVE GUIDELINES** - Trades shall be executed on a competitive basis when it is practical in the judgment of the staff. The following rules shall be followed for competitive trades:

- (1) A minimum of three firms will be included on each trade.
- (2) A minimum of one New Mexico firm will be included on each trade.
- (3) The winner on all trades will be included on the competing list for the following trade unless, in the judgment of the staff, the firm does not have good capabilities in the sector related the subsequent trade.
- (4) In the event of a tie, the trade will be awarded to a firm with a New Mexico office if possible.

H. CORPORATE BOND TRADING RULES - New issue trades shall be conducted in the following manner:

- (1) Securities will normally be purchased from the lead underwriter.
- (2) Available designations will first be used to fulfill soft dollar commitments.
- (3) Remaining designations may be used to compensate firms according to the value of services provided to the investment office.

I. BOND EXCHANGES - Bond exchanges will be managed under the following guidelines:

- (1) Recognizing the value of original ideas proposed bond exchanges would not be shopped among other institutional firms.
- (2) If uncertainty exists concerning the levels of the bid or offer prices on the proposed exchange, the level(s) should be checked with at least one other firm.
- (3) If a higher bid or offer is found, the proposing firm shall be given the opportunity to improve their bid or offer. The proposing firm shall win any ties.

[6/15/99; Recompiled 10/1/01]

#### **2.60.14.10 SOFT DOLLAR POLICY:**

A. The use of soft dollars refers to the use of commissions to pay for brokerage and research services instead of brokerage fees. It is common practice among large institutions to use a portion of the available commissions in both equity and fixed income portfolios to pay for investment-related goods and services.

B. GUIDELINES - The state investment office will be guided by prudent business principles and the following guidelines:

(1) The investment office will strictly follow the safe harbor" provision of Section 28(e) of the Securities and Exchange Act. The controlling principle used to determine whether an item constitutes brokerage and research services is whether it provides lawful and appropriate assistance to the money manager in the performance of his or her investment decision-making responsibilities.

(2) All soft dollar expenditures will be for the exclusive benefit of the funds managed by the investment office.

(3) The broker must provide brokerage and research services. The broker must incur the direct legal obligation to pay the third-party providers for the brokerage and research services.

(4) The investment office will determine that the value of brokerage and research services received is reasonable in relation to the amount of commissions paid.

(5) The investment office will not pay a higher commission rate on trades allocated to the soft-dollar account than it pays on any other trades with the same broker. Best price and execution will not be sacrificed.

(6) Best execution will not be sacrificed. Securities transactions will be executed in such a manner that the total cost or proceeds in each transaction is the most favorable under the circumstances. In placing brokerage, the investment office will consider the full range and quality of a broker's services, including but not limited to execution capability, the value of research, commission rate, financial responsibility, and responsiveness to the investment office.

(7) Obligations will be satisfied using normal flow of orders. Trades will not be created to pay for soft-dollar commitments.

(8) Fixed assets acquired with soft dollars will be included on the investment office inventory. equipment on loan from a third-party soft-dollar provider will not be included on the inventory.

(9) The state investment office will maintain records of soft-dollar procurement, including soft-dollar cost and actual (hard dollar) cost if the services are offered for hard dollars or can be obtained through other sources. The records will include details of the amount of securities transactions and related commissions allocated to the soft-dollar costs together with details of the arrangement governing the level of commissions necessary to meet these costs.

(10) Soft-dollar expenditures will be reported to the council annually at the close of the fiscal year.

[6/15/99; Recompiled 10/1/01]

#### **2.60.14.11 ELIGIBLE BROKERAGE AND RESEARCH SERVICES:**

A. INVESTMENT RESEARCH - advice, furnished either directly or through publications or writings, as to the value of securities, the advisability of investing in, purchasing or selling securities, the advisability of investing in, purchasing or selling securities, and the availability of securities or purchasers or sellers of securities. Analyses and reports concerning issuers, industries, securities, economic factors and trends, portfolio strategy and portfolio performance.

B. DATA SERVICE - On line data feeds that aid in the investment decision-making process.

C. EQUIPMENT - Computer hardware/software and communications equipment which support the investment decision-making process. All computer hardware/software purchases will be coordinated with the management information systems department.

D. EXCHANGE FEES - Fees paid to both domestic and international exchanges to provide real-time quotes.

E. PROFESSIONAL SERVICES - Services that provide appropriate assistance to the investment decision-making process. Examples include performance measurement and proxy-voting services.

F. SUBSCRIPTION/REFERENCE MATERIALS - Publications, which provide appropriate assistance to the investment decision-making process.

G. POLICY REVIEW - The state investment officer will recommend changes to this policy as necessary to conform to standard industry practices.

[6/15/99; Recompiled 10/1/01]

### **PART 15: COLLATERAL POLICY FOR NEW MEXICO SAVINGS AND LOAN ASSOCIATIONS GOVERNING CERTIFICATES OF DEPOSIT CREATED AFTER MAY 25, 1988**

#### **2.60.15.1 ISSUING AGENCY:**

State Investment Council.

[Recompiled 10/01/01]

#### **2.60.15.2 SCOPE:**

**[RESERVED]**

[Recompiled 10/01/01]

**2.60.15.3 STATUTORY AUTHORITY:**

Sections 7-27-5, 7-27-5.2, 6-8-7, 6-10-10, 6-10-16, 6-10-17, 6-10-18, 6-10-20, 6-10-24.1, 6-10-29 and 6-10-35 NMSA 1978.

[Recompiled 10/01/01]

**2.60.15.4 DURATION:**

[Permanent.]

[Recompiled 10/01/01]

**2.60.15.5 EFFECTIVE DATE:**

These rules will become effective five (5) days after filing with the records and rules commission. [Filed June 6, 1988, effective June 11, 1988]

[Recompiled 10/01/01]

**2.60.15.6 OBJECTIVE:**

In the exercise of its authority under Sections 7-27-5, 7-27-5.2, 6-8-7, 6-10-10, 6-10-16, 6-10-17, 6-10-18, 6-10-20, 6-10-24.1, 6-10-29 and 6-10-35 NMSA 1978, the state investment council (the "council") desires to minimize potential risks to existing and future deposits of severance tax permanent funds ("state funds"). As a first step towards achieving this objective, the council hereby directs the state investment officer to review the financial condition of each savings and loan association in the program. The review will include a determination of each savings and loan associations' regulatory net worth/average asset ratio, its total four quarter (successive quarters ending with the current quarter) net income (before or after taxes, whichever is greater, and determined by computing all four quarters on a consistent basis of either "before taxes" or "after taxes")/total average assets (over the past 12 months) ratio. The institutions shall then be classified according to the level of risk and each level of risk assigned an appropriate level of collateralization.

[Recompiled 10/01/01]

**2.60.15.7 DEFINITIONS:**

A. "Securities" shall be defined as those securities eligible as collateral for severance tax permanent funds under Section 6-10-16 and 7-27-5.2 [repealed], as amended, and effective May 21, 1986, Art IV, Sec. 23, N.M. Constitution.

B. "Mortgages", shall be defined as eligible mortgage collateral under Section 7-27-5.2 NMSA 1978 [repealed] and the council's guidelines promulgated under Section 7-27-5.2 [repealed], as those guidelines may be amended from time to time by the council.

C. "Risk classifications:"

(1) "Class A" means a savings and loan association which meets all of the following financial conditions:

(a) A regulatory net worth to average asset ratio (as contained in the FHLB quarterly report) of 3 percent or greater.

(b) A ratio of its' four quarter net income (before or after taxes, whichever is greater, and determined by computing all four quarters on a consistent basis of either "before taxes" or "after taxes") to its total average assets of .30 percent or greater.

(c) Failure of a savings and loan association to meet any one of these financial conditions automatically results in reclassification into the next lower financial class.

(2) "Class B" means a savings and loan association which meets all of the following conditions:

(a) a regulatory net worth to average asset ratio (as contained in the FHLB quarterly report) of at least 2 percent;

(b) a ratio of its' four quarter net income (before or after taxes, whichever is greater, and determined by computing all four quarters on a consistent basis of either "before taxes" or "after taxes") to its total average assets of at least .2 percent.

(c) Failure of a savings and loan association to meet any one of these financial conditions automatically results in reclassification into the next lower financial class.

(3) "Class C" means a savings and loan association with any one or more of the following financial conditions:

(a) a regulatory net worth to average asset ratio (as contained in the FHLB quarterly report) of less than 2 percent;

(b) a ratio of its' four quarter net income (before or after taxes, whichever is greater, and determined by computing all four quarters on a consistent basis of either "before taxes" or "after taxes") to its total average assets of less than .20 percent.

(c) Failure of a savings and loan association to meet any one of these financial conditions automatically results in reclassification into the next lower financial class.

(4) "Class D" means a savings and loan association with both of the following financial conditions:

(a) a regulatory net worth to average asset ratio (as contained in the FHLB quarterly report) of less than 1 percent;

(b) a ratio of its' four quarter net income (before or after taxes, whichever is greater, and determined by computing all four quarters on a consistent basis of either "before taxes or after taxes" to its total average assets of less than .10 percent.

[Recompiled 10/01/01]

#### **2.60.15.8 COLLATERALIZATION REQUIREMENTS:**

A. The investment officer is directed to require collateral to be maintained for institutions within each classification at levels in accordance with the following schedule for all new deposits and all reinvestments of existing deposits. These rules will become effective five (5) days after filing with the records and rules commission.

(1) CLASS A. A savings and loan in this class shall be required to maintain collateral at the statutory minimum level set forth in Section 6-10-17 NMSA 1978 or Section 7-27-5.2 NMSA 1978 [repealed], as applicable. Collateral in the form of securities shall have an aggregate market value equal to 50 percent of the amount of deposit. Collateral in the form of mortgages shall have an aggregate outstanding principal balance equivalent to 120 percent of the amount of the initial deposit, and shall be maintained at a minimum of an aggregate outstanding principal balance equivalent to 100 percent of the amount of the deposit.

(2) CLASS B. A savings and loan in this class shall be required to maintain collateral in the form of securities with an aggregate market value equal to 75 percent of the amount of deposit or collateral in the form of mortgages with an aggregate outstanding principal balance equivalent to 120 percent of the amount of the initial deposit.

(3) CLASS C. A savings and loan in this class shall be required to maintain collateral in the form of securities with an aggregate market value equal to 100 & of the amount of the deposit, or collateral in the form of mortgages maintained at a minimum aggregate outstanding principal balance equivalent to 120 percent of the amount of the deposit.

(4) CLASS D. A savings and loan in this class shall be required to maintain collateral in the form of securities with an aggregate market value equal to 100 percent

of the amount of the deposit, or collateral in the form of mortgages with an aggregate outstanding principal balance equivalent to 120 percent of the amount of the deposit. The investment officer may, at his discretion, require the pledging of additional mortgage collateral of up to 200 percent of the outstanding principal balance, or additional securities with an aggregate market value equal to 120 percent of the amount of the deposit to prevent the loss of public funds.

B. FSLIC insurance will not be counted as collateral unless the savings and loan is willing to certify quarterly in writing what the insurance amount is after prorating for other state accounts, including agency accounts.

C. If a savings and loan association is unable to meet the collateral level required by its financial classification, the state investment officer may make withdrawals of deposits to an amount which can be collateralized at an appropriate level, as above specified. The increased collateral levels shall be required until the ratios of the savings and loan, as determined by the risk assessment, return to a level which allows reclassification to a less restrictive level. The collateral levels shall be governed by the policy in effect at the time of deposit or renewal of deposit.

D. Any qualifying savings and loan that fails to maintain the pledge of qualifying collateral or other security for deposits, or fails to substitute or provide additional qualifying collateral or security when requested by the council or state investment officer, is subject to a penalty by the director of the financial institutions division of up to one hundred dollars (\$100) a day for each two hundred and fifty thousand dollars (\$250,000) deposited for each day the violation continues. The state investment officer may also take any other action deemed necessary to secure state funds.

E. In making the decision to accept or reject collateral, the state investment office or the treasurer's office reserves the right to reject, either at the time of submission or at any time thereafter, any collateral that does not meet all statutory criteria and any collateral not of sufficient quality to protect the state's interests.

F. Depository institutions are to provide to the state investment office a complete audit of all mortgage collateral by an outside certified public accountant using generally accepted auditing standards to ensure that all requirements of the depository and custodial agreements, state law, these regulations and any other pertinent regulations have been met. The audit will be done annually or more frequently as requested by the state investment officer. Specific guidelines for the required audit of all mortgage collateral will be developed by the state investment office.

[Recompiled 10/01/01]

#### **2.60.15.9 GENERAL:**

A. In the event of a premature withdrawal of deposits, the savings and loan association may impose the minimum penalty provided by federal law.

B. The figures to be used by the investment officer in the risk-assessment analyses shall be calculated by each savings and loan association, including those relying on FSLIC insurance, from the quarterly federal home loan bank report and shall be furnished to the investment officer no later than the tenth day of the second month following that quarter, provided however, if the tenth day falls on a weekend or legal holiday, the figures shall be submitted on the next business day. The figures provided to the state investment officer by the savings and loan association shall be certified in writing by the president of the savings and loan association, an executive officer of the savings and loan, or a person authorized by corporate resolution of the savings and loan association to certify the information. The state investment officer shall, at any time between quarterly reporting periods, request additional certified information, as needed, to assess the risk level of any savings and loan association. If a savings and loan association fails to provide the requested information, it shall be required to maintain collateral in the form of securities or mortgages, as appropriate, with an aggregate market value equal to or greater than 100 percent of the amount of deposit for securities and an aggregate outstanding principal balance equal to or greater than 120 percent of the deposit for mortgages, as applicable.

C. The investment officer is also directed to require each savings and loan association which has had a final administrative enforcement action imposed upon it to advise the investment officer of such action. If the investment officer believes such action indicates a high level of risk in maintaining public deposits in that institution, he shall report to the council, who shall decide whether additional collateral will be required.

D. Notwithstanding any of the above provisions, the state investment officer may make an emergency withdrawal of state deposits prior to maturity when in his judgment such action is necessary in the exercise of reasonable care to protect state funds.

E. If a savings and loan association believes that exceptional circumstances exist indicating it would not be appropriate for the investment officer to take any of the actions listed above, the savings and loan association shall appear at a meeting of the state investment council to present its position. The council may at that time vote on whether an exception to the policy will be allowed, or the council may continue the issue in order to take further evidence, testimony or advice. In order to be placed on the council's agenda, the institution shall submit a written request, stating its position, to the investment office at least 10 calendar days prior to the meeting, including a bill of particulars, copies of any statutes or cases it intends to use in its presentation as well as a list of names, titles and business addresses and phone numbers of anyone whose testimony it deems necessary.

F. The state investment officer is further directed to take immediate and prudent steps to initiate this policy.

G. Nothing herein shall restrict the state treasurer, state investment officer or the state investment council from the lawful exercise of rights and duties conferred by law.

[Recompiled 10/01/01]

## **PART 16: SEVERANCE TAX PERMANENT FUND POLICY GOVERNING PURCHASES OF SMALL BUSINESS ADMINISTRATION OR FARMERS HOME ADMINISTRATION OBLIGATE**

### **2.60.16.1 ISSUING AGENCY:**

State Investment Council, 2055 S. Pacheco Street, Suite 100, Santa Fe, New Mexico 87505.

[6/15/99; Recompiled 10/1/01]

### **2.60.16.2 SCOPE:**

New Mexico small business administration or farmers home administration.

[6/15/99; Recompiled 10/1/01]

### **2.60.16.3 STATUTORY AUTHORITY:**

Pursuant to Section 7-27-5.4 (A) NMSA 1978 as amended pursuant to Senate Bill 1018 approved by the 41st legislature of the state of New Mexico, 2nd session, which says, in part" no more than ten percent of the book value of the severance tax permanent fund (the STPF") may be invested in notes or obligations securing loans to New Mexico businesses made by farm credit entities, banks and savings and loan associations and mortgages approved by the congress of July 30, 1953 known as the Small Business Act of 1953, as amended, and notes or obligations pursuant to the act of congress of August 14, 1946 amended, only to the extent that both principal and interest are guaranteed by the United States government." The effective yield of these loans shall be a market rate not less than the yield available on the planned amortized class tranche of collateralized mortgage obligations guaranteed by mortgage corporation with an average life comparable to the maturity of the loan. The state investment officer may enter into administration of the receipts therefrom. Any servicing agreement may contain reasonable and customary provisions, including servicing fees not to exceed one hundred fifty basis points, as may be agreed upon; provided, in no event shall the rate paid by the borrower on the loan, together with servicing fees, exceed the maximum rate permitted by the applicable federal guarantee program;"

[6/15/99; Recompiled 10/1/01]

### **2.60.16.4 DURATION:**

Permanent.

[6/15/99; Recompiled 10/1/01]

#### **2.60.16.5 EFFECTIVE DATE:**

June 15, 1999 unless a later date is specified at the end of a section or paragraph.

[6/15/99; Recompiled 10/1/01]

[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

#### **2.60.16.6 OBJECTIVE:**

As amended pursuant to Senate Bill 1018 approved by the 41st legislature of the state of New Mexico, 2nd session, which says, in part" no more than ten percent of the book value of the severance tax permanent fund (the STPF") may be invested in notes or obligations securing loans to New Mexico businesses made by farm credit entities, banks and savings and loan associations and mortgages approved by the congress of July 30, 1953 known as the Small Business Act of 1953, as amended, and notes or obligations pursuant to the act of congress of August 14, 1946 amended, only to the extent that both principal and interest are guaranteed by the United States government."

[6/15/99; Recompiled 10/1/01]

#### **2.60.16.7 DEFINITIONS:**

**[RESERVED]**

#### **2.60.16.8 INVESTMENT MANAGEMENT POLICY:**

A. IMPLEMENTATION: Commitments made on behalf of the STPF to purchase the SBA or FmHA guaranteed portion of loans before Senate Bill 1018 of the 41st New Mexico legislature, 2nd session, was passed and became law shall be honored according to the rates, servicing fees and other terms as provided in SIC Rule 89-1, dated November 30, 1989 and amended on October 20, 1993, based on New Mexico statutes existing at the time the commitment was made. However, all commitments issued on behalf of the STPF after March 8, 1994 to purchase loans guaranteed by the SBA or FmHA shall be issued according to the rates, servicing fees and other terms of SIC Rule 94-2 pursuant to Section 7-27-5.4 (A), NMSA 1978, as amended by Senate Bill 1018 approved by the 41st legislature of the state of New Mexico, 2nd session.

B. RATES: The effective yield to the STPF on these loans shall be a market rate equivalent to the yield on the planned amortized class tranche of collateralized mortgage obligation guaranteed by the federal national mortgage association or the federal home loan mortgage corporation (FNMA or FHLMC PAC CMO's"), rounded up to the nearest 1/8 of 1 percent, with an average life comparable to the maturity of the loan. In order to produce an effective yield to the STPF equivalent to yields on FNMA or

FHLMC PAC CMO's with an average life of comparable maturity as required by New Mexico law, a blended rate may be used for any SBA/FmHA guaranty purchased by the STPF which includes a partial refinancing of a loan previously purchased by the STPF guaranteed by the SBA or FmHA. The blended rate shall be calculated by weighting the rate, time and amount of the loan to be refinanced together with the portion of the new loan used for purposes other than refinancing. Not less than 25 percent of the proceeds of the loan refinancing must be used for new purposes other than refinancing.

C. AMORTIZATION/MATURITY PERIODS: The loan amortization/maturity periods shall be limited to 5, 7, 10, 15, 20 and 25 years.

D. COMMITMENT FEES: A one percent commitment fee to be paid by the farm credit entities, bank or savings and loan association to the STPF shall be charged on all SBA and FmHA loans. The term of such commitment shall be set by the SBA and FmHA based on the institution's and SBA's or FmHA's best estimate of the time required to close the loan, but in no case shall such terms exceed four (4) months, except in the case of construction loans where the term may be extended to twelve months.

(1) The commitment fee is refundable to the bank or savings and loan only (a) upon delivery of the loan within the commitment period or within the extended commitment period of an extension is granted by the state investment officer. (b) if the SBA withdraws or cancels its guaranty before the loan is sold to the STPF, or (c) if, considering the circumstances at the time, the state investment officer determines it is in the best interest of the STPF to refund the commitment fee for reasons not contained in this policy.

(2) If a loan is not funded until after the expiration date, the state may still purchase it at its discretion. However, if the state does accept the loan this does not imply that the commitment fee will be refunded.

E. SERVICING COMPENSATION: A maximum servicing fee of one hundred fifty (150) basis points of interest may be charged by the bank or savings and loan association on the unpaid balance of the loan as compensation for servicing by the financial institution; provided, in no event shall the total rate of interest paid by the borrower on the loan, including the yield to the STPF equivalent to the FNMA of FHLMC PAC CMO yield together with servicing fees up to a maximum of 150 basis points of interest, exceed the maximum rate permitted by the applicable federal guarantee program. In addition, a one-eighth of one percent (.00125) servicing fee computed on the unpaid balance of the loan shall be charged to the borrower to pay Colson Acquisition Service. Servicing fees payable to Colson Acquisition Service and any other fees that may be assessed by the applicable federal guarantee program shall be paid by the financial institution servicing [sic] the loan from the servicing fees received by that institution as provided in this paragraph. In the event the FNMA or FHLMC PAC CMO yields plus 150 basis points for servicing fees exceed the maximum rate allowed by the applicable federal guarantee program, the servicing fees shall be limited to the

difference between the FNMA or FHLMC PAC CMO yield and the maximum rate allowed by the applicable federal guarantee program.

F. EXTENSION: The state investment officer may grant extension beyond the original commitment period if the SBA or FmHA has granted an extension. The SBA or FmHA shall determine the terms and conditions for such extension after consultation with the bank, or savings and loan association and receiving the approval of the state investment officer.

G. DEFERMENT OF PAYMENTS: Deferment of payments beyond the initial three-month period allowed in SBA 1086 may be granted, if such deferment is approved by the lending institution and the SBA. The deferment, including the initial three-month period, may not exceed six months. Deferment of payments beyond six months may be granted on a case by case basis with the prior approval of the state investment officer. As consideration for each deferment and deferment extension the STPF will impose a fee of \$25.00 for the first \$10,000 of principal or principal and interest deferred. For each \$2,000 of principal or principal and interest greater than \$10,000 and additional \$5.00 will be charged. The fee will be calculated on the total amount of principal or principal and interest deferred. The fee is paid by the lender to the state investment office and may be charged to the borrower.

[6/15/99; Recompiled 10/1/01]

#### **2.60.16.9      PROCEDURE:**

Upon approval of a loan by the SBA/FmHA, the originating financial institution desiring to sell the loan to the state investment council should contact the SBA/FmHA portfolio manager by phone or in writing to request a commitment. The portfolio manager will provide a commitment at the time of receiving the request and will issue a commitment letter providing the details of the commitment.

A. Each request for a commitment must include the following information; the borrowers name, the SBA GP number or FmHA case number, the maximum amount the loan is approved for, the loan maturity, the guarantee portion of the loan, as a percent, to be purchased by the state, the nature of the loan and the commitment period.

B. In the month the institution is prepared to deliver the loan the state investment office must receive at least two weeks prior to settlement from the originating institution an invoice on a form provided by the STPF and the completed loan package in the form required by the SBA or farmer's home administration.

C. The severance tax fund will purchase SBA and FmHA loans on or about the 20th of each month. Accrued interest may be purchased. Please forward the necessary documents to this office at least two weeks prior to settlement.

D. Send all correspondence to: State Investment Council, Portfolio Manager SBA Loans, 2055 S. Pacheco, Suite 100, Santa Fe, New Mexico 87505, Phone # 505-424-2500.

[6/15/99; Recompiled 10/1/01]

#### **2.60.16.10 GUARANTEED PAYMENTS:**

To provide both timeliness and certainty in loan payments the state investment office may convert each SBA loan purchased after July 1, 1989 to a depository receipt, offered by Colson Acquisition Service to guarantee payments on the same day every month. Also, all loans currently held may be converted to the depository receipt, if they are eligible and it is cost effective. The state investment office will pay the cost of converting the SBA certificate to the depository receipt. The lender will continue to pay the initial standard setup fee.

[6/15/99; Recompiled 10/1/01]

### **PART 17: COLLATERAL POLICY FOR NEW MEXICO BANKS GOVERNING CERTIFICATES OF DEPOSIT CREATED AFTER MAY 25, 1988**

#### **2.60.17.1 ISSUING AGENCY:**

State Investment Council.

[Recompiled 10/1/01]

#### **2.60.17.2 SCOPE:**

**[RESERVED]**

[Recompiled 10/1/01]

#### **2.60.17.3 STATUTORY AUTHORITY:**

Sections 7-27-5, 7-27-5.2 [repealed], 6-8-7, 6-10-10, 6-10-16, 6-10-17, 6-10-18, 6-10-20, 6-10-24.1, 6-10-29 and 6-10-35 NMSA 1978.

[Recompiled 10/1/01]

#### **2.60.17.4 DURATION:**

Permanent.

[Recompiled 10/1/01]

#### **2.60.17.5 EFFECTIVE DATE:**

These rules will become effective five (5) days after filing with the records center and archives commission. [Filed June 6, 1988, effective June 11, 1988]

[Recompiled 10/1/01]

#### **2.60.17.6 OBJECTIVE:**

In the exercise of its authority under Sections 7-27-5, 7-27-5.2 [repealed], 6-8-7, 6-10-10, 6-10-16, 6-10-17, 6-10-18, 6-10-20, 6-10-24.1, 6-10-29 and 6-10-35 NMSA 1978, the state investment council (the "council") desires to minimize potential risks to existing and future bank deposits of severance tax permanent funds ("state funds"). As a first step towards achieving this objective, the council hereby directs the state investment officer to review the financial condition of each bank in the program. The review will include a determination of each bank's primary capital/asset ratio, its net income/total average assets ratio and its non-performing loans/primary capital ratio. The institutions shall then be classified according to the level of risk, and each level of risk assigned an appropriate level of collateralization.

[Recompiled 10/1/01]

#### **2.60.17.7 DEFINITIONS:**

A. "Securities" shall be defined as those securities eligible as collateral for severance tax permanent funds under Section 6-10-16 and 7-27-5.2 [repealed], as amended, and effective May 21, 1986, Art. IV, Section 23, N.M. Constitution.

B. "Mortgages", shall be defined as eligible mortgage collateral under Section 7-27-5.2 NMSA 1978 [repealed] and the council's guidelines promulgated under Section 7-27-5.2 [repealed], as those guidelines may be amended from time to time by the council.

C. Risk classifications:

(1) "CLASS A" means a bank which meets all of the following conditions:

(a) a primary capital to asset ratio (as defined by the FDIC) of 6 percent or greater;

(b) a net income (current quarter plus previous three quarters after taxes) to average asset ratio of .61 percent or greater.

(c) a ratio of non-performing loans (defined as loans which are at least 90 days past due) to primary capital ratio of 34.9 percent or less.

(d) Failure of a bank to meet any one of these ratios automatically results in reclassification into the next lower financial class.

(2) "CLASS B" means a bank with all of the following financial conditions:

(a) a primary capital to asset ratio (as defined by the FDIC) of at least 5 percent;

(b) a net income (current quarter plus previous three quarters after taxes) to average asset ratio of at least .51 percent;

(c) A ratio of non-performing loans (defined as loans which are at least 90 days past due) to the bank's primary capital of no more than 49.9 percent.

(d) Failure of a bank to meet any one of these ratios automatically results in reclassification into the next lower financial class.

(3) "CLASS C" means a bank with any one of the following financial conditions:

(a) a primary capital to asset ratio (as defined by the FDIC) of less than 5 percent.

(b) a net income (current quarter plus previous three quarters after taxes) to average asset ratio less than .51 percent.

(c) A ratio of non-performing loans (defined as loans which are at least 90 days past due) to the bank's primary capital of greater than 49.9 percent.

(4) "CLASS D" means a bank with any two of the following financial conditions:

(a) a primary capital to asset ratio (as defined by the FDIC) of less than 2 1/2 percent.

(b) a net income (current quarter plus previous three quarters after taxes) to average asset ratio of less than .10 percent.

(c) a ratio of non-performing loans to the bank's primary capital of greater than 67 percent, two quarters in a row during the past 12 months.

[Recompiled 10/1/01]

## **2.60.17.8 COLLATERALIZATION REQUIREMENTS:**

A. The investment officer shall require collateral levels to be maintained for all institutions (within each classification) in accordance with the following schedule for both new deposits and reinvestments of existing deposits. These rules will become effective five (5) days after filing with the records center and archives commission.

(1) CLASS A. A bank in this classification shall be required to maintain collateral at the statutory minimum level set forth in Section 6-10-17 NMSA 1978 or Section 7-27-5.2 NMSA 1978 [repealed], as applicable. Collateral in the form of securities shall have an aggregate market value equal to 50 percent of the amount of deposit. Collateral in the form of mortgages shall have an aggregate outstanding principal balance equivalent to 120 percent of the amount of the initial deposit, and shall be maintained at a minimum of an aggregate outstanding principal balance equivalent to 100 percent of the amount of the deposit.

(2) CLASS B. A bank in this classification shall be required to maintain collateral in the form of securities with an aggregate market value equal to 75 percent of the amount of deposit, or collateral in the form of mortgages with an aggregate outstanding principal balance equivalent to 120 percent of the amount of the initial deposit.

(3) CLASS C. A bank in this classification shall be required to maintain collateral in the form of securities with an aggregate market value equal to 100 percent of the amount of the deposit, or collateral in the form of mortgages with a minimum aggregate outstanding principal balance equivalent to 120 percent of the amount of the deposit.

(4) CLASS D. A bank in this classification shall be required to maintain collateral in the form of securities with an aggregate market value equal to 100 percent of the amount of the deposit, or collateral in the form of mortgages with an aggregate outstanding principal balance equivalent to 120 percent of the amount of the deposit. The investment officer may, at his discretion, require the pledging of additional mortgage collateral (up to 200 percent of the outstanding principal balance), or additional securities with an aggregate market value equal to 120 percent of the amount of the deposit, to prevent the loss of public funds.

B. A newly chartered bank shall be considered as having class A collateral requirement for the first year of operation, and in its second year of operation, the bank shall annualize its net operating income beginning with the first quarter of the second year for the purpose of calculating ratios pursuant to this Subsection [now 2.60.17.8 NMAC].

C. FDIC insurance will not be counted as collateral unless the bank is willing to certify quarterly, in writing, the insurance amount after prorating other state accounts, including agency accounts.

D. If a bank is unable to meet the collateral level required by its financial classification, the state investment officer may make withdrawals of deposits to the amount which can be collateralized at an appropriate level, as specified above. The increased collateral levels shall be required until the ratios of the institution return to a level which allows an upgrade in classification (as determined by the risk assessment ratios of the bank). The collateral levels shall be governed by the policy in effect at the time of deposit or reinvestment of a certificate of deposit.

E. Any qualifying bank that fails to maintain the pledge of qualifying collateral or other security for deposits, or fails to substitute or provide additional qualifying collateral or security when requested by the state investment officer is subject to a penalty by the director of the financial institutions division, of the commission on banking for New Mexico, of up to one hundred dollars (\$100) a day for each two hundred and fifty thousand dollars (\$250,000) deposited for each day the violation continues. The state investment officer may also take any other action as deemed necessary to secure state deposits.

F. In making the decision to accept or reject collateral, the state investment office and the treasurer's office reserves the right to reject, either at the time of submission or at any time thereafter, any collateral that does not meet all statutory criteria and any collateral not of sufficient quality to protect the state's interests.

G. Depository institutions are to provide to the state investment office a complete audit of all mortgage collateral by an outside certified public accountant, using generally accepted auditing standards, to ensure that all requirements of the depository and custodial agreements, state law, these regulations and any other pertinent regulations have been met. Audits will be performed annually, or more frequently as requested by the state investment officer. Specific guidelines for the required audit of all mortgage collateral will be developed by the state investment office.

[Recompiled 10/1/01]

#### **2.60.17.9      GENERAL:**

A. In the event of a premature withdrawal of deposits, the bank may impose the minimum penalty provided by federal law.

B. The figures to be used by the investment officer in the risk-assessment analyses shall be calculated by each bank, including those relying on FDIC insurance instead of collateral, from the quarterly call statements and shall be furnished to the investment officer no later than the tenth day of the second month following that quarter, provided however, if the tenth day falls on a weekend or legal holiday, the figures shall be submitted on the next business day. The figures provided to the state investment officer by the bank shall be certified in writing by the president of the bank, an executive officer of the bank, or a person authorized by corporate resolution of the bank to certify the information. The investment officer shall, at any given time between quarterly reporting

periods, request additional certified information from the bank, as needed to assess the risk level of any bank. If a bank fails to provide the requested information, it shall be required to maintain collateral in the form of securities or mortgages, as appropriate, with an aggregate market value equal to or greater than 100 percent of the amount of deposit for securities and an aggregate outstanding principal balance equal to or greater than 120 percent of the deposit for mortgages, as applicable.

C. The investment officer is also directed to require each bank which has had a final administrative enforcement action imposed upon it to advise the investment officer of such action. If the investment officer believes such action indicates a high level of risk in maintaining public deposits in that bank, he shall report to the council, and they shall decide whether additional collateral or actions will be required.

D. Notwithstanding any of the above provisions, the state investment officer may make an emergency withdrawal of state deposits prior to maturity when in his judgement it is necessary in the exercise of reasonable care to protect state funds.

E. If a bank believes that exceptional circumstances exist indicating that it would not be appropriate for the investment officer to take any of the actions listed above, the bank shall appear at a meeting of the state investment council to present its position. The council may at that time vote on whether an exception to the policy will be allowed, or it may continue the issue in order to take further evidence, testimony or advice. In order to be placed on the council's agenda, the institution shall submit to the state investment office at least 10 calendar days prior to the meeting, a written request stating its position to the investment office including a bill of particulars, copies of any statutes or cases it intends to use in its presentation, as well as a list of names, titles and business addresses and phone numbers of anyone whose testimony it deems necessary.

F. The investment officer is further directed to take immediate and prudent steps to initiate this policy.

G. Nothing herein shall restrict the state treasurer, state investment officer or the state investment council from the lawful exercise of rights and duties conferred by law.

[Recompiled 10/1/01]

## **PART 18-19: [RESERVED]**

## **PART 20: VENTURE CAPITAL INVESTMENT ADVISORY COMMITTEE POLICIES AND PROCEDURES MANUAL**

### **2.60.20.1 ISSUING AGENCY:**

New Mexico State Investment Council.

[Recompiled 10/1/01]

**2.60.20.2 SCOPE:**

**[RESERVED]**

[Recompiled 10/1/01]

**2.60.20.3 STATUTORY AUTHORITY:**

**[RESERVED]**

[Recompiled 10/1/01]

**2.60.20.4 DURATION:**

[Permanent]

[Recompiled 10/1/01]

**2.60.20.5 EFFECTIVE DATE:**

[Filed March 29, 1993]

[Recompiled 10/1/01]

**2.60.20.6 OBJECTIVE:**

**[RESERVED]**

[Recompiled 10/1/01]

**2.60.20.7 DEFINITIONS:**

**[RESERVED]**

[Recompiled 10/1/01]

**2.60.20.8 THE NATIONAL VENTURE CAPITAL INVESTMENT PROGRAM (VCIP):**

**A. PROGRAM STRUCTURE:**

(1) The national venture capital investment program of the state of New Mexico's severance tax permanent fund (STPF, or fund) is intended to produce significant capital gains to the fund corpus and additional diversification for the fund's assets. The venture capital investment program is managed by the New Mexico state

investment council (SIC, or council) with the advice of the venture capital investment advisory committee (VCIAC, or committee) and a fiduciary advisor. Currently, the advisor is Brinson Partners Inc. (BPI, or the advisor). The STPF is a permanent trust fund, and all market-rate fund investments are subject to the prudent man rule. Since the council is also required to retain investment discretion over all fund assets, the advisor has been retained on a non-discretionary basis to advise the committee and council on venture capital investments. Historically, the average returns on well structured venture capital investment programs have been 6 percent to 10 percent above that achievable in the traditional U.S. equities market.

(2) The venture capital asset class entails a high degree of risk, which must be managed very carefully to avoid significant losses. Based on historical data, even the most experienced and successful venture capitalists expect that 30 percent of their direct investment portfolio companies will fail. This fact necessitates prudent selection and proper diversification of venture capital fund investments.

(3) Venture capital has been accepted as a prudent asset class for investment both by the financial markets and by the federal government. Most institutional investors limit their exposure to venture capital to between 2 percent and 5 percent of their total portfolios. Subsection A of 7-27-5.6 NMSA 1978, as amended during the 1990 legislative session, specifies that the total investment in the VCIP may not exceed one and one-half percent of the book value of the STPF.

## B. DIVERSIFICATION:

(1) Due to the riskiness of venture capital investments, prudent diversification is necessary to minimize risk and maximize return. The VCIP initially committed to invest in a minimum of fifteen venture partnerships (from \$1.0 million to \$2.0 million each) over a three year period beginning in late 1988. Since each partnership will in turn invest in 25 to 30 portfolio companies, the STPF should have approximately 400 small, rapidly-growing, potentially high yielding investments underlying its venture capital portfolio from these initial phase fund investments. While many of these companies will fail, historical experience indicates that many of the successful companies will generate significant multiples on their original investments, and will provide very attractive returns for the overall portfolio.

(2) The VCIP portfolio will be diversified with respect to time, geography, industry, and stage focus. Of these four variables, time diversification is the most important. The venture capital industry goes through cycles much like all the other investment asset classes. Given the illiquid nature of venture capital investments, attempting to "time the market" is not a realistic alternative. Most sophisticated investors average into the market with new commitments on a steady, annual basis. This insures that the investment of the majority of their funds does not occur at a time when private company valuations are high, when existing technologies are about to be superseded, or when specific industries are in favor. Additionally, adequate time diversification insures that six to seven years from the investment period, an investor is not vulnerable

to a depressed stock market when the majority of the portfolio investments might be ready to go public.

(3) The initial commitment process to venture capital partnerships for the severance tax permanent fund required three years to complete (late 1988 - late 1991). Since the fifteen partnerships selected during this time period will take an additional three to five years to make all of their investments, the STPF venture capital investment program has committed to investments that will be made over about five to eight years, providing substantial time diversification. In late 1992, (four years from the initial commitments), distributions to the SIC from these venture capital fund investments have become significant. These increasing distributions, and the growth of the STPF, should allow investing in two to four new partnerships annually on a continuing basis, which will further enhance time diversification. To provide adequate diversification in geography, stage, and industry, the VCIAC and the advisor have recommended the following weightings for the overall VCIP portfolio:

(4) SEVERANCE TAX PERMANENT FUND PARTNERSHIP GUIDELINES, revised December 1992.

(a) Geography:

- (i) Northeast.....25-30 percent
- (ii) Southeast.....05-10 percent
- (iii) West Coast.....35-40 percent
- (iv) Midwest.....10-15 percent
- (v) Southwest.....15-20 percent

(b) Stage:

- (i) Seed Startup....10-25 percent
- (ii) Growth.....45-60 percent
- (iii) Late.....20-35 percent

(c) Industry:

- (i) Diversified.....85-95 percent
- (ii) Specialized.....05-15 percent

(d) Notes:

(i) It is important to note that these are only general guidelines, and deviations from these guidelines should be expected as market conditions warrant. Deviations must be expected in order to select the best venture capital funds when they are in the market. The best indicator of risk and return is the performance of general partnership teams on prior funds.

(ii) Since the SIC began investing in venture capital in late 1988, the venture capital industry has evolved. The geographical concentrations of venture capital have not changed significantly, but the stage and industry focuses have. More funds are moving to later stage investing, and fewer funds are specializing on one specific industry. The weightings above have been amended to reflect these evolutionary changes. In sum, the venture capital industry is continually changing its focuses in order to reduce risk and enhance returns.

(iii) Many of the guidelines above have wide ranges to allow taking advantage of opportunities that may occur within New Mexico. The most significant example of this is the seed/startup stage category.

(5) The geographic guidelines above reflect where significant venture capital opportunities currently occur on a national basis. Industry results indicate that restricting the investing focus to one particular geographic area reduces the return. With the exception of California, funds that focus entirely on one state have typically not done well. A 15 percent to 20 percent focus on the Southwest may seem small, but in fact is an overweighting in the region. Over the last several years, only 10 percent of the dollars invested nationally have gone into the southwest, which includes Arkansas, Arizona, Colorado, Louisiana, New Mexico, Nevada, Oklahoma, Texas and Utah. This overweighting in the southwest region is a conscious decision on the committee's part to encourage venture capital investment in New Mexico.

(6) Subsection D of 7-27-5.6 NMSA 1978 states, "In making investments pursuant to this section, the council shall give consideration to investments in venture capital funds whose investments enhance the economic development objectives of the state, provided such investments offer a rate of return and safety comparable to other venture capital investments currently available." New Mexico is fortunate to have many scientific, technical and academic resources. The VCIAC has tasked the advisor to review for investment every venture capital organization with interests in New Mexico that applies under the VCIP, and to not reject any such funds without first consulting with the committee and SIC staff. The VCIAC and the advisor will maintain open minds regarding all opportunities in New Mexico, and will identify partnerships that have the early stage, seed, and startup skills that are needed to succeed in the state without compromising expected return.

(7) The committee and the advisor do not advocate the use of venture capital investment programs solely for economic development purposes, since historical data indicate that venture capital programs focused on economic development have done poorly, and in many cases, have been notable failures. The committee and the advisor

will, however, be sensitive to the needs of the state of New Mexico in this area. One criterion used in selecting the advisor was the extensive data base it maintains on groups outside the state with significantly successful investment track records to use in evaluating all proposed investments for the VCIP. This will insure that any New Mexico related fund selected by the committee and council for investment will have a high probability of succeeding in the high risk venture capital environment.

(8) In another effort to increase the probability of attracting venture capital to the state, the VCIAC and the advisor have recommended a mild overweighting with respect to stage focus on the seed and startup category. Typically, only 5 percent to 10 percent of the money raised by venture partnerships goes into this category due to its high risk.

(9) The majority of the selected partnerships will have an opportunistic or diversified industry focus, since this approach has historically been the most successful. However, with the continually increasing technological sophistication in today's more competitive business environment, some specialized funds focusing on specific industries may make sense. Industries of particular interest are biotechnology, telecommunications, military and defense, health care, advanced materials, and specialty retailing. The advisor's data base tracks numerous funds that have been successful in each of these industries, and the committee will use this information to select individual specialized funds with high probabilities for success.

(10) In summary, the VCIAC and the advisor believe that these diversification guidelines will provide the maximum return and safety of principal that are required by both Section 7-27-5.6 NMSA 1978 and the prudent man rule.

#### C. PARTNERSHIP SELECTION CRITERIA:

(1) The committee seeks to prudently invest in individual partnerships with at least the following characteristics:

- (a) partners that have significant venture capital experience;
- (b) partners that are well known to each other and have worked together as partners;
- (c) partners that have demonstrated successful investment performance records;
- (d) partners that have appropriate experience for the proposed industry focus of the fund;
- (e) partners that have appropriate experience for the proposed stage focus of the fund;

(f) partners that are raising a fund that has a size consistent with their investment strategy and human resources capabilities;

(g) partners that have the abilities to source many of their own deals;

(h) partners that have the time, experience and interpersonal skills to work effectively with their portfolio companies;

(i) partnerships in which the compensation plan for the general partners is fair, creates the proper incentives, and rewards the general partners for superior long-term performance;

(j) partnerships that have as their primary business activity the investment of funds in return for equity in businesses for the purpose of providing capital for start-up, expansion, new product development, or similar business purposes;

(k) partnerships that hold out the prospects for capital appreciation from such investments comparable to similar investments made by other professionally managed venture capital funds;

(l) partnerships with a minimum committed capital of \$5,000,000;

(m) partnerships that accept investments only from accredited investors as that term is defined in Section 2 of the Federal Securities Act of 1933, as amended, (15 U.S.C. Section 77(b)) and rules and regulations promulgated pursuant to that section;

(n) partnerships that have full-time management with at least five years of experience in managing venture capital funds; and

(o) partnerships that receive at least 40 percent of the fund's capital from institutional investors.

(2) Many institutional investors seek only to invest in the oldest, most well-known partnerships. While this may be effective, the advisor has indicated several concerns with this strategy if it is used as the sole approach. First, the individual general partners who are responsible for the track record may be retiring or spending less than full time with the partnership. Second, the large size of the new funds may make duplicating the earlier track record unlikely. Third, the growth in management fees may have tempered the general partners' desire to work hard to generate capital gains. Fourth, the growth in the general partners' organization and staff may cause communication and investment decisions to be less consistent and less thorough than that experienced on earlier partnerships. Finally, the wealth the general partners have derived from their previous investment successes may dampen their enthusiasm to work as diligently on the new partnerships.

(3) The advisor has recommended that the committee consider younger venture organizations where the general partners have the right combination of venture capital experience and youthful (mid 30's to mid 40's) drive and ambition, which will often produce the best venture capital performance. The committee and advisor will therefore select fewer well-known megafunds (where the above mentioned problems may be significant) and more smaller-sized (\$40MM-\$80MM) funds with experienced and still aggressive general partners.

(4) The committee and advisor will follow a balanced approach in selecting partnerships. It is expected that the severance tax permanent fund portfolio will ultimately contain some "first time" funds as well as some large, well-known funds. The key ingredient throughout the selection process will be the backing of experienced people. All "first time" fund investments will be based on excellent managers with significant venture capital experience. It should be emphasized again that the only significant data that may be evaluated to indicate the probability of success on any proposed fund investment is the performance of the general partners on previous funds. It is thus no accident that the criteria listed above focus almost totally on the general partners, their experience and their proposed strategies, and compare these factors to the previous funds managed by the same general partners and the strategies that were successful on those funds. The only collateral on venture capital investments is the general partners themselves.

(5) Paragraph (2) of Subsection F of 7-27-5.6. NMSA 1978 provides the applicable definition of a venture capital fund for the venture capital investment program. For the purpose of defining "five years of experience in managing venture capital funds" the VCIAC and the advisor will include prior experience in other venture capital fund organizations.

#### D. INVESTMENT DECISION PROCESS:

(1) The investment decision process will begin with a thorough review and analysis of each proposal by the advisor. Those proposals recommended by the advisor for investment, and/or those related to New Mexico, will be forwarded to the committee to evaluate. Those proposals recommended by the committee for investment will be presented to the council for approval. The council may then authorize the state investment officer to make specific investments.

(2) The first eight steps in the evaluation process below are internal procedures followed by the advisor's staff. These steps are presented below in order to fully describe the thorough and prudent process required to select any venture capital fund proposal for investment. While the SIC staff may be advised of proposals currently under consideration by the advisor and informed of progress on specific proposals, active involvement by the SIC staff and the VCIAC will not begin until step 9 below [now Subparagraph (i) of Paragraph 5 of Subsection D of 2.60.20.8 NMAC].

(3) The advisor's venture division is organized in a manner that will facilitate efficient and informed investment decisions. Several individuals currently share the primary responsibility for handling partnership investment opportunities. Although these specific individuals shepherd each partnership through the decision process, all of the professionals in the division are actively involved in each investment decision.

(4) The advisor will keep the council's venture capital portfolio manager (VCPM) fully informed during the following process, particularly during steps 1 through 8 [now Subparagraphs (a) through (h) of Paragraph 5 of Subsection D of 2.60.20.8 NMAC], and especially on those proposals that are related to New Mexico. The actual procedure used will be as follows:

(5) ADVISOR'S INTERNAL INVESTMENT DECISION PROCESS:

(a) The advisor receives/solicits an offering/investment proposal from a partnership raising money. Should the state investment council receive any proposals directly, they will be forwarded to the advisor for the initial review.

(b) The advisor's professionals will review the proposal. Careful attention is paid to each opportunity, particularly groups organized, operating, or focusing in New Mexico.

(c) Should the decision be to not recommend investment, a letter will be sent or a phone call made to inform the partnership of the decision. If the opportunity is one which was referred by the committee or council, or one which is related to the state of New Mexico, the advisor will discuss the decision with the state investment officer and the VCPM prior to any notification of the partnership; if the opportunity merits further evaluation, rigorous due diligence is performed. Reference checks are made, the track record is analyzed, and meetings are held with the general partners. Numerous internal discussions are held and issues are raised and addressed.

(d) The advisor's venture division reaches a consensus on whether to pursue the investment further or to reject it. If the decision is negative at this point, the notification procedures in paragraph 3 [now subparagraph (c)] above will be followed.

(e) If the decision is to continue, an Investment memorandum is written by the advisor's venture partnership investment professionals. This memo summarizes the opportunity and the factors leading to the decision to pursue the investment.

(f) The investment memorandum is sent to the advisor's venture capital subcommittee (not related to the VCIAC). The subcommittee is comprised of the advisor's chief investment officer, all of the advisor's venture investment professionals, and senior management from the advisor's legal, equity, and account management divisions.

(g) If a majority (which must include the chief investment officer) of the advisor's subcommittee approves the investment, a commitment is made to the partnership. The advisor will then notify the VCPM of the amount that will be recommended to the committee for investment under the VCIP. All recommendations are still subject to successful negotiation of the partnership documents.

(h) At this point, a copy of the investment memorandum, as well as the offering/investment proposal will be mailed to the VCPM. The time frame in which an investment decision is needed will be indicated in the cover letter, as well as in a follow-up phone call.

(i) When the advisor's investment memorandum and the fund offering / investment proposal are received by the VCPM, the SIC staff will decide, based on the time available until an investment decision is required, whether to schedule consideration by the committee and the SIC by:

(i) including the proposal for consideration at the next regularly scheduled VCIAC and SIC meetings if this procedure will produce a timely investment decision; or by

(ii) distributing the materials to the VCIAC members by regular or express mail as necessary, and scheduling a special committee meeting. In either case, if the committee's recommendation is favorable and time then permits, the proposal will be included on the agenda for the next regularly scheduled SIC meeting (normally the last Wednesday of each month). If an investment decision is required prior to the next regularly scheduled council meeting, the state investment officer will make a decision, based on the committee's evaluation of the relative attractiveness of the proposal, on whether to request a special meeting of the SIC in order to meet the decision deadline, or to notify the advisor that the proposal will be held until the next regular SIC meeting and that additional time is required to reach a decision. If the necessary additional time is not available, the proposal will not be considered further, and the advisor will be notified of a negative decision. Special meetings of the SIC may be called upon a minimum of 72 hours notice.

(j) If a negative investment decision is reached at any point during the VCIAC/SIC consideration process, the advisor will be immediately notified by telephone. If the outcome is a favorable decision, the advisor will be notified of the approval and the amount of the SIC commitment; and

(k) After the council reaches a decision and the advisor has been notified, the advisor will then be responsible for notifying the partnership of the decision and the firm commitment amount, if any, pending agreement on document terms.

#### E. PARTNERSHIP DOCUMENTATION PROCEDURES:

(1) Each venture capital limited partnership is created and governed by a partnership agreement. Each partnership agreement covers and defines all relevant terms for the affected partnership, including fees, distribution policies, purposes of the partnership, limited partners' rights and duties, and a myriad of other matters.

(2) The advisor will begin reviewing the major terms of the partnership early in the decision process. Review of the actual documents begins after an investment decision has been made. The advisor will act as the council's agent in assuring that the partnership documents are complete and meet all of the SIC's legal requirements. The process for review of the legal documents is as follows:

(a) the partnership legal agreement is received by the advisor;

(b) a copy of the agreement, as well as any other documentation (e.g. management agreement, subscription agreement, side letters), are sent to the advisor's legal counsel;

(c) both the advisor's legal counsel and venture partnership investment professionals will review the documents;

(d) the advisor will negotiate the most favorable terms possible with the partnership;

(e) after final documents are drafted by the partnership's counsel and approved by the advisor, the initial closing will occur;

(f) the advisor's legal counsel or the applicable general partners' legal representative, as appropriate, will include a cover letter on all partnership agreement documents sent to the SIC stating that the agreement conforms to Section 7-27-5.6 NMSA 1978 as well as to prudent management and normal business practices prevailing in the venture capital industry. This will allow execution of the documents without further review by the New Mexico attorney general's office or by any other state agencies. If there are unknown factors at the time the cover letter is issued, they will be clearly stated; and

(g) each partnership will provide a side letter indicating their views on investing in New Mexico and on assisting the venture capital industry in the state when opportunities occur and/or if so requested by the SIC staff.

#### F. CLOSING PROCEDURES:

(1) After a commitment has been made and acceptable documents are submitted by the partnership, the first closing will occur. A closing requires execution of the necessary partnership documents and, usually, a transfer of funds. All appropriate documents (and any subsequent amendments) will be sent by the advisor to the VCPM for execution. The advisor's legal counsel or the applicable general partners' legal

representative, as appropriate, will include a cover letter as described under Partnership document procedures [now Subsection E of 2.60.20 NMAC] above. The SIC will execute the partnership documents, and provide wiring instructions and all other information necessary for the STPF's fiscal agent bank to deliver the amount of the initial drawdown if /as required. After the closing, all executed documents will be sent to the VCPM for review and transmittal to safekeeping.

(2) The advisor will notify the VCPM of all subsequent drawdowns and provide wiring instructions a minimum of five business days prior to each drawdown date. Using the procedures described above, the SIC will instruct the fiscal agent bank to wire funds to the partnership in accordance with the STPF's investment obligation.

#### G. DISTRIBUTION MANAGEMENT PROCEDURES:

(1) The successful outcome of a venture capital investment program will be the distribution of cash and securities to the limited partners. The advisor will be responsible for returning, or directing the return of, all distributions, both cash and securities, to the STPF. As the partnership interests mature and distributions, or notices of distributions, are received, the advisor will notify the VCPM and the STPF's fiscal agent bank. For cash distributions, the advisor will insure that the proceeds are delivered directly by wire or check to the fiscal agent bank. The advisor will provide information as to the components of the cash distributions (i.e., return of principal, realized gains, and interest/dividend income). Securities will be delivered directly to the STPF's custodian bank. In some cases, partnerships will manage distributions through brokerage firms. In those cases, arrangements will be made by the advisor to transfer custody of the securities to the custodian bank. The advisor will contact the VCPM as necessary to obtain current delivery instructions.

(2) When stock distributions are received, the advisor's post-venture public stock managers will analyze the public companies and determine the optimal time to sell the stock. The advisor will advise the VCPM of the hold/sell recommendations, and act only as authorized by the VCPM. If stock under the advisor's control is sold, sales proceeds will be delivered to the fiscal agent bank as directed by the VCPM.

(3) Stocks distributed by venture capital partnerships may be restricted under the SEC's Rule 144 or under an underwriting lockup provision. The council will rely on the advisor, who has had significant experience in dealing with these issues and has personnel on its staff dedicated to the evaluation of these securities, to advise the SIC on the most prudent disposition in each case.

H. MONITORING PROCEDURES: The advisor will be responsible for monitoring the activities of all venture capital partnerships in the SIC portfolio. Specifically, the advisor will:

(1) attend annual meetings. As notices of meetings are received, the advisor will notify the VCPM in writing. The VCPM or other SIC representative(s) will attend these meetings when possible;

(2) review all amendments to the partnership agreements and forward to the SIC with recommendations for approval or disapproval;

(3) evaluate all partnership activities for compliance with partnership documents;

(4) serve on advisory boards on behalf of the council as appropriate;

(5) consolidate the partnership reports into uniform statements on a quarterly basis;

(6) measure and evaluate partnership return data;

(7) evaluate and manage the distributions of public stocks; and

(8) conduct periodic meetings with the general partners on an individual basis.

I. REPORTING PROCEDURES: The advisor's portfolio status and performance reports will be provided to the council staff on a quarterly basis. These reports will be sent within six weeks following each calendar quarter end. Verbal reports of valuations only are available on the fifth business day following the quarter end. The advisor's reports will be compiled from data in the quarterly statements received from the individual partnerships, which normally are received by the advisor from one to three months following the end of each partnership's fiscal quarter (which may also vary). Due to these delays, the performance reports received by the council staff will be dated four to five months following the end of the period the data covers. Since venture capital valuations are very imprecise and uncertain, this delay is not considered significant. These reports will summarize the status of the portfolio and each individual partnership with respect to total commitment, drawdowns, cost, valuations, distributions, total value and internal rate of return. A separate performance page will illustrate the returns of the partnerships listed in chronological order to provide a better perspective on the returns. The following regularly updated facts will then be reported for each partnership: client capital account information, ownership percentage, internal rate of return, a summary of terms, the names of the general partners, a listing of all investments (including those written off), and a distribution table. All return information will be calculated on a quarterly basis by the advisor. The returns are based on cash on cash [sic] plus adjusted residual value to the limited partner. This requires an accurate record of all distributions, a review of the portfolio company valuations for accuracy, an adjustment for the net unrealized gains on the general partners' carry, and an update on the public stocks, if any, for the quarter end value less appropriate discounts for trading (i.e. Rule 144) restrictions.

[Recompiled 10/1/01]

**2.60.20.9 NEW MEXICO VENTURE CAPITAL INVESTMENT PROGRAM (NMVCIP):**

**A. INTRODUCTION:**

(1) The 1990 New Mexico legislature passed an amendment (House Bill 140) to the original 1987 venture capital statute which created a New Mexico-oriented venture capital program, and authorized up to one-half percent of the severance tax permanent fund for potential investment in New Mexico based venture capital funds. This amended statute is contained in Section 7-27-5.15 NMSA 1978.

(2) This new program is the New Mexico venture capital investment program (NMVCIP) of the STPF, and is a differential rate program which was intended by the legislature to encourage development of a venture capital industry within the state. The NMVCIP has several provisions that differ from the original 1987 program (the venture capital investment program, or VCIP) contained in Section 7-27-5.6 NMSA 1978 and implemented by Section I [now 2.60.20.8 NMAC] of this Manual. These amended provisions are listed below under New Mexico venture capital fund requirements. The policies and procedures contained in Section I [now 2.60.20.8 NMAC] will also apply to NMVCIP investments except where changed in Section II [now 2.60.20.9 NMAC]. The NMVCIP investments are required to be prudent investments and are subject to the exercise of good business judgement by the VCIAC and state investment council. The sub-sections listed below will correspond by title to those in Section I [now 2.60.20.8 NMAC] and contain any changes applicable to the NMVCIP.

(3) It should be noted that a New Mexico venture capital fund could apply for investment consideration under either the VCIP or the NMVCIP.

**B. NEW MEXICO VENTURE CAPITAL FUND REQUIREMENTS:**

(1) New Mexico venture capital funds which wish to qualify under Section 7-27-5.15 NMSA 1978 must meet certain statutory requirements. Specifically, each New Mexico venture capital fund must be a limited partnership or corporation organized and operating in the United States and maintaining its principal active office in New Mexico that:

(a) has as its primary business activity the investment of funds in return for equity in businesses for the purpose of providing capital for start-up, expansion, new product development or similar business purposes;

(b) holds out the prospects for capital appreciation from such investments;

(c) has a minimum committed capital of \$1,250,000;

(d) has full-time management with at least three years of professional experience in assessing the growth prospects of businesses or evaluating business plans, and who has established permanent residency in the state;

(e) is committed to investing in New Mexico one hundred percent of the investment made by the state investment officer pursuant to this section in businesses with a principal place of business in the state and holds promise for attracting additional capital from individual or institutional investors nationwide to businesses in the state;

(f) accepts investments only from accredited investors as that term is defined in Section 2 of the Federal Securities Act of 1933, as amended, (15 U.S.C. Section 77(b)) and rules and regulations promulgated pursuant to that section; and

(g) receives at least forty percent of the fund's capital from institutional investors other than the state of New Mexico, which includes pension funds, insurance companies, corporations, trust funds, foundations, venture capital funds and financial institutions.

(2) If an investment is made under this section, not less than \$500,000 or more than \$3,000,000 may be invested in any one New Mexico venture capital fund, and such investment shall not exceed forty percent of the committed capital of that fund. Investments shall be made only in the initial offering of a New Mexico venture capital fund, provided that any investment may be made in one or more increments. The state investment officer is authorized to make investments pursuant to this section contingent upon a New Mexico venture capital fund securing paid-in investments from other accredited investors for the balance of the minimum committed capital of the fund.

(3) In making investments pursuant to this section, the council shall give consideration to investments in New Mexico venture capital funds whose investments enhance the economic development objectives of the state.

C. PROGRAM STRUCTURE: Total investment in the New Mexico venture capital investment program is limited to one-half percent of the book value of the STPF by Section 7-27-5.15.

D. DIVERSIFICATION: The general comments on diversification in Section I., Paragraph B. [now Subsection B of 2.60.20.8 NMAC] are also applicable to the New Mexico venture capital investment program. Proper diversification is the most basic and essential requirement of any prudent investment program, and in order to control risk adequately in the venture capital investment class (the riskiest of all major investment classes), the NMVCIP will be considered as one element in the overall VCIP for diversification purposes. Since some diversification parameters such as geography will be necessarily restricted by the in-state requirements of the NMVCIP, the remaining diversification parameters will become much more critical.

E. PARTNERSHIP GUIDELINES: The NMVCIP is restricted to funds that maintain their principal active office in New Mexico. In addition, each New Mexico fund selected under the NMVCIP for investment will be required to certify in the partnership documents that it will maintain its principal active office in the state for the life of the partnership.

F. PARTNERSHIP SELECTION CRITERIA:

(1) In addition to the basic statutory requirements listed under New Mexico venture capital fund requirements [now Subsection B of 2.60.2.9 Nmac] above, the committee seeks to prudently invest in New Mexico partnerships with at least the following characteristics:

- (a) partners that have significant venture capital experience;
- (b) partners that are well known to each other and have worked together as partners;
- (c) partners that have demonstrated successful investment performance records;
- (d) partners that have appropriate experience for the proposed industry focus of the fund;
- (e) partners that have appropriate experience for the proposed stage focus of the fund;
- (f) partners that are raising a fund that has a size consistent with their investment strategy and human resources capabilities;
- (g) partners that have the ability to source many of their own deals;
- (h) partners that have the time, experience and interpersonal skills to work effectively with their portfolio companies; and
- (i) partnerships in which the compensation plan for the general partners is fair, creates the proper incentives, and rewards the general partners for superior long-term performance.

(2) The primary goal of the committee's selection process will be to identify and invest in people that have the necessary experience to succeed in the New Mexico venture capital environment. This effort will be highly critical for the NMVCIP, since most venture capital investment opportunities in New Mexico will probably occur in early stage (seed/startup) high technology companies. These highly specialized investments are the riskiest in the venture capital universe. The partnership criteria listed above define the basic standards of prudence used by the venture capital industry in

evaluating venture capital fund investments. The same comments on the importance of selecting experienced and successful general partners expressed in Section I.C. above [now Subsection C of 2.60.20.8 NMAC] will apply to the NMVCIP, and will be even more critical in this New Mexico only program.

#### G. INVESTMENT DECISION PROCESS:

(1) The investment decision process will be essentially the same as that contained in Section I., Paragraph D. [now Subsection D of 2.60.20.8 NMAC]. The advisor will conduct a full evaluation on each New Mexico based fund applying for investment consideration under either the NMVCIP or the VCIP. The advisor will not reject any New Mexico funds without first consulting with the committee and investment office staff. The advisor will not be required to make any recommendations for or against investment on any New Mexico funds applying under the NMVCIP or the VCIP. A comprehensive evaluation report (investment memorandum) on each fund will be forwarded by the advisor to the VCPM when complete, and the fund proposal will be placed on the agenda for consideration by the committee at the next scheduled meeting. All New Mexico based funds will receive a complete hearing before the committee. The committee will make the investment decision using the advisor's investment memorandum as well as all other information available on each proposal.

(2) If a New Mexico based fund is recommended for investment by the committee and the investment is subsequently approved by the state investment council, the council, if so requested by that fund, may authorize the state investment officer to issue a contingent letter of commitment to that fund. The contingent letter of commitment will require that the fund obtain the balance of the required minimum committed capital prior to the commitment taking effect, and will contain a clause indicating that the council may cancel the contingent commitment at any time if there is any change in the circumstances that led to its issuance.

H. PARTNERSHIP DOCUMENTATION PROCEDURES: The advisor will process all NMVCIP partnership documents in exactly the same manner as outlined in Section I., Paragraph E [now Subsection E of 2.60.20.8 NMAC]. For NMVCIP proposals, the statutory reference will be Section 7-27-5.15 NMSA 1978.

I. CLOSING PROCEDURES: Closing procedures will be exactly as stated in Section I., Paragraph F [now Subsection F of 2.60.20.8 NMAC].

J. DISTRIBUTION MANAGEMENT PROCEDURES: Distribution management procedures will be exactly as stated in Section I., Paragraph G [now Subsection G of 2.60.20.8 NMAC].

K. MONITORING PROCEDURES: The advisor will be responsible for monitoring the activities of all NMVCIP partnerships in which investments are made in exactly the same manner as outlined in Section I., Paragraph H [now Subsection H of 2.60.20.8 NMAC].

L. REPORTING PROCEDURES: Reporting procedures will be exactly as stated in Section I., Paragraph I [now Subsection I of 2.60.20.8 NMAC].

M. CHANGES AND REVISIONS: This policy and procedures manual will be reviewed at least annually and revised as necessary.

[Recompiled 10/1/01]

## **PART 21: ADMINISTRATIVE PROCEDURES FOR NEW MEXICO FINANCIAL INSTITUTIONS APPLYING FOR DEPOSITS OF SEVERANCE TAX PERMANENT FUND**

### **2.60.21.1 ISSUING AGENCY:**

State Investment Council.

[Recompiled 10/1/01]

### **2.60.21.2 SCOPE:**

These regulations will apply to applications received by the state investment council from banks, savings and loan associations, and credit unions for all deposits, including reinvestment of existing deposits, deposits made in addition to existing deposits in an institution, and deposits made in institutions not previously having a deposit, of the severance tax permanent fund made after these regulations go into effect. The regulations in effect at the time existing deposits were made shall govern those certificates of deposit.

[Recompiled 10/1/01]

### **2.60.21.3 STATUTORY AUTHORITY:**

Pursuant to Sections 6-10-9, 6-10-35, and 7-27-5.2 [repealed] NMSA 1978, the state investment officer shall receive and review written applications from banks and savings and loan associations that wish to qualify as depositories of the severance tax permanent fund. The council is empowered by Sections 6-8-7 and 7-27-5.2(l) [repealed] NMSA 1978 to establish regulations pertaining to the nature, limitations, conditions, and restrictions of investments of the severance tax permanent fund and to devise regulations to address the investment, deposit and allocation of such funds invested under Section 7-27-5.2 [repealed]. The state investment officer is required by Section 6-8-7 to "formulate and recommend to the council for approval investment regulations or resolutions pertaining to the kind or nature of investments and limitations, conditions, and restrictions upon the methods, practices or procedures for investment, reinvestment, purchase, sale or exchange transactions which should govern the activities of the investment office." The council is required by Section 7-27-5.2(l)

[repealed] to "devise guidelines to cover the investment, deposit and allocation of funds, among institutions qualifying under this section, of the severance tax permanent fund."

[Recompiled 10/1/01]

**2.60.21.4 DURATION:**

Permanent.

[Recompiled 10/1/01]

**2.60.21.5 EFFECTIVE DATE:**

Filed June 6, 1988.

[Recompiled 10/1/01]

**2.60.21.6 OBJECTIVE:**

A. The purpose of these regulations is to exercise the council's rule making authority under Sections 6-8-7 and 7-27-5.2(I) [repealed] consistently with the requirements of 7-27-5.2 [repealed] and the overall investment standard governing the severance tax permanent fund and safety considerations imposed on the investment officer by Sections 6-8-7 and 7-27-5.2 [repealed]. These regulations define the procedure by which banks and savings and loan associations will apply for deposits of the severance tax permanent fund, the standards by which the state investment officer will evaluate such applications, the conditions applying to such applications, and the allocation of funds among depositories.

B. Credit unions may apply by filing an application form which may be obtained from the office of the state treasurer. This application will include either or both executed general fund or severance tax permanent fund depository agreements and the data required for the risk assessment report. The application is for both general fund and severance tax permanent fund deposits. Whether state funds deposited with the credit union will be severance tax permanent fund or general fund will depend on the term of the deposit and, of course, the availability of funds to be deposited. A credit union may not have state deposits in excess of \$100,000.

[Recompiled 10/1/01]

**2.60.21.7 DEFINITIONS:**

A. "Council" shall mean the state investment council.

B. "State funds" means funds of the severance tax permanent fund deposited pursuant to Sections 7-27-5 and 7-27-5.2 [repealed] NMSA 1978 (and known as the differential rate investments).

C. "Reinvestment of certificate of deposit" means the replacement upon maturity, of an existing deposit at the discretion of the investment officer acting in accordance with these regulations. For the purposes of these regulations, this will be considered the same as any other type of deposit except that the institution retains physical possession of the state funds rather than the funds being transferred from the state to the institution.

#### D. FOR BANKS

(1) "CLASS A" means a bank which meets all of the following financial conditions:

(a) a primary capital to asset ratio (as defined by the FDIC) of 6 percent or greater.

(b) a net income (current quarter plus previous three quarters after taxes) to average asset ratio of .61 percent or greater;

(c) a ratio of non-performing loans (defined as loans which are at least 90 days past due) to primary capital ratio of 34.9 percent or less.

(d) Failure of a bank to meet any one of these ratios automatically results in reclassification into the next lower financial class.

(2) "CLASS B" means a bank which meets all of the following financial conditions:

(a) a primary capital to asset ratio (as defined by the FDIC) of at least 5 percent.

(b) a net income (current quarter plus previous three quarters after taxes) to average asset ratio of at least .51 percent;

(c) a ratio of non-performing loans (defined as loans which are at least 90 days past due) to the bank's primary capital of no more than 49.9 percent.

(d) Failure of a bank to meet any one of these ratios automatically results in reclassification into the next lower financial class.

(3) "CLASS C" means a bank with any one of the following financial conditions:

(a) a primary capital to asset ratio (as defined by the FDIC) of less than 5 percent.

(b) a net income (current quarter plus previous three quarters after taxes) to average asset ratio less than .51 percent;

(c) a ratio of non-performing loans (defined as loans which are at least 90 days past due) to the bank's primary capital of greater than 49.9 percent.

(4) "CLASS D" means a bank with any two of the following financial conditions:

(a) a primary capital to asset ratio (as defined by the FDIC) of less than 2 1/2 percent.

(b) a net income (current quarter plus previous three quarters after taxes) to average asset ratio of less than .10 percent;

(c) a ratio of non-performing loans to the bank's primary capital of greater than 67 percent, two quarters in a row during the past 12 months.

#### E. FOR SAVINGS AND LOAN ASSOCIATIONS:

(1) "CLASS A" means a savings and loan association which meets all of the following conditions:

(a) a regulatory net worth to average asset ratio (as contained in the FHLB quarterly report) of 3 percent or greater;

(b) a ratio of the institutions' four quarter net income (before or after taxes, whichever is greater, and determined by computing all four quarters on a consistent basis of either "before taxes" or "after taxes") to its total average assets of .30 percent or greater.

(c) Failure of a savings and loan association to meet any one of these financial conditions automatically results in reclassification into the next lower financial class.

(2) "CLASS B" means a savings and loan association with all of the following conditions:

(a) a regulatory net worth to average asset ratio (as contained in the FHLB quarterly report) of at least 2 percent;

(b) a ratio of the institutions' four quarter net income (before or after taxes, whichever is greater, and determined by computing all four quarters on a consistent

basis of either "before taxes" or "after taxes") to its total average assets of at least .2 percent.

(c) Failure of a savings and loan association to meet any one of these financial conditions automatically results in reclassification into the next lower financial class.

(3) "CLASS C" means a savings and loan association with any one or more of the following financial conditions:

(a) a regulatory net worth to average asset ratio (as contained in the FHLB quarterly report) of less than 2 percent;

(b) a ratio of the institutions' four quarter net income (before or after taxes, whichever is greater, and determined by computing all four quarters on a consistent basis of either "before taxes" or "after taxes") to its total average assets of less than .20 percent.

(c) Failure of a savings and loan association to meet any one of these financial conditions automatically results in reclassification into the next lower financial class.

(4) "CLASS D" means a savings and loan association with both of the following financial conditions:

(a) a regulatory net worth to average asset ratio (as contained in the FHLB quarterly report) of less than 1 percent;

(b) A ratio of the institutions' four quarter net income (before or after taxes, whichever is greater, and determined by computing all four quarters on a consistent basis of either "before taxes" or "after taxes") to its total average assets of less than .10 percent.

[Recompiled 10/1/01]

## **2.60.21.8 APPLICATION PROCESS:**

All New Mexico banks and savings and loan associations, desiring to receive deposits of the severance tax permanent fund pursuant to Sections 7-27-5 and 7-27-5.2 [repealed] NMSA 1978, as amended, including those institutions requesting reinvestments of certificates of deposit, shall make written application to the state investment officer as follows:

A. The application shall state the amount desired, the amount (if any) already on deposit under the severance tax permanent fund certificate of deposit program, and the

percentage of state funds that will be deposited with that financial institution if the application is granted.

B. The application shall include a current financial statement of the institution.

C. The application shall state the financial institution's agreement to pay interest on the deposits in accordance with the interest rate policy set by the council under Section 7-27-5.2(A) [repealed] or Section 7-27-5.2(B) [repealed], to calculate all interest daily on a 365 day basis, and to make interest payments (accruing from the previous month) to the council upon the first day of the next following month.

D. The application shall state the conditions or penalties for early withdrawal that will be incorporated into the certificate of deposit documents that the financial institution will issue to the council.

E. The application shall state whether the request is for new deposits or for reinvestment of certificates of deposit made pursuant to Section 7-27-5.2(A) [repealed] or 7-27-5.2(B) [repealed], and shall describe the collateral that will be pledged to secure the deposits of state funds.

F. The application shall state the name of the bank or banks and/or savings and loan association or associations that the state treasurer's office has designated to act as the state's agent or agents in performing custodial functions with respect to pledged collateral and which the applicant plans to utilize.

[Recompiled 10/1/01]

## **2.60.21.9 INVESTMENT MANAGEMENT POLICY:**

The investment officer shall rule on applications and make funds available to all financial institutions in accordance with the applicable statutes and the investment criteria outlined below.

### **A. GENERAL STANDARDS GOVERNING APPLICATIONS:**

(1) The applicant and the custodian or custodians designated by the state treasurer will have executed the form depository and custodial agreements for the severance tax permanent fund. The forms will then be approved and accepted by the state investment officer.

(2) The application shall comply with the fund limitations promulgated by statute and by the regulations of the council. In addition, the total deposits of state funds in a class C or class D institution shall not exceed 100 percent of net worth or primary capital.

(3) The rate of interest on all certificates of deposit shall be set at a market rate or 50 basis points over the bond equivalent yield of U.S. treasury securities of comparable maturity, whichever is greater. The treasury bonds, notes and bills section in the Wall Street Journal on the day the rate is set will be used as the reference. The state investment council will continuously monitor the interest rate and amend it as necessary.

(4) The exact maturity will be set by the state investment officer based on the cash management needs of the fund and on an analysis of risk versus maturity.

(5) The size of the certificate or certificates of deposit in each financial institution will be determined by the state investment officer in accordance with Section VI of these regulations [now Section 2.60.21.10 NMAC].

(6) If the terms of the deposit are not acceptable to the financial institution, then the institution retains the right to reject the deposit.

(7) The investment officer shall not invest in any certificate or certificates of deposit which contain early withdrawal penalties in excess of the minimum penalty required by federal laws.

(8) When deposits are cashed in or withdrawn, the certificate of deposit document(s) will be released from the fiscal agent in accordance with delivery instructions provided by the financial institution, but only after the state treasurer's office, state investment council or state investment officer takes physical receipt of all principal and interest due or owing to the state.

(9) The investment meets the asset allocation policy of these regulations;

(10) Granting the application is not in violation of applicable state law, these regulations, and/or other applicable regulations.

#### B. MATURITIES AND QUALIFYING FINANCIAL CONDITIONS:

(1) When state funds are deposited under the severance tax permanent fund certificate of deposit program, the maturity is not to exceed eight years in a class A bank or savings and loan association, and shall not exceed four years in a class B bank or savings and loan association. The state investment officer has full discretion in setting maturities. Class C and D institutions are not qualified for additional deposits, above and beyond existing deposits, and may or may not have existing deposits reinvested, as determined by the state investment officer pursuant to the rules and regulations governing such situations.

(2) When deposits mature in class C and class D institutions, the reinvestment of a certificate of deposit is limited to the amount of the pre-existing deposit. In this event, the maturities shall not exceed one year in the case of a class C

bank or savings and loan association. In the case of a class D bank or savings and loan association, the deposit may be reinvested for a period not to exceed one month at the discretion of the state investment officer, and then only if needed to preserve the corpus of the deposit, or, secondarily, to prevent premature failure of the institution.

[Recompiled 10/1/01]

#### **2.60.21.10 ASSET ALLOCATION:**

The funds available for investment in the certificate of deposit program will be allocated in accordance with the following criteria:

A. In order to have reasonable diversification as required by Section 6-8-7, economic stimulation as required by Section 7-27-5, and protection of the corpus as required by statutes referenced in Section I [now Section 2.60.21.3 NMAC] of these procedures, no more than 10 percent of the total amount required to be available for investment pursuant to Section 7-27-5.2 [repealed], 7-27-5.3, 7-27-5.4 and 7-27-5.5 in certificates of deposit may be invested at any one institution. If deposits in an institution exceed 10 percent of the severance tax permanent fund certificate of deposit investments on the effective date of these regulations, then deposits at that bank or savings and loan shall not be reinvested until the total amount of deposits are brought to or below 10 percent of the total investment in certificates of deposit or alternately, according to a plan approved by the council for a specific institution to come into compliance with these regulations.

B. No deposit is to be made that causes the financial institution to exceed the fund limitations in Section 7-27-5.2(G) [repealed] NMSA 1978, or in Section VI A [now Subsection A of 2.60.21.10 NMAC] of these rules. In addition, the total deposits in a class C or class D institution shall not exceed 100 percent of regulatory net worth or primary capital.

C. The first priority shall be to replace on maturity existing deposits of class A and class B institutions in such amounts and for such maturities as are appropriate. Reinvestment of certificates of deposits at class C institutions will be allowed secondarily.

D. For new deposits, eligible class A and class B institutions with no severance tax permanent fund deposits will have priority over other financial institutions.

E. If the demand is greater than the amount available for investment, the investment officer is directed to give priority to class A institutions, except as noted in Item D [now Subsection D of 2.60.21.10 NMAC] above.

F. If the demand by eligible class A institutions is greater than the amount available for investment, then the investment officer is directed to distribute the funds in such a manner as to promote both geographic and economic diversification around the state.

G. The distinction as to whether an institution is a bank or savings and loan is not to be considered in the allocation of state funds.

H. \$2,000,000 of the total state funds allocated for investment in certificates of deposit will be made available for deposits with credit unions. At no time is the deposit in a credit union to exceed the amount of insurance on the deposit.

I. The investment officer may disqualify any institution from receiving new deposits or reinvestments of certificates of deposits if that institution does not comply with the requirements promulgated by the council and/or dictated by other pertinent statutes.

J. If an institution believes that exceptional circumstances exist that indicate it would not be appropriate for the investment officer to take any of the actions listed above, the institution shall appear at a meeting of the state investment council to present its position. The council may at that time vote on whether an exception to the policy should be allowed, or it may continue the issue in order to take further evidence, testimony or advice. In order to be placed on the council's agenda, the institution shall submit a written request stating its position to the investment office at least 10 calendar days prior to the meeting, including a bill of particulars, copies of any statutes or cases it intends to use in its presentation as well as a list of names, titles, business addresses and phone numbers of anyone whose testimony it deems necessary.

K. If at any time a financial institution is not in compliance with council regulations, the state investment officer will be responsible for establishing a plan to bring the financial institution into compliance.

L. If after all requests for deposits of state funds are honored in accordance with these regulations and applicable state law, the total funds on deposit at all institutions are less than the legislated floor, those institutions that qualify for additional deposits will be notified, either individually or through their associations, of the availability of state funds for deposit, and will be encouraged to accept such deposits.

[Recompiled 10/1/01]

## **PART 22: REGULATIONS GOVERNING THE INVESTMENT OF THE SEVERANCE TAX PERMANENT FUND IN OIL AND GAS PARTICIPATIONS**

### **2.60.22.1 ISSUING AGENCY:**

State Investment Council.

[Recompiled 10/1/01]

### **2.60.22.2 SCOPE:**

**[RESERVED]**

[Recompiled 10/1/01]

**2.60.22.3 STATUTORY AUTHORITY:**

A. Pursuant to Section 7-27-5.7 NMSA 1978 the severance tax permanent fund may be invested in notes, obligations and mortgages held by banks and savings and loan associations which represent loans by such financial institutions upon the production potential of new oil and gas wells that have been drilled in New Mexico when such investments are recommended by the oil and gas production assistance council. The principal amount of such notes, obligations or mortgages purchased in any twelve month period may not exceed fifty million dollars and the total aggregate amount of purchases outstanding at any one time shall not exceed three hundred million dollars or ten percent of the book value of the fund, which ever is less.

B. The state investment council is required under Section 7-27-5.7 NMSA 1978 Subsection B,C,E to adopt regulations to provide for the terms and conditions for participation in the investment, to set limits on fees to be charged by the state and lending institutions and to determine the effective yield on investments at or not more than one percent below market rate but in no case less than seven percent. The purpose of these regulations is to implement the legislation.

[Recompiled 10/1/01]

**2.60.22.4 DURATION:**

**[RESERVED]**

[Recompiled 10/1/01]

**2.60.22.5 EFFECTIVE DATE:**

[Filed July 12, 1989.]

[Recompiled 10/1/01]

**2.60.22.6 OBJECTIVE:**

The purpose of this investment program is to provide a mechanism to encourage private New Mexico financial lending agencies to make loans to qualified oil and gas producers to initiate the drilling of and enhance the production from new oil and gas wells in the state and thereby promote the economic welfare of New Mexico.

[Recompiled 10/1/01]

#### **2.60.22.7 DEFINITIONS:**

A. "Lender" shall mean a New Mexico bank or savings and loan which has made loans based upon the production potential of new oil and gas wells drilled in New Mexico and desires to sell a participation in the notes, obligation of mortgages to the severance tax permanent fund.

B. "OGPAC" shall mean the oil and gas production assistance council as created in Section 7-27-5.12 NMSA 1978.

C. "Production potential" of new oil and gas well(s) means the calculated fair market value of potential production of oil and gas reserves in New Mexico as determined by a qualified professional engineer based on evaluation of proven reserves.

D. "SIC" shall mean the state investment council.

[Recompiled 10/1/01]

#### **2.60.22.8 INVESTMENT MANAGEMENT POLICY:**

The state investment officer may invest the severance tax permanent fund in participations up to but not to exceed 80 percent of the outstanding funded principal balance at the time of purchase, of loans made on the production potential of new oil and gas wells drilled in New Mexico when the proceeds of such loans are used solely to drill and complete new oil and gas wells in New Mexico. Such investments must be made in accordance with applicable statutes and the requirements outlined below.

A. All investments must be recommended by the OGPAC before the purchase of the participation can be made.

B. The term of the investment may not exceed five years and the maximum individual loan participation purchased shall not exceed five million dollars nor shall more than five million dollars be loaned to one individual except with the approval of the state investment officer and the SIC after considering the diversification of funds among borrowers.

C. The effective yield on the investment to the state excluding servicing fees shall not be more than one percent below market rate. The market rate shall be determined by taking the chase prime rate plus one percent or the lender's rate for the loan whichever is greater. Any service fees would then be added.

D. The servicing fee to the lender for servicing the loan shall not exceed one half of one percent per year of the unpaid principal balance of the loan. This does not include origination fees, legal fees or documentation costs which shall be passed on to the bank or borrower at cost.

E. The lender must complete and sign a participation agreement in the form approved by the state's attorney general and submit all information required in the application.

F. The SIC or the OGPAC may hire a consulting professional engineer *and* or oil and gas attorney to do reasonable work reviewing the loan, the cost of which will be paid for by the borrower.

G. The loan must be secured by a first mortgage and/or a first lien against the new oil and gas wells and the potential production of the wells, assignment or control of purchaser payments for production from the new wells and any other source to the borrower sufficient to repay the loan and assignment and control of any other collateral required by the OGPAC or SIC. Evidence of title to collateral must include a title binder or attorney's title opinion. The original loan may not exceed fifty percent of the appraised or fair market value of the pledged collateral or ninety percent of the present value of the discounted cashflow of the borrowers production interest in the new and other wells securing the loan over a five year period. The cashflow shall be discounted using the discount rate required by the securities and exchange commission for similar transactions. At the lender's recommendation, if the loan is to a partnership or single individual, life insurance may be required for the value of the loan as well as personal guarantees where appropriate. The participation agreement with the lender must include a due on sale clause.

H. The purchasers of production from the well(s) will specify on their division order, or other internal payment control document, that the borrowers percentage of production from the well (identified as net recoverable income (NRI) from the well payable to the borrower, after deduction of royalties or overriding royalties, severance taxes and operators payments) be paid directly to the lender. Upon receipt of such payment, the lender will retain the amount currently due, or overdue, in monthly payments on the loan and will forward the state's participation payment as required in the servicing agreement between the lender and the SIC and the balance of the payments will be immediately forwarded to the borrower or distributed as otherwise directed by the borrower.

I. The lender and the borrower shall provide a statement of the purpose of the loan and prior to release of any funds by the state investment office provide copies of the approved application for permit to drill (APD) and the authority for expenditure (AFE).

J. The borrower must agree to provide at least annually to the SIC, a current certified financial statement and, if requested, to submit new engineering reports throughout the life of the loan.

[Recompiled 10/1/01]

## **2.60.22.9 APPLICATION PROCESS:**

New Mexico banks and savings and loan associations desiring to sell a participation interest in a loan based on the production potential of new oil and gas wells to the severance tax permanent fund may do so by submitting a request in writing to the state investment officer providing the following:

A. a description of the loan and the purpose of the loan made by the financial institution which has been reviewed and approved in accordance with the financial institutions loan review procedures;

B. a signed loan participation agreement on a form approved by the attorney general;

C. the borrower's loan application and all loan documentation;

D. the borrower's business experience with respect to the production of oil and gas, including a resume of the experience and qualifications of the applicant in regard to oil and gas exploration, field development and production;

E. the borrower's financial condition including a certified income statement and balance sheet, a description of all current debts, liens, encumbrances or other financial obligations and other relevant financial information;

F. an engineering report prepared by a licensed professional petroleum engineer detailing cashflows and evidence including geological tests of the production potential of the new well(s);

G. a copy of the loan agreement, the original note and the mortgage securing the loan, documents evidencing all overriding royalties, percentage working interests, and net recoverable income to be utilized to make monthly payments, a legal description of any additional collateral to be provided, and a copy of the title binder or attorney's title opinion;

H. all necessary draft documents evidencing the assignment by the borrower of all payments and collateral to the SIC and agreements subordinating any lienholders interest to the SIC; fully executed and recorded originals of these documents will be provided to the SIC prior to completing the investment.

I. copies of the approved APD and AFE; Both must be received before funds are dispersed.

J. a statement of the estimated economic impact upon the New Mexico economy as a result of the proposed drilling and production activity including estimates of jobs to be created, effect on service industries, and the market demand for crude oil, oil products and for natural gas;

K. The request and the documentation as well as any additional supplementary information will be submitted to the OGPAC. The OGPAC shall review each request for the investment of the severance tax permanent fund in the loan participation within thirty days of receipt of all completed documentation and shall recommend to the state investment officer whether the participation should be purchased. After a favorable recommendation by the OGPAC the proposal and all documents will be subject to approval as to legal form and sufficiency by the New Mexico attorney general and approval of the state investment officer before the investment will be made.

[Recompiled 10/1/01]

## **PART 23: RULES AND REGULATIONS OF THE NEW MEXICO STATE INVESTMENT COUNCIL PERTAINING TO THE SEVERANCE TAX PERMANENT FUND SINGLE FAMILY**

### **2.60.23.1 ISSUING AGENCY:**

State Investment Council.

[Recompiled 10/1/01]

### **2.60.23.2 SCOPE:**

**[RESERVED]**

[Recompiled 10/1/01]

### **2.60.23.3 STATUTORY AUTHORITY:**

These council rules and regulations are issued under and pursuant to Section 10 of Chapter 306 of the Laws of 1983 of the state of New Mexico, being Section 7-27-5.3 NMSA 1978, (the "Pass-through Securities Investment Act"). These rules and regulations apply to the purchase of the conventional mortgage pass-through certificate in the original amount of up to \$87,000,000 authorized by the council by letter of August 29, 1984 or later. The council's rule 83-1 [repealed] continues to apply to the purchase of the conventional mortgage pass-through certificate, in the amount of up to \$100,000,000 previously authorized by the council.

[Recompiled 10/1/01]

### **2.60.23.4 DURATION:**

Permanent.

[Recompiled 10/1/01]

#### **2.60.23.5 EFFECTIVE DATE:**

Filed August 31, 1984.

[Recompiled 10/1/01]

#### **2.60.23.6 OBJECTIVE:**

These council rules and regulations are established to effectuate, and shall be applied so as to accomplish, the general purposes of the Pass-through Securities Investment Act and the following specific objectives:

- A. the expansion of the supply of funds in the state available for new residential mortgages;
- B. promotion of the economic well-being of the state through increased construction and opportunity for employment;
- C. the regulation by the council of the authority and the mortgage lenders participating in the STM program;
- D. the establishment of guidelines by the council for mortgage loans eligible for inclusion in the mortgage pass-through security; and
- E. the determination of the yield required to be paid on the mortgage pass-through security pursuant to the Pass-through Securities Investment Act.

[Recompiled 10/1/01]

#### **2.60.23.7 DEFINITIONS:**

The following words and terms as used in these council rules and regulations shall have the following meanings.

- A. "Application" shall mean an application to sell mortgage loans filed by a mortgage lender with the authority in response to an invitation.
- B. "Authority" shall mean the New Mexico mortgage finance authority, created by the New Mexico Mortgage Finance Authority Act.
- C. "Authority rules and regulations" shall mean the rules and regulations issued by the authority under and pursuant to the Mortgage Finance Authority Act, Section 58-18-1, *et seq.*, NMSA 1978, as amended.

D. "Condominiums" shall mean real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership, as an undivided interest, solely by the owners of those portions.

E. "Conventional mortgage" shall mean a mortgage loan which is not guaranteed by the VA or insured by the FHA or the FmHA.

F. "Council" shall mean the state investment council of the state acting in connection with the investment of the state's severance tax permanent fund.

G. "Council rules and regulations" shall mean these rules and regulations issued by the council under and pursuant to Section 10 of Chapter 306 of the Laws of 1983 of the state of New Mexico, being Section 7-27-5.3 NMSA 1978 (the "Pass-through Securities Investment Act").

H. "Eligible assumptor" shall mean a person who meets, at the time the application for assumption of loan is made, the definition of an eligible mortgagor, and who intends to occupy the single family residence purchased as his or her principal residence within 30 days after the closing of the assumption.

I. "Eligible mortgagor" shall mean a person who is over the age of 18 and a domiciliary of the state, who meets the credit standards set forth in the guide for servicers.

J. "Family" shall mean a person or a group of persons, at least one of whom shall be an eligible mortgagor, consisting of, but not limited to, the head of a household, the spouse, if any, and children, if any, who are allowable as personal exemptions for federal income tax purposes.

K. "FDIC" shall mean the federal deposit insurance corporation.

L. "FHA" shall mean the federal housing administration.

M. "FmHA" shall mean the farmers home administration.

N. "FMNA" shall mean the federal national mortgage association.

O. "FSLIC" shall mean the federal savings and loan insurance corporation.

P. "Guide for servicers" shall mean the authority's STM program guide for seller/servicers, as it may be modified from time to time by the authority.

Q. "Invitation" shall mean the authority's then current invitation to mortgage lenders for applications to sell mortgage loans to the authority pursuant to the STM program.

R. "Manufactured housing" shall mean a modular or pre-manufactured home, built to uniform building code standards, which is designed to be and, prior to the closing of a mortgage loan on the home, is, permanently affixed to real property.

S. "Mobile home" shall mean a moveable or portable housing structure, constructed to be towed on its own chassis and designed so as to be installed with or without a permanent foundation for occupancy as a residence and which is not manufactured housing.

T. "Mortgage" shall mean a mortgage, mortgage deed, deed of trust or other instrument creating a first lien on a fee interest in real property located within the state.

U. "Mortgage lender" shall mean any bank, bank or trust company, trust company, mortgage company, mortgage banker, national banking association, savings bank, savings and loan association, building and loan association and any other lending institution which meets the requirements set forth in Section 4 [now Section 2.60.23.8 NMAC] of the council rules and regulations.

V. "Mortgage loan" shall mean a conventional loan:

- (1) secured by a mortgage,
  - (2) made to an eligible mortgagor to finance the acquisition, construction or rehabilitation of an owner-occupied single family residence in the state;
  - (3) the commitment for which was made by the mortgage lender after the date of submission by the mortgage lender of its application; and
  - (4) which meets the underwriting standards set forth in the guide for servicers.
- A mortgage loan shall not include a loan the proceeds of which are used, directly or indirectly, to refinance an existing mortgage loan or loans for the present mortgagor, unless the primary purpose of such mortgage loan is to finance the rehabilitation of such single family residence.

W. "Mortgage pass-through security" shall mean a security issued by the authority in connection with the STM program representing an undivided interest in a pool of mortgage loans purchased by the authority pursuant to a notice of acceptance conforming to the requirements of the Pass-through Securities Investment Act.

X. "NCUAB" shall mean the national credit union administration board.

Y. "New construction" shall mean a single family residence that has not been previously occupied.

Z. "Notice of acceptance" shall mean the authority's notice to the mortgage lender of the acceptance of its application.

AA. "Owner-occupied" shall mean that the eligible mortgagor or the eligible assumptor must occupy the single family residence upon which a mortgage loan is made at the time the mortgage loan is closed or assumed.

BB. "Pass-through Securities Investment Act" shall mean Section 10 of Chapter 306 of the Laws of 1983 (being Section 7-27-5.3 NMSA 1978).

CC. "PUD-unit" shall mean a residential unit within a real estate development of separately owned lots with contiguous or noncontiguous areas or facilities usually owned by an owners' association in which the owners of the lots have a stock or membership interest, title to the real estate under the dwelling units being held by the association, and membership in the owners' association may not be severed from the ownership of individual units.

DD. "Rehabilitation" shall mean substantial renovation or reconstruction, including an increase of living area, of an existing single family residence, for example, to put such residence in a decent, safe and sanitary condition or to cause such single family residence to comply with applicable building codes, and shall not include routine or ordinary repairs, improvements or maintenance, such as interior decorating, remodeling or exterior painting, except in conjunction with other substantial renovation or reconstruction.

EE. "Residential use" shall mean that the structure is designed primarily for use as the principal residence of the occupant and shall exclude vacation or "second" homes. Portions of the structure designed or used for nonresidential purposes shall not exceed ten percent of the usable square feet of the structure.

FF. "Seller" shall mean the immediate past owner of the single family residence.

GG. "Severance tax permanent fund" shall mean the fund created pursuant to Section 7-27-3 NMSA 1978.

HH. "Single family residence" shall mean real estate or an interest therein in the state upon which is located or is to be constructed or located a structure or structures designed for residential use and consisting of a residence for one family, provided that the owner or owners of such structure or structures occupy such residence as their principal residence, and includes a condominium unit or units.

II. "State" shall mean the state of New Mexico.

JJ. "STM program" shall mean the severance tax permanent fund single family mortgage pooling program.

KK. "VA" shall mean the veterans' administration.

LL. "Zero lot line homes" shall mean a series of individual residences having architectural unity and a common wall within each unit.

[Recompiled 10/1/01]

#### **2.60.23.8 REQUIREMENTS FOR MORTGAGE LENDERS:**

A mortgage lender which desires to participate in the STM program shall meet the following criteria:

A. If a commercial bank, its deposits must be insured by FDIC; if a savings institution, its deposits must be insured by FSLIC; and if a credit union, its deposits must be insured by NCUAB.

B. A mortgage lender must be approved by the FHA and VA to make FHA or VA loans.

C. A mortgage lender must demonstrate experience or expertise as determined by the authority in selling mortgage loans in the secondary market.

D. A mortgage lender must have a net worth of at least \$250,000; and

E. A mortgage lender originating mortgage loans for the STM program must have its principal office in the state, and be authorized to initiate mortgages in the state.

[Recompiled 10/1/01]

#### **2.60.23.9 ALLOCATION OF FUNDS TO MORTGAGE LENDERS:**

A. Funds available to the authority by reason of the sale of its mortgage pass-through securities shall be allocated by the authority based upon instructions from the council among eligible mortgage lenders submitting applications. The allocation shall be based on the following criteria:

(1) the financial condition of the mortgage lenders submitting applications;

(2) the amount of residential mortgage loans made in the state by each mortgage lender submitting applications during a 24-month period preceding the date of the application;

(3) the aggregate principal balances of mortgage loans offered for sale by each mortgage lender compared with the aggregate principal balances of mortgage loans offered for sale by all mortgage lenders;

(4) the aggregate principal balances of mortgage loans for new construction offered for sale by each mortgage lender compared with the aggregate principal

balances of mortgage loans for new construction offered for sale by all mortgage lenders;

(5) the authority's assessment of the ability of the mortgage lender or its designated servicer to act as servicer of mortgage loans to be sold to the authority based upon, among other things, the experience of the mortgage lender or its designated servicer in the secondary mortgage market;

(6) equitable geographic distribution of the funds throughout the state, with an emphasis on broad geographic locations served;

(7) the mortgage lenders' abilities to deliver allocations, evaluated on the basis of prior performance in the STM program; and

(8) the minimum allocation to any mortgage lender shall be \$500,000.

B. The council, or its designee, shall instruct the authority as to specific allocations of funds to individual mortgage lenders. These specific allocations shall be based upon the applications submitted by mortgage lenders, as well as other information available to the council and the authority which is pertinent to the criteria set forth in this section. Allocations of funds by the council and authority shall be conclusive.

[Recompiled 10/1/01]

#### **2.60.23.10 OBLIGATIONS OF THE AUTHORITY:**

With respect to the STM program, the authority shall comply with the requirements set forth in this section as well as any other requirements which may be adopted from time to time by the council to ensure the continuity and efficacy of the STM program. The authority shall, through regulation or some other means:

A. provide that at least 60 percent of the initial aggregate principal balances are earmarked for mortgage loans for new construction and the authority may not accept deliveries from mortgage lenders of mortgage loans not for new construction in excess of 40 percent of the total aggregate allocations; prior to the time that mortgage lenders deliver the entire total allocation, the issuance by the authority of the mortgage pass-through security, and the purchase of such security by the council, consisting of the mortgage loans already delivered, will comply with the requirements of the Pass-through Securities Investment Act;

B. provide that a fixed limit will be set on any pre-arranged commitments for new construction by mortgage lenders to builders or developers;

C. maintain a permanent manned office in New Mexico;

D. provide that interest rate subsidy plans be limited to buydowns and pledged accounts during the first three years of the mortgage loan;

E. provide that re-financings of an existing mortgage loan or loans for the present mortgagor shall not be included in the STM Program, except in the case of a rehabilitation of a single family residence, or to replace construction or bridge financing;

F. provide that no loans on mobile homes may be purchased by mortgage lenders for sale to the authority, however the authority may consider purchasing mortgage loans on manufactured housing;

G. provide that no more than 50 percent of the aggregate value of the mortgage loans may be on condominiums, PUD-units and zero lot line homes;

H. provide that each mortgage loan to be included in the mortgage pass-through security be made on an owner-occupied single family residence;

I. provide that all mortgage loans issued pursuant to the STM program shall be sold to the authority within nine months of receipt by the mortgage lender of notice of acceptance from the authority.

[Recompiled 10/1/01]

## **2.60.23.11 REQUIREMENTS FOR MORTGAGE LOANS:**

All mortgage loans which are included in any mortgage pass-through security purchased by the council shall contain the following minimum criteria:

A. be originated by a qualified mortgage lender;

B. be secured by a single family residence;

C. be a conventional mortgage;

D. have a maximum term which shall not be greater than thirty years and a minimum term which shall not be less than twenty years;

E. be made to an eligible mortgagor;

F. contain no prepayment penalties;

G. be freely assumable by an eligible assumptor, if the single family residence will be owner-occupied after assumption;

H. not exceed the dollar limit for FNMA approved mortgages, as in effect at the time the loans are originated;

I. have a maximum loan-to-value ratio of 80 percent, however mortgage loans with loan-to-value ratios of up to and including 95 percent may be considered for inclusion if such mortgage loans are subject to primary mortgage insurance in an amount sufficient to provide that the uninsured portion of the mortgage loan does not exceed 72 percent of the value of the property;

J. permit the mortgage lender to charge, as an origination fee, no more than 2 percent of the amount of the mortgage loan, to be allocated between the eligible mortgagor and the seller; and

K. such other requirements that an independent nationally recognized bond rating service would require to give a security purchased under the "Pass-through Securities Investment Act" a AA rating or higher.

[Recompiled 10/1/01]

#### **2.60.23.12 FEES AND CHARGES:**

A. A commitment fee or fees shall be established and collected by the authority from each mortgage lender filing an application in such amount or amounts as the authority may deem appropriate. A portion of the commitment fee shall be non-refundable. The commitment fee or fees may be used for, among other purposes, reimbursing the authority for all or part of its reasonably-expected administrative costs of issuing the mortgage pass-through securities and of administering the STM program.

B. The authority may retain the difference between the interest rate on the mortgage loan and the face rate of the mortgage pass-through security to be purchased by the council, as established by the purchase agreement between the council and the authority, for its reasonably expected costs of acting as the master servicer for the mortgage pass-through security and to compensate lending institutions which act as sub-servicing agents of the authority.

C. The authority may establish such other charges, premiums and penalties as it shall deem to be necessary in connection with the administration of the STM program.

[Recompiled 10/1/01]

#### **2.60.23.13 YIELD TO SEVERANCE TAX PERMANENT FUND:**

The yield to the severance tax permanent fund on the mortgage pass-through security purchased by the council pursuant to the provisions of the pass-through securities investment act shall be set from time to time by the council in accordance with the Pass-Through Securities Investment Act.

[Recompiled 10/1/01]

#### **2.60.23.14 AMENDMENT OF COUNCIL RULES AND REGULATIONS:**

The council rules and regulations may be amended by the council at any time and from time to time.

[Recompiled 10/1/01]

### **PART 24: RULES AND REGULATIONS OF THE NEW MEXICO STATE INVESTMENT COUNCIL PERTAINING TO THE THIRD SEVERENCE TAX PERMANENT FUND SINGLE**

#### **2.60.24.1 ISSUING AGENCY:**

State Investment Council.

[Recompiled 10/1/01]

#### **2.60.24.2 SCOPE:**

These rules and regulations apply to the purchase of the conventional mortgage pass-through certificates in the original amount of up to \$87,000,000, reduced by the principal amount of the certificate authorized by and delivered pursuant to the council's rule 84-1 [now 2.60.23 NMAC] and by letter agreement of August 29, 1984, as amended. The council's rule 84-1 [now 2.60.23 NMAC] continues to apply to the purchase of the conventional mortgage pass-through certificate, in the amount of up to \$87,000,000 which was previously authorized by the council.

[Recompiled 10/1/01]

#### **2.60.24.3 STATUTORY AUTHORITY:**

These council rules and regulations are issued under and pursuant to Section 10 of Chapter 306 of the Laws of 1983 of the state of New Mexico, being Section 7-27-5.3 NMSA 1978, (the "Pass-through Securities Investment Act").

[Recompiled 10/1/01]

#### **2.60.24.4 DURATION:**

**[RESERVED]**

[Recompiled 10/1/01]

#### **2.60.24.5 EFFECTIVE DATE:**

[Filed March 28, 1985]

[Recompiled 10/1/01]

**2.60.24.6 OBJECTIVE:**

These council rules and regulations are established to effectuate, and shall be applied so as to accomplish, the general purposes of the Pass-through Securities Investment Act and the following specific objectives:

- A. the expansion of the supply of funds in the state available for new residential mortgages;
- B. promotion of the economic well-being of the state through increased construction and opportunity for employment;
- C. the regulation by the council of the authority and the mortgage lenders participating in the STM program;
- D. the establishment of guidelines by the council for mortgage loans eligible for inclusion in the mortgage pass-through security; and
- E. the determination of the yield required to be paid on the mortgage pass-through security pursuant to the Pass-through Securities Investment Act.

[Recompiled 10/1/01]

**2.60.24.7 DEFINITIONS:**

The following words and terms as used in these council rules and regulations shall have the following meanings:

- A. "Application" shall mean an application to sell mortgage loans filed by a mortgage lender with the authority in response to an invitation.
- B. "Authority" shall mean the New Mexico mortgage finance authority, created by the New Mexico Mortgage Finance Authority Act.
- C. "Authority rules and regulations" shall mean the rules and regulations issued by the authority under and pursuant to the Mortgage Finance Authority Act, Section 58-18-1, *et seq.*, NMSA 1978, as amended.
- D. "Condominiums" shall mean real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership, as an undivided interest, solely by the owners of those portions.
- E. "Conventional mortgage" shall mean a mortgage loan which is not guaranteed by the VA or insured by the FHA or the FmHA.

F. "Council" shall mean the state investment council of the state acting in connection with the investment of the state's severance tax permanent fund.

G. "Council rules and regulations" shall mean these rules and regulations issued by the council under and pursuant to Section 10 of Chapter 306 of the Laws of 1983 of the state of New Mexico, being Section 7-27-5.3 NMSA 1978 (the "Pass-through Securities Investment Act").

H. "Eligible assumptor" shall mean a person who meets, at the time the application for assumption of loan is made, the definition of an eligible mortgagor, and who intends to occupy the single family residence purchased as his or her principal residence within 30 days after the closing of the assumption.

I. "Eligible mortgagor" shall mean a person who is over the age of 18 and a domiciliary of the state, who meets the credit standards set forth in the guide for servicers.

J. "Family" shall mean a person or a group of persons, at least one of whom shall be an eligible mortgagor, consisting of, but not limited to, the head of a household, the spouse, if any, and children, if any, who are allowable as personal exemptions for federal income tax purposes.

K. "FDIC" shall mean the federal deposit insurance corporation.

L. "FHA" shall mean the federal housing administration.

M. "FmHA" shall mean the farmers home administration.

N. "FNMA" shall mean the federal national mortgage association.

O. "FSLIC" shall mean the federal savings and loan insurance corporation.

P. "Guide for servicers" shall mean the authority's STM program guide for seller/servicers, as it may be modified from time to time by the authority.

Q. "Invitation" shall mean the authority's then current invitation to mortgage lenders for applications to sell mortgage loans to the authority pursuant to the STM program.

R. "Manufactured housing" shall mean a modular or pre-manufactured home, built to uniform building code standards, which is designed to be and, prior to the closing of a mortgage loan on the home, is, permanently affixed to real property.

S. "Mobile home" shall mean a moveable or portable housing structure, constructed to be towed on its own chassis and designed so as to be installed with or without a permanent foundation for occupancy as a residence and which is not manufactured housing.

T. "Mortgage" shall mean a mortgage, mortgage deed, deed of trust or other instrument creating a first lien on a fee interest in real property located within the state.

U. "Mortgage lender" shall mean any bank, bank or trust company, trust company, mortgage company, mortgage banker, national banking association, savings bank, savings and loan association, building and loan association and any other lending institution which meets the requirements set forth in Section 4 [now 2.60.24.8 NMAC] of the council rules and regulations.

V. "Mortgage loan" shall mean a conventional loan:

- (1) secured by a mortgage;
  - (2) made to an eligible mortgagor to finance the acquisition, construction or rehabilitation of an owner-occupied single family residence in the state;
  - (3) the commitment for which was made by the mortgage lender after the date of submission by the mortgage lender of its application; and
  - (4) which meets the underwriting standards set forth in the guide for servicers.
- A mortgage loan shall not include a loan the proceeds of which are used, directly or indirectly, to refinance an existing mortgage loan or loans for the present mortgagor, unless the primary purpose of such mortgage loan is to finance the rehabilitation of such single family residence.

W. "Mortgage pass-through security" shall mean a security issued by the authority in connection with the STM program representing an undivided interest in a pool of mortgage loans purchased by the authority pursuant to a notice of acceptance conforming to the requirements of the Pass-through Securities Investment Act.

X. "NCUAB" shall mean the national credit union administration board.

Y. "New construction" shall mean a single family residence that has not been previously occupied.

Z. "Notice of acceptance" shall mean the authority's notice to the mortgage lender of the acceptance of its application.

AA. "Owner-occupied" shall mean that the eligible mortgagor or the eligible assumptor must occupy the single family residence upon which a mortgage loan is made at the time the mortgage loan is closed or assumed.

BB. "Pass-through Securities Investment Act" shall mean Section 10 of Chapter 306 of the Laws of 1983 (being Section 7-27-5.3 NMSA 1978).

CC. "PUD-unit" shall mean a residential unit within a real estate development of separately owned lots with contiguous or noncontiguous areas or facilities usually owned by an owners' association in which the owners of the lots have a stock or membership interest, title to the real estate under the dwelling units being held by the association, and membership in the owners' association may not be severed from the ownership of individual units.

DD. "Rehabilitation" shall mean substantial renovation or reconstruction, including an increase of living area, of an existing single family residence, for example, to put such residence in a decent, safe and sanitary condition or to cause such single family residence to comply with applicable building codes, and shall not include routine or ordinary repairs, improvements or maintenance, such as interior decorating, remodeling or exterior painting, except in conjunction with other substantial renovation or reconstruction.

EE. "Residential use" shall mean that the structure is designed primarily for use as the principal residence of the occupant and shall exclude vacation or "second" homes. Portions of the structure designed or used for nonresidential purposes shall not exceed ten percent of the usable square feet of the structure.

FF. "Seller" shall mean the immediate past owner of the single family residence.

GG. "Severance tax permanent fund" shall mean the fund created pursuant to Section 7-27-3 NMSA 1978.

HH. "Single family residence" shall mean real estate or an interest therein in the state upon which is located or is to be constructed or located a structure or structures designed for residential use and consisting of a residence for one family, provided that the owner or owners of such structure or structures occupy such residence as their principal residence, and includes a condominium unit or units.

II. "State" shall mean the state of New Mexico.

JJ. "STM program" shall mean the severance tax permanent fund single family mortgage pooling program authorized by this rule 85-2 [now 2.60.24. NMAC].

KK. "IVA" shall mean the veterans' administration.

LL. "Zero lot line homes" shall mean a series of individual residences having architectural unity and a common wall within each unit.

[Recompiled 10/1/01]

## **2.60.24.8 REQUIREMENTS FOR MORTGAGE LENDERS:**

A mortgage lender which desires to participate in the STM program shall meet the following criteria:

A. If a commercial bank, its deposits must be insured by FDIC; if a savings institution, its deposits must be insured by FSLIC; and if a credit union, its deposits must be insured by NCUAB.

B. A mortgage lender must be approved by the FHA and VA to make FHA or VA loans.

C. A mortgage lender must demonstrate experience or expertise as determined by the authority in selling mortgage loans in the secondary market.

D. A mortgage lender must have a net worth of at least \$250,000, and

E. A mortgage lender originating mortgage loans for the STM program must have its principal office in the state, and be authorized to initiate mortgages in the state.

[Recompiled 10/1/01]

#### **2.60.24.9 ALLOCATION OF FUNDS TO MORTGAGE LENDERS:**

A. Funds available to the authority by reason of the sale of its mortgage pass-through securities shall be allocated by the authority based upon instructions from the council among eligible mortgage lenders submitting applications. A preference will be given to mortgage lenders who participated in the program authorized by the council's rule 84-1 [now 2.60.23 NMAC] (the "STM II program") in an amount equal to such mortgage lender's undelivered commitment under the STM II program. If any funds remain available after mortgage lenders with an available preference have received allocations, then the allocation of such available funds shall be based on the following criteria:

- (1) the financial condition of the mortgage lenders submitting applications;
- (2) the amount of residential mortgage loans made in the state by each mortgage lender submitting applications during a 24-month period preceding the date of the application;
- (3) the aggregate principal balances of mortgage loans offered for sale by each mortgage lender compared with the aggregate principal balances of mortgage loans offered for sale by all mortgage lenders;
- (4) the aggregate principal balances of mortgage loans for new construction offered for sale by each mortgage lender compared with the aggregate principal balances of mortgage loans for new construction offered for sale by all mortgage lenders;

(5) the authority's assessment of the ability of the mortgage lender or its designated servicer to act as servicer of mortgage loans to be sold to the authority based upon, among other things, the experience of the mortgage lender or its designated servicer in the secondary mortgage market;

(6) equitable geographic distribution of the funds throughout the state, with an emphasis on broad geographic locations served;

(7) the mortgage lenders' abilities to deliver allocations, evaluated on the basis of prior performance in any previous STM program; and

B. The council, or its designee, shall instruct the authority as to specific allocations of funds to individual mortgage lenders. These specific allocations shall be based upon the applications submitted by mortgage lenders, as well as other information available to the council and the authority which is pertinent to the criteria set forth in this section. Allocations of funds by the council and authority shall be conclusive.

[Recompiled 10/1/01]

#### **2.60.24.10 OBLIGATIONS OF THE AUTHORITY:**

With respect to the STM program, the authority shall comply with the requirements set forth in this section as well as any other requirements which may be adopted from time to time by the council to ensure the continuity and efficacy of the STM program. The authority shall, through regulation or some other means:

A. provide that at least 60 percent of the initial aggregate principal balances are earmarked for mortgage loans for new construction and the authority may not accept deliveries from mortgage lenders of mortgage loans not for new construction in excess of 40 percent of the total aggregate allocations; prior to the time that mortgage lenders deliver the entire total allocation, the issuance by the authority of the mortgage pass-through security, and the purchase of such security by the council, consisting of the mortgage loans already delivered, will comply with the requirements of the Pass-through Securities Investment Act;

B. provide that a fixed limit will be set on any pre-arranged commitments for new construction by mortgage lenders to builders or developers;

C. maintain a permanent manned office in New Mexico;

D. provide that interest rate subsidy plans be limited to buydowns and pledged accounts during the first three years of the mortgage loan;

E. provide that re-financings of an existing mortgage loan or loans for the present mortgagor shall not be included in the STM program, except in the case of a rehabilitation of a single family residence, or to replace construction or bridge financing;

F. provide that no loans on mobile homes may be purchased by mortgage lenders for sale to the authority, however the authority may consider purchasing mortgage loans on manufactured housing;

G. provide that no more than 50 percent of the aggregate value of the mortgage loans may be on condominiums, PUD-units and zero lot line homes;

H. provide that each mortgage loan to be included in the mortgage pass-through security be made on an owner-occupied single family residence;

I. provide that all mortgage loans issued pursuant to the STM program shall be sold to the authority within nine months of receipt by the mortgage lender of notice, of acceptance from the authority.

[Recompiled 10/1/01]

#### **2.60.24.11 REQUIREMENTS FOR MORTGAGE LOANS:**

All mortgage loans which are included in any mortgage pass-through security purchased by the council shall contain the following minimum criteria:

A. be originated by a qualified mortgage lender;

B. be secured by a single family residence;

C. be a conventional mortgage;

D. have a maximum term which shall not be greater than thirty years and a minimum term which shall not be less than twenty years;

E. be made to an eligible mortgagor;

F. contain no prepayment penalties;

G. be assumable by an eligible assumptor, if the single family residence will be owner-occupied after assumption and the eligible assumptor meets the applicable underwriting criteria;

H. not exceed the dollar limit for FNMA approved mortgages, as in effect at the time the loans are originated;

I. have a maximum loan-to-value ratio of 80 percent, however mortgage loans with loan-to-value ratios of up to and including 95 percent may be, considered for inclusion if such mortgage loans are subject to primary mortgage insurance in an amount sufficient to provide that the uninsured portion of the mortgage loan does not exceed 72 percent of the value of the property;

J. permit the mortgage lender to charge, as an origination fee, no more than 2 percent of the amount of the mortgage loan, to be allocated between the eligible mortgagor and the seller; and

K. such other requirements that an independent nationally recognized bond rating service would require to give a security purchased under the "Pass-through Securities Investment Act" a AA rating or higher.

[Recompiled 10/1/01]

#### **2.60.24.12 FEES AND CHARGES:**

A. A commitment fee or fees shall be established and collected by the authority from each mortgage lender filing an application in such amount or amounts as the authority may deem appropriate. All or a portion of the commitment fee shall be nonrefundable. The commitment fee or fees may be used for, among other purposes, reimbursing the authority for all or part of the reasonably-expected administrative costs incurred by the authority in connection with the issuance of the mortgage pass-through securities and the administration of the STM program.

B. The authority may retain the difference between the interest rate on the mortgage loan and the face rate of the mortgage pass-through security to be purchased by the council, as established by the purchase agreement between the council and the authority, for its reasonably expected costs of acting as the master servicer for the mortgage pass-through security and to compensate lending institutions which act as sub-servicing agents of the authority.

C. The authority may establish such other charges, premiums and penalties as it shall deem to be necessary in connection with the administration of the STM program.

[Recompiled 10/1/01]

#### **2.60.24.13 YIELD TO SEVERANCE TAX PERMANENT FUND:**

The yield to the severance tax permanent fund on the mortgage pass-through security purchased by the council pursuant to the provisions of the Pass-through Securities Investment Act shall be set from time to time by the council in accordance with the Pass-through Securities Investment Act.

[Recompiled 10/1/01]

#### **2.60.24.14 AMENDMENT OF COUNCIL RULES AND REGULATIONS:**

The council rules and regulations may be amended by the council at any time and from time to time.

[Recompiled 10/1/01]

## **PART 25: NEW MEXICO STATE INVESTMENT COUNCIL STATEMENT OF INVESTMENT POLICY**

### **2.60.25.1 ISSUING AGENCY:**

State Investment Council.

[Recompiled 10/1/01]

### **2.60.25.2 SCOPE:**

**[RESERVED]**

[Recompiled 10/1/01]

### **2.60.25.3 STATUTORY AUTHORITY:**

**[RESERVED]**

[Recompiled 10/1/01]

### **2.60.25.4 DURATION:**

Permanent.

[Recompiled 10/1/01]

### **2.60.25.5 EFFECTIVE DATE:**

Filed December 13, 1990.

[Recompiled 10/1/01]

### **2.60.25.6 OBJECTIVE:**

**[RESERVED]**

[Recompiled 10/1/01]

### **2.60.25.7 DEFINITIONS:**

**[RESERVED]**

[Recompiled 10/1/01]

#### **2.60.25.8 INTRODUCTION:**

A. As established by the New Mexico State Constitution and statutes, the New Mexico state investment office (office) manages two permanent trust funds under the directions of the New Mexico state investment council (council) and the state investment officer (SIO). These trust funds are the permanent fund (PF) and the severance tax permanent fund (STPF).

B. The state investment council was established by an act of the 23rd legislature which was approved on March 28, 1957, and subsequently ratified by the citizens of New Mexico in the general election of 1958. According to the terms of this legislation, responsibility for the investment of the PF was transferred to the state investment officer, subject to the policy direction of the council. The state investment office became operational in January, 1959 as the administrative arm of the council.

C. Statutory authority for investment of the STPF by the council became effective July 1, 1983. The transition from the office of the state treasurer was completed on April 1, 1985, when the \$573 million certificate of deposit program was transferred to the state investment office.

D. It is the function of the office to provide, under the guidance of the council, the investment expertise and necessary support services for the PF and the STPF. The agency is responsible for the prudent investment of these funds in diversified sectors of the securities markets in order to maximize the total return of the funds while minimizing all forms of risk. The types of securities allowable for investment are defined by statute and may be further constrained by policy and objectives implemented by the council and the SIO.

E. This document is a summary of the applicable statutory provisions and the current policies established by the council and SIO.

[Recompiled 10/1/01]

#### **2.60.25.9 PURPOSE OF THE FUNDS:**

A. Permanent fund: The purpose of the permanent fund is to hold in trust royalties and other funds received from state lands and to make distributions of income earned on these funds to the common schools and other designated institutions of the state. Since the fund is considered to be a common trust, it is invested in accordance with the prudent man rule and fiduciary law. The state investment council, as a fiduciary, has a duty to act solely in the interest of the fund's beneficiaries. A steady stream of income that maintains its value in real (inflation adjusted) dollars must be provided for the beneficiary institutions, while the real value of the corpus must be maintained for future generations who will need the fund's income to support these institutions.

B. Severance tax permanent fund:

(1) The purpose of the state of New Mexico severance tax permanent fund is to hold in trust that part of state revenues derived from excise taxes which have been or shall be designated severance taxes imposed upon the severance of natural resources within the state, in excess of that amount which has been or shall be reserved by statute for the payment of principal and interest on outstanding bonds to which severance tax revenue has been or shall be pledged, and to make distributions of the income earned on these funds to the general fund. Since the fund is a permanent trust fund, it shall be invested in accordance with the prudent man rule with the state investment officer and council acting as fiduciaries.

(2) The state investment council, as a fiduciary, has the responsibility and authority to establish policies for the investment of the severance tax permanent fund. The objective of the market rate portfolio in the severance tax permanent fund is to provide a steady stream of income that maintains its value in real (inflation adjusted) dollars, while maintaining the real value of the corpus for future generations. The objective of the differential rate portfolio in the severance tax permanent fund is to stimulate the economy of New Mexico on a continuing basis by maintaining a diversified portfolio of New Mexico investments, which expands business activity, promotes the creation and preservation of jobs, and provides a reasonable yield, as intended by the differential rate statutes.

[Recompiled 10/1/01]

#### **2.60.25.10 INVESTMENT PHILOSOPHY AND OBJECTIVES:**

A. Principal Objectives: Based upon the two purpose statements in Section II [now Section 2.60.25.9 NMAC] above, the principal objectives of both funds are:

(1) the preservation of capital in real terms, while providing reasonable levels of income distribution to the beneficiaries;

(2) to obtain maximum returns within reasonable and acceptable levels of risk for all market rate investments; and

(3) to maintain a prudent and diversified portfolio of differential rate investments that stimulate the economy of the state while providing reasonable diversification and yield. In keeping with the permanent trust fund nature of both funds, all market rate investment objectives are based on a long term investment horizon.

B. Other Basic Goals and Objectives: The following goals and objectives are based on modern financial and portfolio theory and are common to both funds:

(1) Diversification is one of the fundamental principles of modern portfolio theory which focuses on minimizing risk and maximizing return. In accordance with this principle, the SIC's portfolios will be constructed by the individual portfolio managers to

attain prudent diversification in all equity and fixed income holdings while remaining within statutory and constitutional limitations.

(2) Consistent with the need for adequate diversification, the SIC's investment policy is based on the assumption that the volatility of the combined portfolio will be similar to that of the market. Consequently, it is expected that the total portfolio volatility, in the aggregate, will be reasonably close to the volatility of a commitment-weighted composite of the market indexes selected for performance evaluation purposes.

(3) Due to the permanent nature of the funds and the limitations on allowable investments imposed by the Constitution and statutes on both funds, it is anticipated that the quality levels in both funds will be maintained at or above the average quality of the indexes they are compared with. The overriding objective for both funds is preservation of principal, and this will generally translate over time into higher average allocations to government and other high quality securities. Riskier investments such as equity and venture capital will be monitored closely to insure that the long term expected returns justify the implied risks.

(4) Due to the long term time horizon of both funds and the monthly distribution of all cash dividend and interest income (adjusted for accounting amortization and accretion), cash availability or liquidity (the cash positions in the two funds) is not a significant factor in determining asset allocations or acceptable investments. The liquidity (or marketability) of the securities in the funds' portfolios is a concern, and it is expected that the characteristics of the securities held by the council will individually and collectively approximate the characteristics of the market in general. Investment policy will be designed to avoid large swings in annual distributable income as much as market conditions will permit. The actual distributable income growth rate will depend primarily on:

- (a) the revenues (new money) received into the corpus of both funds, and
- (b) the asset allocations as determined by council policy.

C. Performance: Fund performance is measured by comparison with broad market indexes appropriate to each asset class. The following indexes are currently used for this purpose:

(1) ASSET CLASS INDEX

Equities	Standard & Poor's 500
Fixed Income	Shearson Lehman Aggregate
Cash Equivalents	Average 90-day U.S. T-bill rate

(2) These benchmarks will be used to evaluate the performance of both funds. In the STPF, only the market rate portion is evaluated, since market prices are generally unreliable or not available for the differential rate investments. The general goals are to exceed the performance of each of these indexes. Managing against specified benchmarks provides clearly defined objectives and measures of performance. The benchmarks also provide a starting point for formulating strategy. The appropriateness of the selected indexes will be periodically reviewed as the composition of the SIC portfolios change over time.

[Recompiled 10/1/01]

#### **2.60.25.11 ASSET ALLOCATION:**

The most important component of investment strategy is the portfolio asset mix, or the resource allocations between the various classes of securities available to the council for investment purposes.

A. Current asset allocations and authorization: The council has currently authorized the SIO to increase the equity holdings to 30 percent of the book value of the PF and 20 percent of the book value of the STPF, and has directed that such weightings should be achieved by the end of fiscal year (FY) 81 (June 30, 1993). Equity holdings in the STPF are currently limited to 20 percent by statute. The council established these goals based on 1) the advise of the SIO, 2) the results of two asset allocations studies, and 3) the need to maintain current levels of income distributions to the beneficiaries. At the present time, the equity holdings in the two funds are substantially below the book value limitations listed above.

B. Strategic asset allocation targets and ranges: It has been recognized by the council that the two state permanent funds should have asset allocations similar to other major endowment funds in order to protect the corpus of the funds against inflation. The selected strategic asset allocation targets and ranges are as follows (based on market value):

##### **(1) ASSET CLASS TARGET RANGE**

(a) Cash and Equivalents. 5 percent 0 - 15 percent

(b) Equities 35 percent 30 - 40 percent

(c) Fixed Income 60 percent 55 - 65 percent

##### **(2) These asset classes are defined as follows:**

(a) Cash equivalents - investments in fixed income securities with maturities of one year or less, including treasury bills and notes, commercial paper, banker's

acceptances, repurchase agreements, certificates of deposit, and the state treasurer's overnight deposit program.

(b) Equities - common and preferred stocks and convertible issues representing ownership interests in corporations;

(c) Fixed income - investments in securities with an obligated fixed rate of interest, including bonds, notes, debentures, mortgages, or other obligations or evidence of indebtedness.

(3) There are many other specific investments authorized in the New Mexico constitution and statutes. For strategic asset allocation purposes, however, they generally can be categorized under one of the above classifications. The constitution and statutes also contain specific percentage limitations on the various investment classes, and those limitations are presented in the following sections of this document where appropriate. The asset allocation ranges stated above conform with all current statutory and constitutional limitations.

(4) The asset allocation ranges and targets listed above also represent a long term perspective. Net new cash flows shall in general be directed to the most attractive and undervalued asset classes. For the near future, the equity class will receive the majority of available allocations as long as the equity market is attractive. Because of rapid and unanticipated market shifts and this bias towards selecting the best values, the actual allocations in certain periods may fall outside the desired ranges. Any divergences should be short term in nature and the actual allocation of assets shall be periodically compared to the above targets. During periods when the various sectors are essentially equal in perceived value, the staff will attempt to move the overall allocations back within the desired ranges and towards the target levels.

C. The investment committee: On a quarterly basis, the investment committee, which consists of the state investment officer, deputy state investment officer, and the equity, fixed income, and differential rate investment officer principals, will meet to discuss overall asset allocations. For each meeting, the investment committee members will have formed opinions on interest rates, inflation, secular trends in the economy, the current stage of the business cycle, and the outlook for economic expansion or recession. The investment committee and/or other staff will hold additional meetings weekly or as necessary to evaluate the funds' performance.

[Recompiled 10/1/01]

## **2.60.25.12 GENERAL POLICIES AND PROCEDURES:**

The following general operating policies and procedures will be observed by the council staff in implementing the directives contained in this document. Specific operating procedures for daily investment office activities will be found in the state investment office operations manual.

A. The investment office staff will follow the prudent man rule as defined in Article XII, Section 7 of the New Mexico Constitution in conducting all investment related activities.

B. The investment office staff may not delegate authority for making independent investment decisions to any agent or entity under contract to or doing business with the state investment council or office.

C. All transactions undertaken by the council staff shall be for the sole benefit of the funds' beneficiaries.

D. The council staff will maintain a separate broker policy which will define the standards and requirements for broker/dealers doing business with the council. This policy will be available for distribution to the public as desired.

E. A professional investment counseling firm (or firms) (advisor) shall be retained by the state investment office. The selected advisor(s) shall have expertise in all investment activities utilized by the state investment office.

F. The office shall employ the services of a professional performance measurement consultant to independently compute the performance of both funds.

G. The office will comply with the intent of the New Mexico statutes and all applicable provisions of the Open Meetings Act.

[Recompiled 10/1/01]

#### **2.60.25.13 CASH INVESTMENT:**

A. Constitutional and statutory restrictions: The only short term securities purchased are those specifically authorized in the New Mexico statutes. Currently, commercial paper (CP), repurchase agreements (repos), and banker's acceptances (BA) are specifically identified in Sections 6-8-19 and 7-27-5.1 NMSA 1978. If in doubt as to whether a particular type of security is authorized, legal opinions are solicited from the state attorney general's office. CP must be rated prime by a national rating service. Repos must be collateralized at 102 percent or higher by obligations of the United States or other securities backed by the United States, and may only be purchased from broker/dealers that have a minimum net worth of \$500 million. Banker's acceptances must be rated prime and issued by money center banks. Medium term notes (MTN) and other bonds must be rated at least A in the permanent fund (Section 6-8-9 NMSA 1978), and at least BBB in the severance fund (Section 7-27-5.1 NMSA 1978).

B. Council goals and policies:

(1) The council has adopted the following goals for the management of the short term investment program (STIP) portfolios:

(a) safety and preservation of STIP capital through the maintenance of well-diversified portfolios of short term investments with high credit quality;

(b) maintenance of STIP liquidity to support the long term investment programs; and

(c) maximization of STIP current income.

(2) Achievement of these goals by the state investment office will be pursued under the following policies:

(a) All corporate bonds purchased by the council under the STIP will be rated A or better.

(b) Stripped securities, or other securities that have abnormally low initial coupons, balloon payments, or other characteristics that make them difficult to price are not acceptable as collateral for repos.

(c) All possible fixed income trades will be done on a competitive basis to obtain the best possible pricing and execution.

[Recompiled 10/1/01]

#### **2.60.25.14 EQUITY INVESTMENT:**

##### **A. Constitutional and statutory restrictions:**

(1) The New Mexico state permanent fund may invest in "common and preferred stocks and convertible issues of any corporation organized and operating within the United States; provided that it has a minimum net worth of twenty-five million dollars (\$25,000,000) and securities listed on one or more national stock exchanges; and provided further that the fund shall not own more than five percent of the voting stock of any company. Common stocks should represent a diversified portfolio with an above average current yield and the prospect for dividend increases and capital appreciation" (Section 6-8-9 F. NMSA 1978). Such investments are subject also to the restriction that common stocks purchased must be those of corporations having a 10 year consecutive dividend history at the date of purchase (New Mexico Constitution, Article XII, Section 7).

(2) Dividend income shall be distributed to the permanent fund's beneficiaries but capital gain proceeds shall be retained as part of the fund. (Section 6-8-12 NMSA 1978).

(3) Commissions paid for the purchase and sale of any security shall not exceed brokerage rates prescribed and approved by national stock exchanges or by industry practice. (Section 6-8-9 NMSA 1978).

(4) Similar statutes apply to the severance tax permanent fund and are contained in Section 7-27-5.1 NMSA 1978. The STPF is additionally limited in that common stocks, at the time of purchase, may not exceed 20 percent of the book value of the fund.

B. Council goals and policies:

(1) The council has adopted the following goals for the management of the equity portfolios:

(a) maintenance of a well-diversified portfolio of common stocks with good quality and liquidity characteristics; and

(b) maximization of the portfolio's total return to include an above average dividend yield.

(2) Achievement of these goals by the state investment office will be pursued under the following policies:

(a) Common stocks shall be chosen from a universe having the following characteristics:

- (i) U.S. incorporated;
- (ii) securities listed on the NYSE;
- (iii) minimum market capitalization of \$500 million;
- (iv) minimum owner's equity of \$25 million.

(b) The number of stocks in the portfolio shall range from 40 to 70 with no single stock representing more than 5 percent of the portfolio's total current market value.

(c) The average dividend yield on the portfolio over time should exceed that of the market in general; and

(d) The portfolio shall be diversified by industry in line with the S&P 500's industry weightings based on market capitalization, with an allowable variance of plus or minus 100 percent except for industries representing more than 5 percent of the S&P 500 which will not be weighted less than 50 percent of the S&P 500's weight.

[Recompiled 10/1/01]

**2.60.25.15 FIXED INCOME INVESTMENT:**

A. Constitutional and statutory restrictions: The New Mexico Constitution and statutes contain numerous provisions to insure the safety of the two funds' assets. These provisions include limits on quality, types of securities, and total corporate securities. Bonds must be rated at least A in the PF (Section 6-8-9 NMSA 1978), and at least BBB in the STPF (Section 7-27-5.1 NMSA 1978). No more than 50 percent of the funds may be invested in corporate securities (both stocks and bonds). The majority of the fixed income portfolios consist of government and corporate bonds with very high quality ratings. Both Funds currently have an average quality rating of AA+ or better. If any questions arise concerning the eligibility of a particular security type for investment, an opinion is obtained from the state attorney general's office.

B. Council goals and policies:

(1) The council has adopted the following goals for the management of the fixed income portfolios:

(a) preservation of capital through the maintenance of a well-diversified portfolios of fixed income investments with high credit quality; and

(b) maximization of the portfolios' current income.

(2) Achievement of these goals by the state investment office will be pursued under the following policies:

(a) all corporate bonds purchased by the council will be rated A or better;

(b) asset backed or other collateralized securities rated AA or better are authorized;

(c) extending duration to maximize yield to maturity when feasible; current income is essential to the funds' beneficiaries, and current income may be increased by lengthening duration when the yield curve is positively sloped. It is therefore reasonable to expect that the funds' durations, average maturities, and price risk or variation will normally be greater than the fixed income benchmark portfolio; and

(d) all possible fixed income trades will be done on a competitive basis to obtain the best possible pricing and execution.

[Recompiled 10/1/01]

**2.60.25.16 DIFFERENTIAL RATE INVESTMENT:**

A. Constitutional and statutory restrictions: The severance tax permanent fund may be invested in a series of investments that are identified in Section 7-27-5 NMSA 1978 as "differential rate" investments. Differential rate (DR) investments are defined as those investments intended to stimulate the economy of New Mexico. DR investments are

authorized in Sections 7-27-5.2 through 7-27-5.5, 7-27-5.7, and 7-27-5.13 through 7-27-5.17 NMSA 1978. As a permanent trust fund and in accordance with Section 6-8-7 NMSA 1978, differential rate investments, as with all investments of the fund, are subject to the prudent man rule and must provide reasonable diversification and reasonable yield.

B. Council goals and policies:

(1) The council has adopted the following goals for the management of the differential rate portfolio:

(a) to insure that credit quality is maintained and risk is minimized;

(b) to maintain a diversified portfolio of investments that are distributed among the various programs and throughout the state and its economic sectors;

(c) to stimulate the economy of New Mexico on a continuing basis;

(d) to expand business activity in the state;

(e) to promote the creation and preservation of jobs; and

(f) to provide a reasonable yield.

(2) Achievement of these goals by the state investment office will be pursued under the following policy: The state investment office shall develop investment guidelines and procedures providing requirements that must be met under the various differential rate programs. Each of the guidelines and procedures shall be adopted in accordance with the state's Administrative Procedures Act, other relevant statutes, and council policy. Each differential rate investment program is unique and requires separate guidelines and procedures to administer. The guidelines for each DR program will incorporate the specific requirements that are specified by statute and will also conform to industry practices for that type of investment. The staff must therefore conduct independent research and analysis on each separate security type to understand the risks involved. Each DR investment should then be structured to minimize all anticipated risks and to meet all New Mexico and federal legal requirements. Finally, all investments must be properly documented for auditing purposes. These steps will insure a reasonable probability of achieving the goals and objectives of the differential rate programs.

[Recompiled 10/1/01]

## **PART 26: GUIDELINES FOR NEW MEXICO BUSINESS INVESTMENTS IN BONDS**

### **2.60.26.1 ISSUING AGENCY:**

State Investment Council.

[Recompiled 10/1/01]

**2.60.26.2 SCOPE:**

**[RESERVED]**

[Recompiled 10/1/01]

**2.60.26.3 STATUTORY AUTHORITY:**

Pursuant to Section 7-27-5.4(B) NMSA 1978 no more than ten percent of the book value of the severance tax permanent fund may be invested in bonds, notes, debentures or other evidence of indebtedness, excluding commercial paper, rated not less than BAA or Bbb or the equivalent or guaranteed by an irrevocable letter of credit to the state of New Mexico issued by a financial institution or corporation rated A or the equivalent by a national rating service of any corporation organized and operating within the United States, excluding regulated public utility corporations, which, as a condition of receiving the proceeds of such evidence of indebtedness, will use such proceeds to establish or expand business outlets or ventures in New Mexico, provided that:

A. the investment in the bonds, notes or debentures or other evidence of indebtedness of any one corporation shall not exceed one hundred percent of the cost of the expansion venture or new outlet, or twenty million dollars (\$20,000,000), whichever is less;

B. the rate of interest to be paid on the bonds, notes or debentures or other evidence of indebtedness shall be equivalent to the yield available on United States treasury issues of a comparable maturity plus fifty to one hundred basis points;

C. the indebtedness shall be approved prior to purchase by the council.

D. the guidelines for initiation of the purchase by the council of the bonds, notes, debentures or other evidence of indebtedness and the terms thereof will be established by the council.

[Recompiled 10/1/01]

**2.60.26.4 DURATION:**

Permanent.

[Recompiled 10/1/01]

**2.60.26.5 EFFECTIVE DATE:**

Filed July 12, 1989.

[Recompiled 10/1/01]

**2.60.26.6 OBJECTIVE:**

**[RESERVED]**

[Recompiled 10/1/01]

**2.60.26.7 DEFINITIONS:**

**[RESERVED]**

[Recompiled 10/1/01]

**2.60.26.8 INVESTMENT MANAGEMENT POLICY:**

The terms and conditions of each particular financing situation will be approved by the council prior to the purchase of the bond, note, debenture or other evidence. In particular the council must approve:

A. the maturity of investment which shall not exceed twenty years;

B. the rate of interest to be paid on the indebtedness which shall be set at the equivalent to the yield available on U.S. treasury notes or bonds of a comparable maturity plus fifty to one hundred basis points, after taking into account the credit rating and credit history of the borrower, the terms of any letter of credit, call and put provisions of the bonds and any other terms or conditions which effect the creditworthiness and/or value of the investment;

C. the terms of any letter of credit used to secure an investment which must be irrevocable, unconditional, payable to the New Mexico state investment council and extend for the life of the investment or if renewable during the term of the investment contain provisions allowing the council to draw the letter of credit for the outstanding unpaid principal balance of the indebtedness upon receiving notice at least 60 days prior to expiration that the letter of credit will not be renewed; and

D. the conditions of each investment which may include call protection for five or more years and if the indebtedness is a rated issue include provisions allowing the council to put the investment back to the borrower, if a minimum rating of BAA or the equivalent cannot be maintained.

[Recompiled 10/1/01]

**2.60.26.9 PROCEDURE:**

A. A corporation which meets the qualifications set forth in Parts I and II [now 2.60.26.3 NMAC and 2.60.26.8 NMAC], above, may request that the state investment council make a purchase of bonds, notes, debentures or other evidence of indebtedness pursuant to Section 7-27-5.4(B) by submitting a proposal containing the following:

- (1) A certified copy of the corporation's articles of incorporation.
- (2) Evidence that the bond rating on the corporation's debt meets the minimum requirement set by statute or that an irrevocable, unconditional letter of credit from a qualified financial institution or corporation can be provided.
- (3) A comprehensive business plan detailing the corporation's proposed expansion venture or new outlet in New Mexico, under Section 7-27-5.4(B), and a projected time frame for completion of the project following approval by the state investment council and subsequent funding.
- (4) A project cost analysis which contains a clear and concise statement by the corporation of the planned utilization of funds received pursuant to Section 7-27-5.4(B), including the total estimated cost of the project, the total amount of funding requested pursuant to Section 7-27-5.4(B), other sources of funding for the project, if any, and a quarterly cash flow schedule showing both the amount and purposes of the projected expenditures of funds received pursuant to Section 7-27-5.4(B).
- (5) Balance sheet and income statements before the project indicating the financial condition of the corporation and proforma statements of estimated income and cash flows of the corporation after the project.
- (6) A description of the debt instrument, including a description of its terms, conditions, collateralization, a proposed repayment schedule and bond rating. Interest payments should be structured on a semi-annual basis. If a letter of credit is being used to qualify the investment a copy of the letter of credit which must be irrevocable, unconditional, for the life of the investment and payable to the state of New Mexico.
- (7) Evidence that the debt instrument has been issued in accordance with all state and federal securities regulations, including registration with the securities and exchange commission.
- (8) A statement from the corporation's independent auditor attesting to the following:
  - (a) the receipt, expenditure and utilization of state funds received by or for the corporation pursuant to Section 7-27-5.4 (B) shall be accounted for in such a manner that the receipt, expenditure, and utilization of such funds are clearly identified on the books of the corporation and distinguished from the receipt, expenditure, and utilization of other funds of the corporation, and

(b) any state funds which are received pursuant to Section 7-27-5.4(B) and held by or for the corporation prior to their expenditure shall be recorded on the books of the corporation separately from the other funds of the corporation and shall be earmarked for expenditures related to the project or purposes described in the proposal submitted to the state investment council.

B. Corporations shall submit their formal proposal and any supplementary information, documentation or evidence requested by the members of the council to the state investment office. The proposal and final closing documents will be subject to approval as to legal sufficiency and form by the New Mexico attorney general and/or bond counsel acting for the state. All costs of issuance, including SIC bond counsel, will be paid by the corporation.

[Recompiled 10/1/01]

## **TITLE 27: INVESTMENT POLICY AND GUIDELINES ON PARTICIPATION LOANS SECTION 7-27-5.1 MARKET RATE INVESTMENTS**

### **2.60.27.1 ISSUING AGENCY:**

State Investment Council.

[Recompiled 10/01/01]

### **2.60.27.2 SCOPE:**

**[RESERVED]**

[Recompiled 10/01/01]

### **2.60.27.3 STATUTORY AUTHORITY:**

Pursuant to Section 7-27-5.1A NMSA 1978 Subparagraph 10, the severance tax permanent fund may be invested in participation interests in New Mexico real property-related business loans if the proceeds of such loans will be or are being used by the borrower to either commence or expand operations in New Mexico. The loans purchased may be in amounts from five hundred thousand to two million dollars. The minimum loan amount may be met by the packaging of up to five separate loans which otherwise meet the requirements of the program.

[Recompiled 10/01/01]

### **2.60.27.4 DURATION:**

Permanent.

[Recompiled 10/01/01]

**2.60.27.5 EFFECTIVE DATE:**

Filed January 17, 1990.

[Recompiled 10/01/01]

**2.60.27.6 OBJECTIVE:**

**[RESERVED]**

[Recompiled 10/01/01]

**2.60.27.7 DEFINITIONS:**

**[RESERVED]**

[Recompiled 10/01/01]

**2.60.27.8 POLICY:**

A. It is the state investment council's objective in making resources available for the purchase of participations in loans to achieve a yield consistent with the safety and soundness of such investments. With this in mind, the state investment officer may purchase from eligible New Mexico financial institutions a participation interest of up to eighty percent in any loan secured by a first mortgage or a deed of trust on real property located in New Mexico of an eligible business entity, or its subsidiary, which is operating or shall use the loan proceeds to commence operations within New Mexico, plus any other guarantees or collateral that may be judged by the eligible institution or the state investment officer to be prudent. Real property is defined as "land and attached buildings, but excludes all interests which may be secured by a security interest under Article 9 of the Uniform Commercial Code, and mineral resource values".

B. In accordance with the provisions of the statute, loan proceeds shall be used exclusively for the purpose of expanding or establishing businesses in New Mexico. The use of loan proceeds may include the refinancing of a business' existing loans outstanding only if the loan is for expansion purposes. However, if a portion of the loan proceeds are used to repay an existing loan and payment of principal and interest on the loan is not paid within ninety days from the due date, the originating institution shall buy back the state's participation interest in the loan.

C. Loan origination fees, servicing fees and any other fees to be charged the borrower shall be reviewed by the state investment officer.

D. The amount invested in New Mexico real property related business loans shall not exceed ten percent of the severance tax permanent fund, and shall be included in any minimum amount of severance tax permanent fund investments required to be placed in New Mexico certificates of deposit.

E. Loans which are being offered to the state investment officer for consideration for participation are subject to the following requirements:

(1) Eligible business entities shall not include public utilities, financial institutions, shopping centers, apartment buildings, or other such passive investments. The decision as to whether a business investment is considered a passive investment shall be determined by the state investment officer.

(2) The minimum loan amount shall be five hundred thousand dollars (\$500,000.00) and may be met by a single institution packaging up to five separate loans to satisfy the requirements of this Subsection. The maximum loan amount shall be two million dollars (\$2,000,000.00).

(3) Loan maturities shall not be less than five years or more than fifteen years. The loan shall be fully amortized over the maturity period and may not include any balloon payments.

(4) The maximum loan-to-value ratio shall be seventy-five percent based on a current MAI appraisal of the real property, or an equivalent appraisal, as approved by the state investment officer. The appraisal shall be completed no more than six months prior to the loan origination date.

(5) Interest rates shall be fixed for five years and shall be adjusted at every fifth anniversary. The yield on the states' participation interest shall never be less than the greater of the then prevailing yield on United States treasury securities of five year maturity, plus two and one-half percent or the yield received by the lending institution, calculated exclusive of servicing fees.

(6) If the payment of principal or interest is not made within ninety days from the due date, and before payment has not been made for one hundred and eighty days from the due date, the originating institution shall buy back the state's participation interest in the loan, substitute another qualifying loan, or begin foreclosure proceedings unless the payment is extended pursuant to an agreement between the originating institution and the state investment officer. If foreclosure proceedings are commenced, the state and the originating institution shall share in proportion to their participation interest in the legal and other foreclosure expenses. Any investment loss incurred as a result of foreclosure sale shall also be shared proportionately. Under no circumstance shall the state be liable for more than the amount of its investment in the participation.

(7) The loan agreement between the borrower and the originating institution must include a due on sale clause if the business is sold.

(8) The state investment officer will consider the following industries to insure diversification across the state in the loan participation program. A twenty-five percent maximum may be invested from the total amount allocated from the severance tax permanent fund in any one of the following classes of industries:

- (a) agriculture, forestry, fishing and related processing;
- (b) mining;
- (c) construction;
- (d) manufacturing;
- (e) transportation;
- (f) wholesale trade;
- (g) retail trade;
- (h) services.

(9) In addition, funds available to the state investment officer for purchase of participations in loans secured by a first mortgage or deed of trust shall be allocated considering but not limited to the following:

(a) the financial condition of the financial institution offering to sell loan participations; such condition shall be based on the quarterly evaluation of financial condition, as determined under the state investment council's certificate of deposit collateral policies, with preference given to institutions evaluated as class A and class B. Class D institutions will not receive funds.

(b) The amount of total loan participations purchased from a single institution shall not exceed ten percent of the maximum total funds authorized for investment in loan participations.

(c) The percentage a county or geographic area's population is to the total population of the state as determined by the most recent decennial census or official population estimates, prepared by the U.S. census bureau, department of commerce.

(10) Before the state investment officer purchases a participation in a loan or package of loans all documents will be subject to review and approval by the office of the attorney general. The state investment officer may employ the services of a private attorney to review and prepare documents on the investment office's behalf if he finds it to be necessary. The cost of such attorney will be paid for by the institution selling the participation and may be passed on to the borrower.

[Recompiled 10/01/01]

## **2.60.27.9 UNDERWRITING GUIDELINES ON LOAN PARTICIPATIONS:**

The selling institution shall provide copies of the necessary documentation, so that the state investment officer can perform an independent analysis of the credit quality of the obligation to be purchased, document the obligation, thoroughly analyze collateral, and maintain complete and current credit information on the borrower throughout the term of the loan. The decision of the state investment officer as to whether or not a loan participation should be purchased shall be final.

[Recompiled 10/01/01]

#### **2.60.27.10 LOAN DOCUMENTATION REQUIRED PRIOR TO COMMITMENT:**

A. Formal loan request or loan application, stating purpose, description of collateral offered, terms and conditions.

B. Copies of financial statements, income statements and balance sheets covering the latest 3 fiscal years; If not available audited proforma statements may be substituted for all but the most recent fiscal year.

C. A current credit bureau report on borrower(s), plus a credit history on current obligations for all borrowings outstanding, including accrual status, and the status of principal and interest payments.

D. Appraisal on the real estate by an MAI or other qualified, approved appraisers. Appraisal should include an evaluation of other comparable properties.

E. Copies of loan agreements that have been negotiated between the selling institution and the borrower.

F. Liquidity ratios, and other ratios if available from selling institutions, which indicate that the business will be able to meet maturing and current obligations. The preferred ratios would be quick ratios and current ratios.

G. Cash flow projections indicating the borrower has adequate revenues to satisfactorily operate the business and to service the loan.

[Recompiled 10/01/01]

#### **2.60.27.11 FINAL DOCUMENTS BEFORE CLOSING:**

A. Commitment by the state investment council stating all terms, conditions, final required documents, servicing fees and period of commitment.

B. Original participation agreement signed by purchaser and seller on the standard form approved by the Attorney General.

C. Certified copy of the original executed note and mortgage filed within the county where property is located.

D. Title insurance policy showing the loan to be first in priority upon the mortgaged property with the exception of items normally excluded from the scope of such policies.

E. Evidence of fire and hazard insurance coverage on the mortgaged premises, in an amount equal to the lesser of the loan balance or the insurable value on the improvements, with a loss payable clause in favor of the originating institution, plus flood insurance, where the premises are located in a flood hazard area.

F. Survey by a registered land surveyor verifying that the property is actually located where it is purported to be, and that the improvements do not encroach on adjoining property.

G. Corporate resolution designating an individual to sign for the corporation authorized by its' board of directors.

H. Quarterly financial statements, income statements and balance sheets for the latest twelve month fiscal period preceding the loan date and an annual financial statement for the most recent fiscal year. A certification from the originating financial institution that they have reviewed the financial statements, income statements and balance sheet and that to the best of their knowledge the statements are an accurate representation of the borrower's financial condition.

I. Copies of documentation showing compliance with applicable special State and Federal laws or regulations governing the borrower's business.

J. Continuing guarantees on closely held corporations to prevent transfer of assets from the corporation to avoid debt repayment. The need for personal guarantees shall be determined upon the recommendation of the selling institution consistent with their standard loan requirements.

[Recompiled 10/01/01]

## **2.60.27.12 GENERAL DEFINITIONS, INTERPRETATIONS AND LOAN CHECKLIST:**

A. APPRAISALS: An objective appraisal is necessary to document the value of the collateral. Care is required to be sure the appraisal is objective, and reasonably reflects true market values.

B. TITLE POLICY: Title companies' primary business is insuring that security interests have been correctly perfected and that there exists no prior ownership interests. The title company guarantees that there will be no losses due to prior claims on the property. The exception clause to the property title should be read carefully. A

title company may issue what appears to be a perfectly good title policy, but if it contains many exceptions in reality the title is not insured at all.

C. SECURITY AGREEMENTS: A security agreement is a legal document that outlines the secured party's right to non-real property not in the physical possession of the secured party. The security agreement must be used with at least one other document to perfect a collateral position. Usually the other document is a financing statement.

D. FINANCING STATEMENTS: A financing statement never stands alone. There must always be a security agreement backing the financing statement. The financing statement legally notifies all potential creditors of a secured party's position.

E. ASSIGNMENT OF A SECURED INTEREST: The secured party may assign all or part of their security interest in the collateral either before or after filing the financing statement. However, to be effective against persons other than the secured party, the assignment should be made a matter of record.

(1) If the assignment is made before filing, the financing statement may disclose the amount of the security interest in the collateral described in the statement by an indication in the statement of the name and address of the assignee, or by including the assignment itself, or a copy thereof, on the face or back of the statement.

(2) If the assignment occurs after filing, and it is made a matter of record by the filing, in the place where the original financing statement was filed, of a separate written statement of assignment signed by the secured party of record and the debtor, the file number and the date of filing of the financing statement, the name and address of the assignee, and a description of the collateral assigned must be included.

F. LOAN AGREEMENTS: The purpose of a loan agreement is to trigger defaults early in a deteriorating loan situation, so that the financial institution can accelerate the loan and gain control of the situation. No matter how tightly the loan agreement is written it does not improve the quality of the credit. It is tailored to fit the requirements of specific situations. The following are common protective provisions:

- (1) maintenance of current working capital position;
- (2) restrictions on borrowings;
- (3) restrictions on dividends;
- (4) restrictions on the sale or pledging of business assets;
- (5) restrictions on merger or consolidation;

- (6) restrictions on acquisitions of additional fixed assets or assuming of lease obligations;
- (7) requirements to keep all taxes paid and in current status;
- (8) requirements to maintain property and equipment in good repair;
- (9) requirements for adequate insurance;
- (10) requirements for furnishing financial statements and credit information;
- (11) restrictions against retirement of capital stock;
- (12) restrictions as to contingent liabilities;
- (13) limitations on salary and bonuses, and advances to officers, employees and other companies.

[Recompiled 10/01/01]

#### **2.60.27.13 RATIO ANALYSIS:**

Ratios are mainly indicators and as such should not be accepted nor used as absolute measurements. They are useful in pointing up areas of strength and weakness in statements. Many ratios are purely quantitative by nature and should not in any way be interpreted as measures of quality. A series of ratios over several periods of time is useful in pointing out trends in financing and operations. Ratios computed for any given company should be compared to industry ratios. If available, all significant variations should be investigated and explained. The following are basic ratios:

##### **A. QUICK RATIO:**

- (1) Method of computation: The total of cash, short-term marketable securities and net receivables for the company is divided by the total of current liabilities.
- (2) Result: The ratio measures short-term liquidity available to meet current debt.
- (3) Principle: Also known as the acid test or liquidity ratio, it is of particular benefit to short-term creditors, as it expresses the extent to which cash and those assets most readily convertible into cash can meet the demands of current liabilities. Any value of less than 1 to 1 implies a reciprocal "dependency" on inventory or other current assets to liquidate short term debts.

##### **B. CURRENT RATIO:**

(1) Method of computation: The total of current assets for the company is divided by the total of current liabilities.

(2) Result: The ratio is one measure of the ability of the company to meet its current debt.

(3) Principle: In comparing an individual company to the industry, a higher current ratio indicates that more current assets are free from debt claims of creditors and prompter payment can be expected.

#### C. FIXED/WORTH:

(1) Method of computation: The net fixed assets (plant and equipment less reserve for depreciation) for the company is divided by the tangible net worth.

(2) Result: The ratio expresses the proportion between investment in capital (fixed) assets and the owner's capital.

(3) Principle: The higher the ratio, the less owner's capital is available for working capital. The lower this ratio, the more liquid is the net worth and the more effective the owner's capital is as a liquidating protection to creditors. The presence of substantial leased fixed-assets, off the balance sheet, may deceptively lower the ratio.

#### D. DEBT/WORTH:

(1) Method of computation: The total debt for the company is divided by the tangible net worth.

(2) Result: The ratio expresses the relationship between capital contributed by creditors to owner's capital-- "what is owed to what is owned".

(3) Principle: Total assets or resources represent the entire capital at the disposal of a company and consist of net worth or owner's capital, and creditor capital, that provided by those outside the business for temporary use. The proportion existing between debt and worth, or leverage, records the debt pressure. The lower the ratio, the easier the pressure and the greater the protection for creditors.

#### E. PROFITS BEFORE TAXES/WORTH:

(1) Method of computation: The amount of net profit before taxes is divided by the tangible net worth (previous year end).

(2) Result: The ratio expresses the relationship between the owner's share of operations before taxes for the year and the capital already contributed by the owners.

(3) Principle: Capital is usually invested in a company in the anticipation of a return on that investment in the form of a profit. This hope of a profit is the attraction for original and new capital. The higher the profit before taxes to worth, the greater is the probability of making appreciable addition to owners' capital after payment of dividends and taxes.

#### F. PROFITS BEFORE TAXES/TOTAL ASSETS:

(1) Methods of computation: The net profit before taxes of the company are divided by the total assets for the company.

(2) Result: The ratio expresses the owners' share of the year's operations before taxes related to the resources contributed by both owners and creditors.

(3) Principle: The relationship indicates the net profitability of the use of all resources of the business.

#### G. CASH PROFIT/CURRENT MATURITIES LONG TERM DEBT:

(1) Method of computation: The net profits plus depreciation and amortization are divided by the current portion of long term liabilities.

(2) Result: The ratio expresses the ability to retire term debt each year from cash generated by operations.

(3) Principle: Cash profit or "throw-off" is the primary source of regular repayment of long term debt. This ratio measures the coverage of such debt service. Often most if not all of the depreciation will be needed for fixed asset replacements and expenditures and similarly part of net profits may be committed to dividends. Hopefully, after all these payments, some portion of cash profit will be left available to enhance working capital. Although all cash profit is not available for debt service, the ratio is a valid measure of the optimum coverage and a useful calculation in all considerations of term lending.

#### H. UNSUBORDINATED DEBT/CAPITAL FUNDS:

(1) Method of computation: Total unsubordinated debt (all current plus senior long term debt) is divided by capital funds (tangible net worth plus long term subordinated debt).

(2) Result: The ratio expresses the proportion between senior creditors' capital and that provided by junior creditors and owners.

(3) Principle: The ratio records debt leverage in relation to the capital base, sometimes referred to as the borrowing base. This gives recognition in the borrowing base to that capital provided by creditors whose rights are subordinated to other

creditors. The use of subordinated debt capital does not altogether remove a corresponding amount of debt pressure from owner's capital, but it does provide an extra cushion for senior creditors who can then view leverage from this ratio.

#### I. SALES/RECEIVABLES:

(1) Method of computation: The net annual sales for the company are divided by the total of trade accounts and bills receivables.

(2) Results: The ratio expresses the relationship of the volume of business to the outstanding receivables.

(3) Principle: A higher ratio, a higher turnover of receivables indicates a more rapid collection of sales during the period and a greater liquidity of the receivables.

#### J. DAY'S SALES:

(1) Method of computation: The sales/receivables is divided into 360 (the number of days in one year).

(2) Result: This figure expresses the average time in days that sales are uncollected.

(3) Principle: A comparison of this figure with the terms of sale for the industry will show the extent of control over credit and collections. The greater the number of days outstanding, the greater is the probability of delinquencies in accounts receivable.

#### K. COST OF SALES/INVENTORY:

(1) Method of computation: Cost of sales for the company is divided by the total of inventory.

(2) Result: The ratios expresses the proportion between cost of sales and inventory at the end of the fiscal period.

(3) Principle: The physical turnover measures merchandising capacity. The higher the ratio the greater is this capacity and the more probable the freshness, salability, and liquidating value of that inventory. Since profit has been eliminated, the cost of sales/inventory gives a more accurate measure of physical turnover than the sales/inventory. Other measures of physical turnover use average monthly inventory or an average of the inventories at the beginning and end of the period.

#### L. SALES/WORKING CAPITAL:

(1) Method of computation: The net annual sales for the company is divided by the net working capital or excess of total current assets over current liabilities.

(2) Result: The ratio expresses the turnover or annual activity of that portion of net capital not devoted to fixed or other non-current assets.

(3) Principle: Net working capital represents the basic support for those assets undergoing conversion cycles (as inventory-receivables-cash) during the selling year. Relating sales to working capital suggests the number of turns in working capital per annum. A low ratio may indicate unprofitable use of working capital while a very high ratio of ten signifies overtrading, a vulnerable condition for creditors.

#### **M. SALES/NET WORTH:**

(1) Method of computation: The net annual sales are divided by the tangible net worth.

(2) Result: The ratio reflects the activity of owners' capital during the year.

(3) Principle: Capital is invested in an enterprise in the hope of a substantial return. The probability of such a return is largely dependent upon a reasonable activity of the investment. This ratio is one measure of this activity. When the relation increases from year to year, it indicates that owner's capital is being used more frequently during the year. A very high ratio may indicate under capitalization (lack of sufficient ownership capital) or overtrading.

[Recompiled 10/01/01]

## **PART 28: GUIDELINES FOR ACCEPTABLE COLLATERAL UNDER SECTION 7-27-5.2(B)**

### **2.60.28.1 ISSUING AGENCY:**

State Investment Council.

[Recompiled 10/1/01]

### **2.60.28.2 SCOPE:**

**[RESERVED]**

[Recompiled 10/1/01]

### **2.60.28.3 STATUTORY AUTHORITY:**

**[RESERVED]**

[Recompiled 10/1/01]

**2.60.28.4 DURATION:**

**[RESERVED]**

[Recompiled 10/1/01]

**2.60.28.5 EFFECTIVE DATE:**

Filed January 13, 1988.

[Recompiled 10/1/01]

**2.60.28.6 OBJECTIVE:**

**[RESERVED]**

[Recompiled 10/1/01]

**2.60.28.7 DEFINITIONS:**

**[RESERVED]**

[Recompiled 10/1/01]

**2.60.28.8 GUIDELINES FOR ACCEPTABLE COLLATERAL UNDER SECTION 7-27-5.2(B): [repealed]**

The following associated items shall be delivered to the state's custodian to qualify a promissory note secured by a first mortgage as acceptable collateral for deposits of the severance tax permanent fund made pursuant to Section 7-25-5.2(B) NMSA 1978 [repealed]:

- A. original promissory note, evidencing first lien;
- B. original mortgage;
- C. copy of title insurance policy;
- D. copy of hazard insurance policy current at time collateral is pledged
- E. insurance (by F.H.A. or V.A. or a private mortgage insurance company authorized to do business in the state of New Mexico) against default by a mortgagor whose outstanding principal balance is in excess of 80 percent of the appraised valuation or sales price

F. endorsement by pledgor financial institution of the promissory note to the state;

G. properly executed and recorded assignment of mortgage to the state;

H. copy of the original, signed appraisal associated with each endorsed promissory note;

I. In addition, substitutions shall be required for any mortgage that becomes 60 days delinquent.

[Recompiled 10/1/01]

## **PART 29: COLLATERAL POLICY FOR NEW MEXICO BANKS**

### **2.60.29.1 ISSUING AGENCY:**

State Investment Council.

[Recompiled 10/1/01]

### **2.60.29.2 SCOPE:**

**[RESERVED]**

[Recompiled 10/1/01]

### **2.60.29.3 STATUTORY AUTHORITY:**

Sections 7-27-5.2 [repealed], and including but not limited to, Sections 6-10-10, 6-10-16, 6-10-17, 6-10-18, 6-10-20, 6-10-24.1, 6-10-29 and 6-10-35 NMSA 1978.

[Recompiled 10/1/01]

### **2.60.29.4 DURATION:**

Permanent.

[Recompiled 10/1/01]

### **2.60.29.5 EFFECTIVE DATE:**

Filed October 5, 1987.

[Recompiled 10/1/01]

### **2.60.29.6 OBJECTIVE:**

**[RESERVED]**

[Recompiled 10/1/01]

**2.60.29.7 DEFINITIONS:**

**[RESERVED]**

[Recompiled 10/1/01]

**2.60.29.8 COLLATERAL POLICY FOR NEW MEXICO BANKS:**

A. In the exercise of its authority under Sections 7-27-5.2 [repealed], and including but not limited to, Sections 6-10-10, 6-10-16, 6-10-17, 6-10-18, 6-10-20, 6-10-24.1, 6-10-29 and 6-10-35 NMSA 1978, the state investment council (the "council") desires to minimize potential risks to existing and future bank deposits of severance tax permanent funds under its authority. As a first step towards achieving this objective, it hereby directs the state investment officer to conduct a risk assessment of banks holding deposits of severance tax permanent fund monies under the council's authority. The risk-assessment will include a determination of each bank's primary capital to asset ratio, its net operating income/total average assets and its non-performing loans/primary capital. If a bank's primary capital to asset ratio is 6 percent or greater, its net operating income/total average asset is .61 percent or greater and its non-performing loans/primary capital is 34.9 percent or less, then the bank shall be required to maintain collateral at the minimum level set forth in Section 7-27-5.2 [repealed] or 6-10-17 NMSA 1978, as applicable. If a bank does not meet these three qualifications for a minimum level of collateral under Section 7-27-5.2 [repealed] or 6-10-17, the state investment officer is hereby directed to cease making any additional deposits of public money into the bank and to withdraw deposits as provided herein, unless the bank provides increased levels of collateral in accordance with the schedule set forth below.

B. The investment officer shall request increased collateral from any bank which holds a deposit of public money within the council's authority and does not meet the qualifications set forth above for a minimum level of collateral under Section 7-27-5.2 [repealed] or 6-10-17 in accordance with the following schedule:

(1) If a bank's primary capital to asset ratio (as defined by the FDIC) is:

(a) 5 percent to 6 percent..... a bank shall be required to maintain collateral in the form of securities with an aggregate market value equal to 75 percent of the amount of the deposit, or mortgages with an aggregate market value equal to 90 percent of the amount of the deposit;

(b) less than 5 percent..... a bank shall be required to maintain collateral in the form of securities with an aggregate market value equal to 100 percent of the amount of the deposit, or mortgages with an aggregate market value equal to 110 percent of the amount of the deposit.

(2) If the ratio of a bank's net operating income (annualized after taxes) to its total average assets is:

(a) . 6 percent - .51 percent..... a bank shall be required to maintain collateral in the form of securities with an aggregate market value equal to 75 percent of the amount of the deposit, or mortgages with an aggregate market value equal to 90 percent of the amount of the deposit.

(b) Less than .51 percent..... a bank shall be required to maintain collateral in the form of securities with an aggregate market value equal to 100 percent of the amount of the deposit, or mortgages with an aggregate market value equal to 110 percent of the amount of the deposit.

(c) Provided, however, a newly chartered bank shall be exempt from the requirements of this subsection for the first year of its operations, and in its second year of operation, the bank shall annualize its net operating income beginning with the first quarter of the second year for the purpose of calculating the ratio pursuant to this subsection.

(3) If the ratio of a bank's non-performing loans (defined as loans which are at least 90 days past due and accruing or non-accruing) to the bank's primary capital is:

(a) 35 percent - 49.9 percent..... a bank shall be required to maintain collateral in the form of securities with an aggregate market value equal to 75 percent of the amount of the deposit, or mortgages with an aggregate market value equal to 90 percent of the amount of the deposit.

(b) above 49.9 percent..... a bank shall be required to maintain collateral in the form of securities with an aggregate market value equal to 100 percent of the amount of the deposit, or mortgages with an aggregate market value equal to 110 percent of the amount of the deposit.

(4) Should the risk assessment ratios under Sections (a) (b) and (c) [now Paragraphs (1), (2) and (3) of Subsection B of 2.60.29.8 NMAC] result in different levels of collateral for a bank (i.e., 50 percent, 75 percent, 90 percent, 100 percent and 110 percent), the state investment officer shall request the highest collateral level required under the three sections.

(5) If a bank is unable to meet the increased collateral level required by sections (a) (b) and (c) [now Paragraphs (1), (2) and (3) of Subsection B of 2.60.29.8 NMAC], above, the state investment officer shall cease to make deposits and shall make withdrawals of deposits in the order in which they would otherwise mature down to an amount which can be collateralized at an appropriate level, as above specified. The collateral levels required by sections (a), (b), and (c), above [now Paragraphs (1), (2) and (3) of Subsection B of 2.60.29.8 NMAC], shall be required until the ratios of the bank as determined by the risk-assessment, return to a level which allows collateral to

be kept at a lower level under sections (a) (b) and (c) [now Paragraphs (1), (2) and (3) of Subsection B of 2.60.29.8 NMAC], or at the statutory minimum level, as appropriate.

(6) For the purpose of this policy "securities" shall be defined as those securities eligible as collateral for severance tax permanent funds under Section 6-10-16 and 7-27-5.2 [repealed], as amended and effective May 21, 1986, Art IV, Sec. 23, N.M. Constitution.

(7) For the purposes of this policy, "mortgages", shall be defined as eligible mortgage collateral under Section 7-27-5.2 NMSA 1978 [repealed] and the council's guidelines promulgated under section 7-27-5.2 [repealed], as those guidelines may be amended from time to time by the council. The "market value" of such mortgages, as referred to in this policy, shall be determined by reference to the value of the mortgage collateral if sold in the secondary market and not the appraised value of the realty pledged by the mortgages.

(8) The withdrawal of deposits shall not be subject to the assessment of a penalty for early withdrawal, except to the extent required to be imposed by federal law and in that event only the minimum penalty required to be imposed shall be imposed by the bank.

(9) The figures to be used by the investment officer in the risk-assessment shall be calculated by each bank from the quarterly call statements and shall be furnished to the investment officer no later than on the tenth day of the second month following that quarter, provided however, if the tenth day falls on a weekend or legal holiday, the figures shall be submitted on the next business day. The figures provided to the state investment officer by the bank shall be certified in writing by the president of the bank, an executive officer of the bank, or a person authorized by corporate resolution of the bank to certify the information. The investment officer shall, at any time between quarterly reporting periods, request additional certified information from the bank, as needed, to assess the risk level of any bank. If a bank fails to provide the requested information, it shall be required to maintain collateral in the form of securities or mortgages, as appropriate, with an aggregate market value equal to 100 percent or 110 percent of the amount of the deposit, as applicable.

(10) Any qualifying bank or savings and loan association that fails to maintain the pledge of qualifying collateral or other security for deposits or fails to substitute or provide additional qualifying collateral or security when requested by the council or state investment officer is subject to a penalty by the director of the financial institutions division of up to one hundred dollars (\$100) a day for each two hundred and fifty thousand dollars (\$250,000) deposited for each day the violation continues.

(11) The investment officer is also directed to require each bank which has had a final administrative enforcement action imposed upon it to advise the investment officer of such action. If the investment officer believes such action indicates a high

level of risk in maintaining public deposits in that bank, he shall report to the council, who shall decide whether additional collateral will be required.

(12) Notwithstanding any of the above provisions, the state investment officer may make an emergency withdrawal of state deposits prior to maturity when such action is necessary in his judgement in the exercise of reasonable care to protect state funds.

(13) If a bank believes that exceptional circumstances exist which indicate that it would not be appropriate for the investment officer to take any of the actions listed above, the bank shall appear before the next meeting of the state investment council and present its position. The investment council shall at that time vote on whether an exception to the policy will be allowed.

(14) The investment officer is further directed to incorporate the terms of this policy into any future depository and collateral agreements and to take immediate and prudent steps to initiate this policy. In no event shall the investment office fail to have this policy in effect with respect to all banks later than January 1, 1986.

(15) Nothing herein shall restrict the state treasurer, state investment officer, or, the state investment council from the lawful exercise of rights and duties conferred upon them by law.

[Recompiled 10/1/01]

## **PART 30: COLLATERAL POLICY FOR NEW MEXICO SAVINGS AND LOAN ASSOCIATIONS**

### **2.60.30.1 ISSUING AGENCY:**

State Investment Council.

[Recompiled 10/01/01]

### **2.60.30.2 SCOPE:**

**[RESERVED]**

[Recompiled 10/01/01]

### **2.60.30.3 STATUTORY AUTHORITY:**

Sections 7-27-5.2 [repealed], and including but not limited to, Sections 6-10-10, 6-10-16, 6-10-17, 6-10-18, 6-10-20, 6-10-24.1, 6-10-29 and 6-10-35 NMSA 1978.

[Recompiled 10/01/01]

**2.60.30.4 DURATION:**

Permanent.

[Recompiled 10/01/01]

**2.60.30.5 EFFECTIVE DATE:**

Filed October 5, 1987.

[Recompiled 10/01/01]

**2.60.30.6 OBJECTIVE:**

**[RESERVED]**

[Recompiled 10/01/01]

**2.60.30.7 DEFINITIONS:**

**[RESERVED]**

[Recompiled 10/01/01]

**2.60.30.8 COLLATERAL POLICY FOR NEW MEXICO SAVINGS AND LOAN ASSOCIATIONS:**

A. In the exercise of its authority under Sections 7-27-5.2 [repealed], and including but not limited to, Sections 6-10-10, 6-10-16, 6-10-17, 6-10-18, 6-10-20, 6-10-24.1, 6-10-29 and 6-10-35 NMSA 1978, the state investment council (the "council") desires to minimize the level of risk to deposits of severance tax permanent fund monies made pursuant to its authority. As a first step towards achieving this goal, the council hereby directs the state investment officer to conduct a risk-assessment of savings and loans holding deposits of severance tax permanent fund monies. The risk assessment will include a determination of each savings and loan's net worth to average asset ratio, its average net income before taxes/total average assets and its after-tax losses. If a savings and loan's net worth to average asset ratio is 3 percent or greater, its four quarter average net income either before or after taxes/four quarter average assets is .30 percent or greater, and it has not had two or more consecutive quarters of after tax losses, the savings and loan should be to maintain collateral at the statutory minimum level set forth in Section 7-27-5.2 [repealed] NMSA 1978 or Section 6-10-17 NMSA 1978, as applicable. If a savings and loan does not meet these 3 qualifications for a minimum level of collateral under Sections 7-27-5.2 [repealed] or Section 6-10-17, the investment officer is hereby directed to cease making any additional deposits of severance tax permanent fund monies into the savings and loan and to withdraw deposits as provided herein, unless the savings and loan provides increased levels of collateral in accordance with the schedule set forth below.

B. The investment officer shall request increased collateral from any savings and loan which holds a deposit of severance tax permanent funds within the council's authority and does not meet the qualifications set out above for a minimum level of collateral under Section 7-27-5.2 [repealed] or 6-10-17, in accordance with the following schedule:

(1) If a savings and loan's net worth to average asset ratio (defined as line number 800/line 810 section C FHLB quarterly report) is:

(a) 2 percent to 3 percent..... a savings and loan shall be required to maintain collateral of deposit in the form of securities with an aggregate market value equal to 75 percent of the amount of the deposit, or mortgages with an aggregate market value equal to 90 percent of the amount of deposit;

(b) less than 2 percent..... a savings and loan shall be required to maintain collateral in the form of securities with an aggregate market value equal to 100 percent of the amount of deposit, or mortgages with an aggregate market value equal to 110 percent of the amount of the deposit.

(2) If the ratio of the savings and loan's four quarter average net income either before or after taxes (defined as line 830 plus lines 320 and 330 section E FHLB quarterly report) to its four quarter average assets is:

(a) .2 percent to .3 percent... a savings and loan shall be required to maintain collateral in the form of securities with an aggregate market value equal to 75 percent of the amount of the deposit, or mortgages with an aggregate market value equal to 90 percent of the amount of the deposit.

(b) less than .2 percent... a savings and loan shall be required to maintain collateral in the form of securities with an aggregate market value equal to 100 percent of the amount of the deposit, or mortgages with an aggregate market value equal to 110 percent of the amount of the deposit.

(c) Provided, however, a newly chartered savings and loan shall be exempt from the requirements of this subsection [now Subparagraphs (a) and (b) of Paragraph (1) and Subparagraphs (a) and (b) of Paragraph (2) of Subsection B of 2.60.30.8 NMAC] for the first year of its operations, and in its second year of operation, the savings and loan shall annualize its net operating income beginning with the first quarter of the second year for the purpose of calculating the ratio pursuant to this subsection [now Subparagraphs (a) and (b) of Paragraph (1) and Subparagraphs (a) and (b) of Paragraph (2) of Subsection B of 2.60.30.8 NMAC].

(3) If a savings and loan experiences two consecutive quarters of after-tax losses (such losses to be determined by reference to Section E of the federal home loan bank quarterly report), collateral shall be required in the form of mortgages with an aggregate market value equal to 90 percent of the amount of the deposit, or securities

with an aggregate market value equal to 75 percent of the amount of the deposit. If the savings and loan experiences three consecutive quarters of after-tax losses, collateral shall be required in the form of mortgages with an aggregate market value of 110 percent of the amount of the deposit, or securities with an aggregate market value equal to 100 percent of the amount of the deposit.

(4) Should the risk assessment ratios under Sections (a), (b) and (c) [now Paragraphs (1), (2) and (3) of Subsection B of Section 2.60.30.8 NMAC] result in different levels of collateral for a savings and loan association (i.e., 50 percent, 75 percent, 90 percent, 100 percent and 110 percent), the state investment office shall request the highest collateral level required under the three Sections.

(5) If a savings and loan association is unable to meet the increased collateral level required by sections (a), (b) and (c) [now Paragraphs (1), (2) and (3) of Subsection B of 2.60.30.8 NMAC] above, the state investment officer shall make withdrawals of deposits in the order in which they would otherwise mature down to an amount which can be collateralized at an appropriate level, as above specified. The increased collateral levels required by Sections (a), (b) and (c) [now Paragraphs (1), (2) and (3) of Subsection B of 2.60.30.8 NMAC], above, shall be required until the ratios of the savings and loan determined by the risk-assessment return to a level which allows collateral to be kept at a lower level under sub-sections (a), or (c), [now Paragraphs (1) and (3) of Subsection B of 2.60.30.8 NMAC], or at the statutory minimum level, as appropriate.

(6) For the purpose of this policy, "securities" shall be defined as those securities eligible as collateral for severance tax permanent funds under Section 6-10-16 and 7-27-5.2, as amended and effective May 21, 1986, Art IV, Sec. 23, N.M. Constitution.

(7) For the purpose of this policy, "securities" shall be defined as those securities eligible as collateral for severance tax permanent funds under Section 6-10-16 and 7-27-5.2 [repealed], as amended and effective May 21, 1986, Art IV, Sec. 23, N.M. Constitution.

(8) For the purposes of this policy, "mortgages", shall be defined as eligible mortgage collateral under Section 7-27-5.2 NMSA 1978 [repealed] and the council's guidelines promulgated under Section 7-27-5.2 [repealed], as those guidelines may be amended from time to time by the council. The "market value" of such mortgages, as referred to in this policy, shall be determined by reference to the value of the mortgage collateral if sold in the secondary market and not the appraised value of the realty pledged by the mortgages.

(9) The withdrawal of deposits shall not be subject to the assessment of a penalty for early withdrawal, except to the extent required to be imposed by federal law and in that event only the minimum penalty required to be imposed shall be imposed by the savings and loan association.

(10) The figures to be used by the investment officer in the risk-assessment shall be calculated by each savings and loan from the quarterly federal home loan bank report and shall be furnished to the investment officer no later than on the tenth day of the second month following that quarter, provided however, if the tenth day falls on a weekend or legal holiday, the figures shall be submitted on the next business day. The figures provided to the state investment officer by the savings and loan shall be certified in writing by the president of the savings and loan, an executive officer of the savings and loan, or a person authorized by corporate resolution of the bank to certify the information. The investment officer shall, at any time between quarterly reporting periods, request additional certified information, as needed, to assess the risk level of any savings and loan. If a savings and loan fails to provide the requested information, it shall be required to maintain collateral in the form of securities or mortgages, as appropriate, with an aggregate market value equal to 100 percent or 110 percent of the amount of the deposit, as applicable.

(11) Any qualifying bank or savings and loan association that fails to maintain the pledge of qualifying collateral or other security for deposits or fails to substitute or provide additional qualifying collateral or security when requested by the council or state investment officer is subject to a penalty by the director of the financial institutions division of up to one hundred dollars (\$100) a day for each two hundred and fifty thousand dollars (\$250,000) deposited for each day the violation continues.

(12) The investment officer is also directed to require each savings and loan which has had a final administrative enforcement action imposed upon it to advise the investment officer of such action. If the investment officer believes such action indicates a high level of risk in maintaining public deposits in that bank, he shall report to the council, who shall decide whether additional collateral will be required.

(13) Notwithstanding any of the above provisions, the state investment officer may make an emergency withdrawal of state deposits prior to maturity when such action is necessary in his judgement in the exercise of reasonable care to protect state funds.

(14) If a savings and loan believes that exceptional circumstances exist which indicate that it would not be appropriate for the investment officer to take any of the actions listed above, the savings and loan shall appear before the next meeting of the state investment council and present its position. The investment council shall at that time vote on whether an exception to the policy will be allowed.

(15) The investment officer is further directed to incorporate the terms of this policy into any future depository and collateral agreements and to take immediate and prudent steps to initiate this policy. In no event shall the investment office fail to have this policy in effect with respect to all banks later than January 1, 1986.

(16) Nothing herein shall restrict the state treasurer, state investment officer, or, the state investment council from the lawful exercise of rights and duties conferred upon them by law.

[Recompiled 10/01/01]

## **PART 31: [RESERVED]**

## **PART 32: COMPLIANCE RULES**

### **2.60.32.1 ISSUING AGENCY:**

State Investment Council.

[Recompiled 10/1/01]

### **2.60.32.2 SCOPE:**

**[RESERVED]**

[Recompiled 10/1/01]

### **2.60.32.3 STATUTORY AUTHORITY:**

**[RESERVED]**

[Recompiled 10/1/01]

### **2.60.32.4 DURATION:**

[Permanent.]

[Recompiled 10/1/01]

### **2.60.32.5 EFFECTIVE DATE:**

February 1, 1992

[Recompiled 10/1/01]

### **2.60.32.6 OBJECTIVE:**

**[RESERVED]**

[Recompiled 10/1/01]

## **2.60.32.7 DEFINITIONS:**

**[RESERVED]**

[Recompiled 10/1/01]

## **2.60.32.8 COMPLIANCE RULES:**

A. The compliance rules set forth below are only applicable to purchase, sale, and short sale of (i.e., trades in) certain securities and securities-oriented options and warrants (derivatives). Compliance with these rules is required of all employees of the state investment office, including the state investment officer. All employees of the state investment office will be required to sign a statement attesting to their having read and understood the compliance rules and will at all times adhere to them. Such statements must be signed within ten working days of adoption of these rules or within ten working days of the start of an employment period, whichever is applicable. Failure to do so may be deemed cause for dismissal from employment.

B. The state investment officer shall appoint an employee of the state investment office to serve as compliance officer. The compliance officer shall monitor trading activities of all state investment office employees for adherence to the compliance rules. The compliance officer shall immediately report, in writing, to the state investment officer any infraction of the compliance rules. Such infraction may be deemed cause for dismissal from employment.

C. The compliance officer shall maintain a restricted list of company names. A company's name shall be added to the restricted list immediately upon:

(1) recommendation by a state investment office employee for inclusion of that company name on the state investment office securities buy/sell list; or

(2) recommendation by the advisor(s) to the state investment office for inclusion of that company name on the state investment office securities buy/sell list.

D. A company's name shall be removed from the restricted list:

(1) immediately upon rejection of a recommendation for inclusion of that company name on the state investment office securities buy/sell list; or

(2) after two full market days following completion of a state investment office trade program in that company's securities in accordance with the securities buy/sell list.

E. There are eight compliance rules:

(1) A state investment office employee shall not trade in the securities or derivatives of companies whose names are on the restricted list for his (her) own

account(s), or any family member account(s), or any account(s) in which he (she) holds a direct or indirect beneficial interest, or any account(s) in which he (she) has discretionary investment authority or power of attorney, nor shall he (she), for any account, advise on trading in the securities or derivatives of companies whose names are on the restricted list.

(2) It shall be the responsibility of a state investment office employee intending to trade securities or derivatives of any company to ascertain if that company's name is on the restricted list.

(3) A state investment office employee shall submit to the compliance officer, no later than the 30th day following the end of every quarter, a copy of the quarterly security statements or the period's three monthly security statements for his (her) own accounts, and any family member account(s), and any account(s) in which he (she) holds a direct or indirect beneficial interest, and any account(s) in which he (she) has discretionary investment authority or power of attorney.

(4) A state investment office employee shall at no time disclose to any person outside of the state investment office any of the contents of the state investment office securities buy/sell list or the contents of the restricted list except as is necessary in the normal course of business.

(5) a state investment office employee shall disqualify himself (herself) from participation in any official act affecting securities in which he (she) has a financial interest.

(6) No state investment office employee shall acquire a financial interest at a time when he (she) believes or has reason to believe that it will be directly affected by his (her) official act.

(7) No state investment office employee shall use confidential information acquired by virtue of his (her) state employment for his (her) or another's private gain.

(8) The compliance officer shall, during the month of January, submit to the secretary of state, in writing, a complete list of the securities and derivatives owned in all appropriate accounts of state investment office employees.

F. Note: For Rules V and VI [now Paragraphs 5 and 6 of Subsection E of 2.60.32.8 NMAC], "official act" means an official decision, approval, disapproval, or any other action which involves the use of discretionary authority, except the term does not mean an act of the legislature or an act of general applicability.

G. Adopted by the state investment council in an open meeting on December 18, 1991, to be effective February 1, 1992.

(1) State Investment Council

(2) By: State Investment Officer

(3) Date: January 24, 1992

[Recompiled 10/1/01]

## **CHAPTER 61: STATE INDEBTEDNESS AND SECURITIES**

### **PART 1: GENERAL PROVISIONS [RESERVED]**

### **PART 2: [RESERVED]**

### **PART 3: DEDICATION OF A PORTION OF THE STATE'S GROSS RECEIPTS TAX INCREMENT**

#### **2.61.3.1 ISSUING AGENCY:**

State Board of Finance, 181 Bataan Memorial Building, Santa Fe, NM.

[2.61.3.1 NMAC - N, 10/15/2008]

#### **2.61.3.2 SCOPE:**

Tax increment development districts formed pursuant to the Tax Increment for Development Act with respect to the state's dedication of a portion of its gross receipts tax increment.

[2.61.3.2 NMAC - N, 10/15/2008]

#### **2.61.3.3 STATUTORY AUTHORITY:**

Section 5-15-2 (A) NMSA 1978 states that the purpose of the Tax Increment for Development Act is to create a mechanism for providing gross receipts tax financing and property tax financing for public infrastructure for the purpose of supporting economic development and job creation. Section 5-15-15 (F) NMSA 1978 provides that the state board of finance, upon review of the applicable tax increment development plan, may find that dedication of a portion of the gross receipts tax increment for the purpose of securing gross receipts tax increment bonds is reasonable and in the best interest of the state and that the use of the state gross receipts tax is likely to stimulate the creation of jobs, economic opportunities and general revenue for the state through the addition of new businesses to the state and the expansion of existing businesses within the state. Section 5-15-15 (F) NMSA 1978 limits the dedication to not more than seventy-five percent (75%) of the gross receipts tax increment attributable to the imposition of the state gross receipts tax within the district. Section 5-15-25.2 NMSA

1978 states that the state board of finance may approve the revision of the base year used to determine a district's gross receipts tax increment once during the lifetime of the district, if the revised year is a calendar year that is completed, if no gross receipts tax increment bonds attributable to the district have been issued, if there is no unresolved objection to the revision by the developer or by a local government that has dedicated a tax increment to the district, and upon a finding that the revision is reasonable and in the best interest of the state.

[2.61.3.3 NMAC - N, 10/15/2008; A, 7/31/2014]

**2.61.3.4 DURATION:**

Permanent.

[2.61.3.4 NMAC - N, 10/15/2008]

**2.61.3.5 EFFECTIVE DATE:**

October 15, 2008, unless a later date is cited at the end of a section.

[2.61.3.5 NMAC - N, 10/15/2008]

**2.61.3.6 OBJECTIVE:**

To establish rules and regulations governing the dedication of a portion of the state's gross receipts tax increment provided for by the Tax Increment for Development Act (Sections 5-15-1 through 5-15-28 NMSA 1978); to provide guidance as to board evaluation of district requests by defining terms setting forth the bases upon which the required findings are to be made, and outlining the methodological framework to be used; to set forth procedures for submittals of applications for a dedication; and to establish reporting requirements.

[2.61.3.6 NMAC - N, 10/15/2008]

**2.61.3.7 DEFINITIONS:**

**A.** "Act" means the Tax Increment for Development Act, NMSA 1978, Sections 5-15-1 through 5-15-28 (2006), as it may be amended.

**B.** "Application" means the submittal by the district, or, if the district is not yet formed, the owners of at least fifty percent (50%) of real property located within the boundaries of the area proposed for inclusion within the district, containing the information and materials required by this rule seeking a dedication by the board of a portion of the state's increment or approval of a revised base year.

**C.** "Base gross receipts taxes" means:

**(1)** the total amount of gross receipts taxes collected within a district, as estimated by the governing body that adopted a resolution to form that district, in consultation with the taxation and revenue department, in the calendar year preceding the formation of the district or, in the case of a district with a revised base year approved by the board, the calendar year approved by the board, when an area is added to an existing district, the amount of gross receipts taxes collected in the calendar year preceding the effective date of the modification of the tax increment development plan and designated by the governing body to be available as part of the gross receipts tax increment; and

**(2)** any amount of gross receipts taxes that would have been collected in such year if any applicable additional gross receipts taxes imposed after that year had been imposed in that year.

**D.** "Board" means the state board of finance.

**E.** "Bonds" means the gross receipts tax increment bonds for which a portion of the state's increment is to be pledged.

**F.** "Developer" means the owner or developer who has entered into an agreement pursuant to subsection A of section 5-15-4 NMSA 1978 with the governing body that formed a district or the owner's or developer's successors or assigns.

**G.** "Direct job" or "direct effect" means employment, economic output and personal income attributable to economic activity within the boundaries of a district. A direct job may include an economic base job, an indirect job or an induced job if these jobs or this economic activity occurs within the boundaries of a district.

**H.** "District" means a tax increment development district formed pursuant to the act for the purposes of carrying out projects.

**I.** "District board" means a board formed in accordance with the provisions of the act to govern a district.

**J.** "Economic base job" means employment within the district with an employer engaged primarily in creating goods and services that are exported out of the state.

**K.** "Economic output" means the contribution to gross domestic product by state as measured by the bureau of economic analysis of the U.S. department of commerce. At a minimum, economic output is the sum of wages and salaries paid to workers in the district, profits of firms engaged in economic activity in the district, and interest and dividends paid to investors on loans and investments in the district.

**L.** "Governing body" means the city council or city commission of a city, the board of trustees or council of a town or village or the board of county commissioners of a county.

**M.** "Gross receipts tax increment" means the gross receipts taxes collected within a district in excess of the base gross receipts taxes collected for the duration of the existence of a district and distributed to the district in the same manner as distributions are made under the provisions of the Tax Administration Act [7-1-1 NMSA 1978].

**N.** "Improvement district" means a district composed of all or a portion of a district wherein a property tax has been imposed pursuant to the provisions of 3-33-2E NMSA 1978.

**O.** "Indirect job" or "indirect effect" means employment, economic output and personal income attributable to economic activity of suppliers to economic base businesses located within the district. These indirect jobs or activity may be located within or outside the district.

**P.** "Induced job" or "induced effect" means employment, economic output and personal income attributable to household spending by employees of all companies directly or indirectly affected by the project. These indirect jobs or effects may be located within or outside the district.

**Q.** "Project" means a tax increment development project, which means activities undertaken within a tax increment development area to enhance the sustainability of the local, regional or statewide economy; to support the creation of jobs, schools and workforce housing; and to generate tax revenue for the provision of public improvements and may include:

(1) acquisition of land within a designated tax increment development area or a portion of that tax increment development area;

(2) demolition and removal of buildings and improvements and installation, construction or reconstruction of streets, utilities, parks, playgrounds and improvements necessary to carry out the objectives of the act;

(3) installation, construction or reconstruction of streets, water utilities, sewer utilities, parks, playgrounds and other public improvements necessary to carry out the objectives of the act;

(4) disposition of property acquired or held by a district as part of the undertaking of a project at the fair market value of such property for uses in accordance with the act;

(5) payments for professional services contracts necessary to implement a tax increment development plan or project;

(6) borrowing to purchase land, buildings or infrastructure in an amount not to exceed the revenue stream that may be derived from the gross receipts tax increment or the property tax increment estimated to be received by a district; and

**(7)** grants for public improvements essential to the location or expansion of a business.

**R.** "Public improvements" means on-site improvements and off-site improvements that directly or indirectly benefit a district or facilitate development within a tax increment development area and that are dedicated to the governing body in which the district lies. Public improvements include:

**(1)** sanitary sewage systems, including collection, transport, treatment, dispersal, effluent use and discharge;

**(2)** drainage and flood control systems, including collection, transport, storage, treatment, dispersal, effluent use and discharge;

**(3)** water systems for domestic, commercial, office, hotel or motel, industrial, irrigation, municipal or fire protection purposes, including production, collection, storage, treatment, transport, delivery, connection and dispersal;

**(4)** highways, streets, roadways, bridges, crossing structures and parking facilities, including all areas for vehicular use for travel, ingress, egress and parking;

**(5)** trails and areas for pedestrian, equestrian, bicycle or other non-motor vehicle use for travel, ingress, egress and parking;

**(6)** pedestrian and transit facilities, parks, recreational facilities and open space areas for the use of members of the public for entertainment, assembly and recreation;

**(7)** landscaping, including earthworks, structures, plants, trees and related water delivery systems;

**(8)** public buildings, public safety facilities and fire protection and police facilities;

**(9)** electrical generation, transmission and distribution facilities;

**(10)** natural gas distribution facilities;

**(11)** lighting systems;

**(12)** cable or other telecommunications lines and related equipment;

**(13)** traffic control systems and devices, including signals, controls, markings and signage;

(14) school sites and facilities with the consent of the governing board of the public school district for which the facility is to be acquired, constructed or renovated;

(15) library and other public educational or cultural facilities;

(16) equipment, vehicles, furnishings and other personal property related to the items listed in this subsection;

(17) inspection, construction management, planning and program management and other professional services costs incidental to the project;

(18) workforce housing; and

(19) any other improvement that the governing body determines to be for the use or benefit of the public.

**S.** "State's increment" means the state's portion of the gross receipts tax increment.

**T.** "Sustainable development" means land and other development that achieves sustainable economic and social goals in ways that can be supported for the long term by conserving resources, protecting the environment and ensuring human health and welfare using mixed-use, pedestrian-oriented, multimodal land use planning.

**U.** "Workforce housing" means decent, safe and sanitary dwellings, apartments, single-family dwellings or other living accommodations that are affordable for persons or families earning less than eighty percent (80%) of the median income within the county in which the project is located; provided that an owner-occupied housing unit is affordable to a household if the expected sales price is reasonably anticipated to result in monthly housing costs that do not exceed thirty-three percent (33%) of the household's gross monthly income; provided that:

(1) determination of mortgage amounts and payments are to be based on down payment rates and interest rates generally available to lower- and moderate-income households; and

(2) a renter-occupied housing unit is affordable to a household if the unit's monthly housing costs, including rent and basic utility and energy costs, do not exceed thirty-three percent (33%) of the household's gross monthly income.

[2.61.3.7 NMAC - N, 10/15/2008; A, 7/31/2014]

#### **2.61.3.8 BASES FOR DEDICATION OF A PORTION OF THE STATE'S INCREMENT AND REVISION OF BASE YEAR:**

In determining whether it can make the findings required for dedication of up to seventy-five percent (75%) of the state's increment and what percentage of the state's increment may be dedicated or for approval of the revision of a district's base year the board will:

**A.** evaluate whether the project can occur in substantially the same form if the state's increment is not obtained or, in the case of a request for approval of a revised base year, if the base year is not revised;

**B.** determine that the following additional criteria are met:

(1) the project is expected to have a positive net revenue impact on the state general fund over a period of time approximately equal to the life of the bonds when calculated as described in this rule;

(2) the project is expected to generate new jobs and economic opportunities;

(3) the project incorporates adequate planning and resource allocation for workforce housing and schools;

(4) the portion of the state's increment requested is reasonable and fully justified by the analysis; and

(5) the developer has a proven record for success with similar developments; and

**C.** consider these additional factors as part of the determination whether the use of the state's increment is reasonable and in the best interest of the state:

(1) the type of development (e.g. greenfield, revitalization, or within a recognized public policy priority);

(2) the anticipated increase in general fund tax revenue and employment within the district as a result of companies moving into the state (companies new to New Mexico);

(3) the anticipated increase in general fund tax revenue and employment within the district as a result of growth of firms currently doing business in New Mexico;

(4) the attributes of employment generated within the district, the nature of the industry, and benefits to the community and the state;

(5) the ratio of local government to state government contribution, expressed both in terms of absolute dollars contributed toward infrastructure and in terms of the relative percentage of available gross receipts and property tax revenues dedicated to bond repayment;

- (6) the impacts on surrounding or non-participating government entities;
- (7) the ratio of private to public investment;
- (8) the use of innovative planning and development techniques;
- (9) the application of environmentally protective technologies, energy and water efficiencies and sustainable development elements in the project, including all residential, commercial, industrial and government structures;
- (10) the maximum maturity of the bonds is reasonable and fully justified by the analysis;
- (11) the availability of water and water rights to support the planned community;
- (12) the proposed governance structure of the district, including the composition of the board and the method of selection; and
- (13) the provision of community facilities, such as senior centers, and non traditional housing to address various social needs such as homelessness and domestic violence and other community benefits.

[2.61.3.8 NMAC - N, 10/15/2008; A, 7/31/2014]

**2.61.3.9 APPLICATION SUBMITTAL, PROCESSING, EVALUATION  
METHODOLOGY, AND EFFECTIVE DATE AND DURATION OF DEDICATION:**

**A.** Contents of application. A district requesting a dedication of a portion of the state's increment or the revision of its base year shall submit an application that includes:

- (1) a conceptual site plan for the project;
- (2) the tax increment development plan approved by the governing body that includes:
  - (a) a map depicting the geographical boundaries of the area proposed for inclusion within the district; this map should indicate any existing infrastructure and residential, commercial and industrial structures and development;
  - (b) the estimated time necessary to complete the project;
  - (c) a description and the estimated cost of all public improvements proposed for the project;

**(d)** whether it is proposed to use gross receipts increment bonds or property tax increment bonds or both to finance all or part of the public improvements;

**(e)** the estimated annual gross receipts tax increment to be generated by the project and the portion of that gross receipts tax increment to be allocated during the time necessary to complete the payment of the project;

**(f)** the estimated annual property tax increment to be generated by the project and the portion of that property tax increment to be allocated during the time necessary to complete the payment of the project;

**(g)** the general proposed land uses for the project;

**(h)** the number of jobs expected to be created by the project classified at the three digit level of the most recent North American industry classification system (NAICS), and separated into full-time and part time jobs;

**(i)** the amount and characteristics of workforce housing expected to be created by the project;

**(j)** the location and characteristics of public school facilities expected to be created, improved, rehabilitated or constructed by the project;

**(k)** a description of innovative planning techniques, including mixed-use transit-oriented development, traditional neighborhood design or sustainable development techniques, that are deemed by the governing body to be beneficial and that will be incorporated into the project; and

**(l)** the amount and type of private investment in each project;

**(3)** information on the availability of other public and private funds for the project, including:

**(a)** whether it is proposed to finance any portion of the infrastructure using the provisions of Section 5-15-13 NMSA 1978, which permits the property owners within a district to impose a property tax rate of up to five dollars (\$5.00) per one thousand dollars (\$1,000) of net taxable value for a period of up to four years; and

**(b)** whether it is proposed to establish an improvement district and finance any portion of the infrastructure using the provisions of Sections 3-33-1 through - 43 NMSA 1978, as they may be amended, and whether the bonds sold through this mechanism conform to the limit of twenty-five percent of total property value established in Section 3-33-14 NMSA 1978;

**(4)** an economic development plan, including an industrial cluster analysis if appropriate, for attracting businesses to the district;

**(5)** market feasibility study that includes:

**(a)** the number of residential (single family and multi-family) units and the square footage of commercial, retail and industrial space to be built by calendar year;

**(b)** the average price per square foot or by unit by type;

**(c)** the market supply (or availability) and the value of each property type in the area and surrounding areas with reference to any other planned development in the surrounding areas; and

**(d)** market demand (or absorption rates) for each property type in the area and surrounding areas with reference to any other planned development in the surrounding areas;

**(6)** economic analysis to include:

**(a)** employment and salary projections by industry as classified at the three digit level of the most recent North American industry classification system (NAICS) in the district by calendar year, whether the jobs are temporary (i.e., construction) or permanent employment, and whether the jobs are full-time or part-time;

**(b)** population projections by calendar year;

**(c)** housing unit projections and type by calendar year;

**(d)** economic output from direct and indirect impacts within the district with temporary construction activity listed separately; separate listing of economic base employment within the district, indirect and induced employment within the district and in surrounding areas is optional, but encouraged;

**(e)** the anticipated net revenue impact on the state general fund shall be calculated as follows:

**(i)** the sum of all general fund revenues generated by economic activity within the district by type of revenue (e.g. gross receipts tax from retail sales, gross receipts tax from services provided to New Mexico businesses, personal income tax, etc.) less: 1) the sum of all general fund costs to the state associated with the provision of services to individuals and businesses (e.g. public schools); 2) the estimated amount of tax incentives provided to promote economic development within the district under current law; 3) the amount of the state's increment requested by the district; and 4) the total amount of capital outlay appropriated for use in the district under current law;

**(ii)** the net revenue impact on the state general fund must be expressed in constant dollar terms; and

**(iii)** the net present value of general fund revenues less general fund costs over the life of the bonds shall be submitted; a discount rate equal to five percent shall be used in this calculation;

**(7)** letter from governing body verifying its ability to pay for operations and maintenance of public infrastructure created by the district and provide basic services such as law enforcement and public health and safety within the district;

**(8)** a detailed timeline of project completion, including public infrastructure expenditures;

**(9)** a financing plan to include:

**(a)** information supporting why tax increment financing is needed;

**(b)** debt structure and terms, including maturity and estimated interest rates;

**(c)** pro-forma for all bonds to be issued for the project (including property tax increment bonds, if proposed); and

**(d)** projected coverage ratios for all bonds;

**(10)** developer information to include:

**(a)** organizational chart;

**(b)** experience in developing similar projects and utilizing tax increment financing;

**(c)** audited financial statements for the past three years; and

**(d)** identify past and pending administrative actions and litigation in which the developer is involved that could impact the current financial viability of the developer; briefly describe the nature of the proceedings and current status or final result;

**(11)** any other information regarding the economic benefits to the project's community and to the state or which the district believes will aid the board in considering the request for the dedication;

**(12)** enacted resolution of governing body approving the plan;

**(13)** enacted resolution of governing body forming the district;

**(14)** enacted resolution of each governing body dedicating a portion of its share of the applicable tax increments;

**(15)** approved master development agreement with governing body;

**(16)** form of board resolution approving the dedication of a portion of the state's increment; and

**(17)** in addition to the submission requirements above, for requests for the approval of a revised base year:

**(a)** a detailed project history including a summary of past appearances before the board, legislative efforts related to the project, and activity to date in the district;

**(b)** a written summary of the reasons why rebasing is requested and stating the revised base year requested; and

**(c)** a certification of the district that the district's base year has never been revised and that no gross receipts tax increment bonds attributable to the district have been issued;

**(d)** tabular or verbal comparison of the information provided pursuant to Paragraphs (2) through (6), (8) and (9) of this Subsection at the time a revised base year is requested versus at the time the dedication of a portion of the state's increment was initially approved, with explanations of any substantive changes;

**(e)** a copy of the resolution adopted by the district declaring the district's intent to revise its base year;

**(f)** a copy of all comments on the intent to revise the base year received from the taxation and revenue department, the developer and the local governments that have dedicated a tax increment to the district; and

**(g)** any other related documentation.

**B.** Timeline and submittal requirements. Any application for dedication of a portion of the state's increment or approval of a revised base year shall be considered by the board at its regular meeting in December or July of each year. Except as provided in this paragraph for applications for the approval of a revised base year, complete applications must be submitted no later than the preceding January 1 for consideration at the board's July meeting, or by July 1 for consideration at the board's December meeting. For applications for a revised base year, the submission requirements of Subparagraphs (e), (f) and (g) of Paragraph (17) of Subsection A of 2.61.3.9 NMAC must be received no more than 45 days after a district's adoption of a resolution declaring the intent to revise its base year. All required materials must be submitted electronically and tables must be submitted as Microsoft Excel files with access to all data, including assumptions and formulae. If a district has not been formed by the submittal deadline, please submit all of the documents listed in Paragraphs (1) through (12) and (16) of Subsection A of 2.61.3.9 NMAC in the initial application, and provide

Paragraphs (13), (14) and (15) of Subsection A within five calendar days of adoption or 21 calendar days prior to the meeting at which the board is to consider the application, whichever occurs first. If a governing body has not adopted a resolution pledging a portion of its gross receipts tax increment or its property tax increment or both by this deadline, that resolution shall be provided immediately upon its adoption and, if the adoption does not occur prior to the meeting at which the board is to consider the application, the board may take any action it deems appropriate, such as imposing a condition requiring such dedication or deferring action until a dedication is made. In addition, the board may require informational presentations at a meeting prior to the meeting at which the application is to be considered. Upon request, the board, in its discretion, may waive provision of any information otherwise required by this rule provided that the requesting party can demonstrate that other documents that are provided are equivalent to or satisfy the rationale for submitting the information and that the state's interest will continue to be sufficiently protected.

**(1)** In addition to submitting an application to the board, additional copies of an application must be submitted to the department of finance and administration economic analysis unit, the New Mexico finance authority, the taxation and revenue department office of the secretary, and legislative finance committee staff at their respective offices. The board may require the submission of supplemental information during its review process. All information submitted pursuant to this rule will be publicly available.

**(2)** Prior to initiating the preparation of an application, a developer is encouraged to schedule a "pre-application" conference to discuss the project and proposed methodology with board staff and the economic analysis unit of the department of finance and administration.

**(3)** The board, in its discretion, may waive certain requirements included in the rule when the application demonstrates why it is in the best interest of the state to do so.

**C. Staff methodology.** The board will evaluate the project as a whole and evaluate each district on a stand alone basis. The board will utilize the services of the department of finance and administration economic analysis unit and may seek the assistance of an independent economic consultant to evaluate each request. The district is encouraged to submit any additional data that may be helpful for use in this review. The department of finance and administration economic analysis unit or any independent economic consultant will use the following methodology in evaluating each request:

**(1)** validation of any economic impact models using standard economic impact tools;

**(2)** determination of the viability of the project under the following scenarios:

**(a)** requested tax increment is approved;

**(b)** requested tax increment is not approved;

**(c)** some portion of the requested tax increment is approved or increment for less than all districts if multi-district project;

**(d)** under different assumptions about the relocation of existing businesses within New Mexico, and economic factors such as inflation and economic growth.

**(3)** evaluation of the project recognizing other economic development efforts by other economic development entities including other districts;

**(4)** assessment of impact on surrounding communities and non-participating governments;

**(5)** determination of the ratio of public to private capital contributions and the ratio of state contributions compared to local contributions;

**(6)** validation of the finance plan; the board will seek input from New Mexico finance authority staff regarding interest rates, coverage ratios and other bond financing features to ensure that they are reasonable and appropriate; and

**(7)** in the case of applications for approval of a revised base year, review of public comments received from the taxation and revenue department, the department of finance and administration, the developer and the local governments that have dedicated a tax increment to the district following the district's adoption of a resolution indicating the district's intent to revise its base year.

**D. Board approval, effective date and duration.**

**(1)** The board's approval of the dedication of a portion of the state's increment or of a revised base year shall be effective January 1 or July 1 following board action. The board may condition its dedication on the approval by the legislature of the issuance of bonds. In that case, the dedication shall be effective on the January 1 or July 1 following legislative and, if required, department of finance and administration approval of the bonds, whichever date next succeeds the last approval to be obtained.

**(2)** Dedications which require legislative approval of bonds and bonds requiring department of finance and administration approval must be approved within four years of the board's approval of the dedication unless the district requests and receives approval of an extension of time from the board prior to the expiration of the four year period. For dedications approved by the board prior to July 15, 2010, an extension may be requested from the board on or before its December 2014 meeting. Any request for extension of dedication shall specify the requested extension period, include a description of efforts to receive legislative, and, if required, department of finance and administration approval of the bonds, and provide updated economic and financial information about the district and the project that is sufficient to allow the board

to make a finding that approval of the extension of dedication is in the best interest of the state.

**(3)** Any substantive change to the tax increment development plan after a dedication has been made must be reported to the board pursuant to Subsection E of 2.61.3.10 NMAC and will require board approval, without which the board's approval of the dedication shall expire.

**(4)** A dedication shall expire upon full payment or early defeasance of the bonds in full.

[2.61.3.9 NMAC - N, 10/15/2008; A, 7/31/2014; A, 6/27/2017]

### **2.61.3.10 REPORTING REQUIREMENTS:**

**A.** Within fourteen (14) business days after a district issues any bonds, the district shall advise the board by letter of the date of issuance, the interest rate, and the total aggregate amount of each issue.

**B.** On or before June 1 of each year following the issuance of the bonds until bonds are fully defeased, a district that has received a dedication of a portion of the state's increment shall provide to the board employment reports, as available, setting forth in reasonable detail the numbers and types of jobs created within the district on a full-time equivalent basis during the preceding twelve (12) month period and the availability of workforce housing.

**C.** Within thirty (30) days of submitting any report or data required by the governing body, the New Mexico finance authority, the legislature, or any legislative committee, the district shall transmit copies of these reports or data to the board and the economic analysis unit of the department of finance and administration.

**D.** By November 1 of each year, a district that has an unexpired dedication of a portion of the state's gross receipts tax increment will submit a written report describing updates on the district, including but not limited to any changes to the plan that have occurred since board approval of the dedication of a portion of the state's increment, information on the infrastructure build-out, jobs created, employers, revenues and expenses, total debt outstanding, a status report of the district's achievements with respect to public facilities and community benefits, such as the provision of schools and workforce housing in the district, and any other information the applicant believes may be useful for the board.

**E.** A district must report any substantive changes to the plan to the board that occur after the dedication of a portion of the state's increment.

**F.** Subsections A through E of 2.61.3.10 NMAC apply to all districts that have received the state's gross receipts tax increment since the adoption of the Tax

Increment for Finance Act in 2006 until the district is dissolved or the board's approval of the increment has expired.

[2.61.3.10 NMAC - N, 10/15/2008; A, 7/31/2014]

## **PART 4: DISTRIBUTION OF PRIVATE ACTIVITY BOND ALLOCATIONS**

### **2.61.4.1 ISSUING AGENCY:**

State Board of Finance, 181 Bataan Memorial Building, Santa Fe, New Mexico.

[12/13/89; 11/29/97; 2.61.4.1 NMAC - Rn, 2 NMAC 61.4.1, 01/01/06]

### **2.61.4.2 SCOPE:**

State agencies and issuing authorities that are not state agencies.

[12/13/89; 2/29/96; 2.61.4.2 NMAC - Rn, 2 NMAC 61.4.2, 01/01/06]

### **2.61.4.3 STATUTORY AUTHORITY:**

Sections 6-20-1 through 6-20-11 NMSA 1978 (Act).

[12/13/89; 2.61.4.3 NMAC - Rn, 2 NMAC 61.4.3, 01/01/06]

### **2.61.4.4 DURATION:**

Permanent.

[12/13/89; 2.61.4.4 NMAC - Rn, 2 NMAC 61.4.4, 01/01/06]

### **2.61.4.5 EFFECTIVE DATE:**

November 29, 1997 unless a different date is cited at the end of a section or paragraph and applies to all private activity bonds issued after this date.

[12/13/89; 2/29/96; 11/30/96; 11/29/97; 2.61.4.5 NMAC - Rn, 2 NMAC 61.4.5, 01/01/06]

### **2.61.4.6 OBJECTIVE:**

To establish rules and regulations governing the distribution of allocations of private activity bonds provided for by the Private Activity Bond Act (Sections 6-20-1 through 6-20-11 NMSA 1978).

[12/13/89; 2/29/96; 2.61.4.6 NMAC - Rn, 2 NMAC 61.4.6, 01/01/06]

#### **2.61.4.7 DEFINITIONS:**

A. "Allocation" means an allocation of the state ceiling issued by the board to an issuing authority to issue private activity bonds.

B. "Board" means the state board of finance.

C. "Bond counsel" means an attorney or a firm of attorneys listed in the most recently available "directory of municipal bond dealers of the United States", published by the bond buyer and commonly known as the "red book", in the section listing municipal bond attorneys of the United States or the successor publication thereto.

D. "Code" means the internal revenue code of 1986, as amended.

E. "Issuing authority" means the state, state agencies, counties and incorporated municipalities.

F. "Mortgage credit certificate election" means an election pursuant to Section 25(c)(2)(A)(ii) of the code, by an issuing authority not to issue qualified mortgage bonds which the issuing authority is otherwise authorized to issue, in exchange for the authority under Section 25 of the code to issue mortgage credit certificates in connection with a qualified mortgage credit certificate within the meaning of Section 25(c)(2) of the code.

G. "Private activity bond" means any bond or other obligation which is a qualified bond under Section 141 of the code which is not excluded by Section 146(g),(h) and (i) of the code, or a bond or other obligation issued under Section 1312 or 1313 of the Tax Reform Act of 1986; and the private activity portion of government use bonds allocated by an issuing authority to an issue under Section 141(b)(5) of the code.

H. "State agency" means the New Mexico finance authority, the New Mexico educational assistance foundation, the New Mexico mortgage finance authority and any other agency, authority, instrumentality, corporation or body, now existing or hereafter created, which under state law can issue private activity bonds on behalf of the state.

I. "State ceiling" means, for any calendar year, the amount as provided by Section 146(d) of the code.

[2/29/96; 11/29/97; 2.61.4.7 NMAC - Rn & A, 2 NMAC 61.4.7, 01/01/06; A, 10/15/08]

#### **2.61.4.8 DISTRIBUTION OF PRIVATE ACTIVITY BOND ALLOCATIONS:**

A. Capitalized terms.

(1) Single family housing purpose bonds shall mean private activity bonds issued pursuant to Section 143 of the code or mortgage credit certificates issued pursuant to Section 25(c)(2) of the code.

(2) Multifamily housing purpose bonds shall mean private activity bonds issued pursuant to Section 142(a)(7) of the code.

(3) Housing purpose bonds shall mean single family housing purpose bonds and multifamily housing purpose bonds.

(4) Education purpose bonds shall mean private activity bonds issued pursuant to Section 144(b) of the code.

(5) Small issue economic development purpose bonds shall mean private activity bonds issued pursuant to Section 144(a) of the code.

(6) Exempt facility purpose bonds shall mean private activity bonds requiring an allocation of the state ceiling under the code other than education purpose bonds, housing purpose bonds and small issue economic development purpose bonds.

(7) Other purpose bonds shall mean small issue economic development purpose bonds and exempt facility purpose bonds.

(8) Single family housing purpose allocation percentage shall mean the percentage, determined annually by the board, of the state ceiling that the board finds appropriate to reserve in a calendar year for single family housing purpose bonds.

(9) Multifamily housing purpose allocation percentage shall mean the percentage, determined annually by the board, of the state ceiling that the board finds appropriate to reserve in a calendar year for multifamily housing purpose bonds.

(10) Education purpose allocation percentage shall mean the percentage, determined annually by the board, of the state ceiling that the board finds appropriate to reserve in a calendar year for education purpose bonds.

(11) Other purpose allocation percentage shall mean the percentage, determined annually by the board, of the state ceiling that the board finds appropriate to reserve in a calendar year for other purpose bonds.

(12) Single family housing purpose carryforward allocation percentage shall mean the percentage (which need not be the same as the single family housing purpose allocation percentage), determined annually by the board no later than the December meeting of the board, of the balance of the state ceiling that can be the subject of a carryforward election allocation that the board finds appropriate to allocate for carryforward purposes relating to single family housing purpose bonds.

(13) Multifamily housing purpose carryforward allocation percentage shall mean the percentage (which need not be the same as the multifamily housing purpose allocation percentage), determined annually by the board no later than the December meeting of the board, of the balance of the state ceiling that can be the subject of a carryforward election allocation that the board finds appropriate to allocate for carryforward purposes relating to multifamily housing purpose bonds.

(14) Education purpose carryforward allocation percentage shall mean the percentage (which need not be the same as the education purpose allocation percentage), determined annually by the board no later than the December meeting of the board, of the balance of the state ceiling that can be the subject of a carryforward election allocation that the board finds appropriate to allocate for carryforward purposes relating to education purpose bonds.

(15) Other purpose carryforward allocation percentage shall mean the percentage (which need not be the same as the other purpose allocation percentage), determined annually by the board no later than the December meeting of the board, of the balance of the state ceiling that can be the subject of a carryforward election allocation that the board finds appropriate to allocate for carryforward purposes relating to other purpose bonds.

(16) Allocation percentage means single family housing purpose allocation percentage, multifamily housing purpose allocation percentage, education purpose allocation percentage and other purpose allocation percentage, respectively.

(17) Carryforward allocation percentage means single family housing purpose carryforward allocation percentage, multifamily housing purpose carryforward allocation percentage, housing purpose carryforward allocation percentage, education purpose carryforward allocation percentage and other purpose carryforward allocation percentage, respectively.

B. Issuing authorities requesting at any time during the year distributions of allocations or carryforward election allocations shall submit the following.

(1) For all requests:

(a) a letter from the issuing authority setting forth the amount of the state ceiling requested, the actual or expected date of adoption of the bond resolution or similar documentation by the issuing authority, the expected date of the sale of the bonds, the expected date of closing of the bonds, a statement of any significant conditions that need to be satisfied before the bonds can be issued, and a statement categorizing the private activity bonds as education purpose bonds, single family housing purpose bonds, multifamily housing purpose bonds, small issue economic development purpose bonds or exempt facility purpose bonds, in accordance with the definitions contained in this part, which categorization is subject to board review and recategorization, if appropriate;

(b) a letter from bond counsel for the issuing authority or the user, with supporting citations to state statutes, stating that the private activity bonds can validly be issued under state law by the issuing authority, which the board may refer to its bond counsel or to the state's attorney general for review and comment; if the board is advised by its bond counsel or the attorney general that the opinion of the issuing authority's bond counsel is incorrect, the board may refuse to issue the allocation requested;

(c) a letter from bond counsel for the issuing authority or the user, with supporting citations to the code and the regulations, stating that the bonds are private activity bonds requiring an allocation of the state ceiling; and

(d) a letter from the issuing authority or the user stating why the public purpose to be served by the issuance of the private activity bonds could not be as economically or effectively served by a means not involving an allocation of the state ceiling;

(e) any fees required by Section 2.61.4.9 NMAC.

(2) For all requests not involving a project, i.e., for single family housing purpose bonds and education purpose bonds, a letter from the issuing authority setting forth the following:

(a) a general description of the location of the proposed borrowers;

(b) experience of the issuing authority in utilizing allocations of the state ceiling.

(3) For all requests involving a project, a letter from the issuing authority or the user including the following:

(a) a copy of the inducement resolution, certified by an official of the issuing authority;

(b) a description of the user, the project and the project's specific location;

(c) the estimated number and types of jobs, both construction and permanent, indicating which are expected to be filled by persons who are residents of the state at the time of submission of the request for allocation and which are expected to be filled by persons who are non-residents at the time of submission of the request for allocation; and a representation that the issuing authority, if it receives an allocation of the state ceiling for the project and issues the related bonds, will provide to the board annually, for four (4) years following the issuance of the bonds, on or before June 1, and after that period upon request of the board, employment reports on a form prescribed by the board setting forth in reasonable detail the numbers and types of workers, and their

residency, employed at the project on a full-time equivalent basis during the preceding 12 month period;

(d) the present use or conditions of the project site and evidence that the proposed user of the project has obtained a legally enforceable right to acquire the project site; evidence of approved zoning of the proposed site must be submitted; this requires that project types for which the cap is being requested are not prohibited by the existing zoning of the proposed site;

(e) the maximum amount of the private activity bonds and other obligations to be issued;

(f) a proposed starting date and estimated completion date of the construction of the project, if applicable;

(g) information relating to the feasibility of the proposed project showing that the project or the user will generate revenues and cash flow sufficient to make payments to pay debt service on the bonds, if applicable;

(h) the amount and source of private capital which will be used for the project in addition to bond financing, as well as a brief table showing estimated sources and uses of funds;

(i) conceptual site plans for the project and a map locating the project area;

(j) in the case of multifamily housing purpose bonds, an explanation of why the housing needs of individuals whose income will make them eligible under Section 142(d) of the code are not being met by existing multifamily housing; information as to the number and percentage of units set aside for households at various income levels or with special needs; the legal mechanisms to monitor and enforce compliance with the set-aside provisions and the experience of the monitoring entity with respect to similar projects; a representation that the issuing authority, if it receives an allocation of the state ceiling for the project and issues the related bonds, will provide to the board annually, for four (4) years following the issuance of the bonds, on or before June 1, and after that period upon request of the board, occupancy reports on a form prescribed by the board setting forth in reasonable detail information as to the occupancy of the rental units by category of household; and the duration of the set-aside provisions;

(k) information relating to the feasibility and proposed utilization of environmentally protective technologies, energy and water efficiencies, and sustainable development practices;

(l) any other information regarding the economic benefits to the project's community and to the state or which the user believes will aid the board in considering the request for allocation; and

(m) a commitment letter or letter of intent, which may be subject to common contingencies or closing conditions, from the proposed underwriter, placement agent or bond purchaser to underwrite, place or purchase the bonds.

(4) For all requests for an allocation for single family housing purpose bonds where the issuing authority seeks an allocation to be used by the issuing authority for mortgage credit certificates or, in its discretion, for either qualified mortgage bonds or mortgage credit certificates, a letter from the issuing authority stating that a qualified mortgage credit certificate program has been adopted by the issuing authority and a description of how the issuing authority is proposing to use the mortgage credit certificates.

(5) For all requests for an allocation for multifamily housing purpose bonds, the board may condition any allocation on the agreement, on behalf of the issuer or the user of the project or projects, to set aside a specified minimum number of units for households at certain income levels or with special needs.

(6) The board or its staff may ask for additional supplemental information from the issuing authority to aid the board in considering the request, including information as to the readiness of the issuer to issue the private activity bonds.

C. Within seven business days after an issuing authority issues any private activity bonds or makes a mortgage credit certificate election, the issuing authority or, in the case of a project, bond counsel for the issuing authority or the user or users, shall advise the board by letter of the date the bonds were issued and the total aggregate amount of the issue, or in the case of a mortgage credit certificate election, the date and the amount of the election, referencing in that letter how the applicable allocations and carryforward allocations issued by the board were used for that issue.

D. The authority of the board to issue, on behalf of the governor (as provided in Section 6-20-11 NMSA 1978), the certification required by the code or the regulations, is hereby delegated to the director of the board. The board interprets its authority to issue the certification, on behalf of the governor, as permissive, and not in substitution of the authority of the governor to issue the certification, on the governor's own behalf.

E. The board shall establish the bond issuance expiration date, pursuant to Section 6-20-2A(5) NMSA 1978, on or before the regularly scheduled meeting of the board in November of that year, except as otherwise provided in Paragraph (2) of Subsection K of 2.61.4.8 NMAC.

F. Issuing authorities shall comply with the following restrictions.

(1) Any issuing authority desiring to make a request to the board for an allocation or a carryforward election allocation must comply with established board rules for inclusion on the board's agenda. In order to be considered for inclusion on the agenda, all materials required to be submitted to the board must be submitted by the

established time period prior to the meeting date. The board publishes to interested parties notice of the deadline for submission of complete materials prior to each meeting. It is an issuing authority's responsibility to ascertain that deadline and comply with it. All requests for allocations of the state ceiling appearing on the board's agenda for a particular meeting will be deemed to have been received simultaneously.

(2) An issuing authority or the user shall advise the board in writing of any unusable allocation of the state ceiling promptly after it becomes aware the allocation will not be used in full prior to the allocation expiration date. After being advised of a return of an allocation of the state ceiling, the board shall make an announcement of the amount of the return at its next board meeting. The board shall not consider any requests for allocation of the state ceiling relating to the amount of any returned allocation until the meeting following the announcement of the return. The board may waive this waiting-period requirement for returns of allocations on or after November 1 of any calendar year.

(3) The board will not consider a request for a new allocation of the state ceiling for a project whose previous allocation has expired or was voluntarily returned until the issuing authority has resubmitted all of the information required by Subsection B of 2.61.4.8 NMAC. Such request for a new allocation will not be given a priority over other requests for allocations.

G. The board may require annually, to be presented at the board's regularly scheduled meeting in November, a report from state agencies issuing housing purpose bonds or education purpose bonds of the projected need of those state agencies for allocations of the state ceiling for the remainder of the calendar year and the next three calendar years.

H. At any time during a calendar year, the board may revise current year allocation percentages and carryforward allocation percentages.

I. Whenever the board has on its agenda requests for allocations exceeding the remaining applicable amount of an allocation percentage or carryforward allocation percentage, the board will prioritize requests, as applicable:

(1) by giving preference to small issue economic development purpose bonds over exempt facility purpose bonds;

(2) with respect to small issue economic development purpose bonds, by considering factors such as employment, geographic location, nature and number of jobs created for residents and non-residents, nature of the industry, the utilization of environmentally protective technologies, energy and water efficiencies, and sustainable development practices, and economic benefits to the community and the state;

(3) with respect to multifamily housing purpose bonds, by considering factors such as percentage of units devoted to persons of low income, services to special

needs groups, percentage of financing provided by equity and other financing not requiring an allocation, geographic location, the experience of the agency charged with monitoring compliance with persons of low income requirements, and the utilization of environmentally protective technologies, energy and water efficiencies, and sustainable development practices;

(4) with respect to single family housing purpose bonds, by considering factors such as targeting to persons of low income, geographic location, and experience of the issuing authority in utilizing allocations of the state ceiling;

(5) with respect to exempt facility bonds, by considering factors such as employment, geographic location, nature of jobs created, nature of the industry, the utilization of environmentally protective technologies, energy and water efficiencies, and sustainable development practices, and economic benefits to the community and the state; and

(6) with respect to education purpose bonds, by considering the geographic location of the prospective borrowers.

J. Pre-July 1 allocations:

(1) The act provides, in Section 6-20-3A and B NMSA 1978, that until July 1 in any calendar year, the state ceiling for the calendar year shall be allocated forty percent to state agencies as a group and sixty percent to issuing authorities, as a group, that are not state agencies; provided, however, that such allocation shall be made in accordance with directives, rules or regulations governing the distribution of allocations to be established by the board. This part is such a directive, rule or regulation of the board.

(2) From January 1 until July 1 of any calendar year, allocations of the state ceiling made pursuant to Section 6-20-3A NMSA 1978 are directed to be utilized so that no single state agency may issue more than fifty percent of the allocation to state agencies as a group, except that the board may exceed that amount if the board determines it is not aware of any planned or pending requests for allocations by any state agency prior to July 1 of any year that could not be approved as a result of granting an allocation of more than fifty percent.

(3) From January 1 until July 1 of any calendar year, allocations of the state ceiling made pursuant to Section 6-20-3B NMSA 1978 are directed to be utilized so that no single issuing authority that is not a state agency may issue more than twenty percent of the allocation to issuing authorities that are not state agencies as a group, except that the board may exceed that amount if the board determines it is not aware of any planned or pending requests for allocation by any issuing authority, which is not a state agency, prior to July 1 of any year that could not be approved as a result of granting an allocation of more than twenty percent.

(4) From January 1 until July 1 of any calendar year, allocations of the state ceiling made pursuant to Sections 6-20-3A and B NMSA 1978 are directed to be utilized so that no more than the single family housing purpose allocation percentage of the state ceiling may be allocated to single family housing purpose bonds, no more than the multifamily housing purpose allocation percentage of the state ceiling may be allocated to multifamily housing purpose bonds, no more than the education purpose allocation percentage of the state ceiling may be allocated to education purpose bonds and no more than the other purpose allocation percentage of the state ceiling may be allocated to other purpose bonds except that the board may exceed an allocation percentage if the board determines it is not aware of any planned or pending requests for allocation by any issuing authority that could not be approved as a result of granting an allocation in excess of the applicable allocation percentage.

(5) The allocation expiration date for any allocation issued by the board prior to July 1 in any calendar year shall be July 1, subject to automatic and discretionary extension pursuant to Section 6-20-10 NMSA 1978, and the board may condition any discretionary extension or extensions on the completion of both a sale and issuance of the private activity bonds within the extension period.

K. Allocations on or after July 1 until November 1:

(1) On or after July 1 until November 1 of any calendar year, allocations of the state ceiling made pursuant to Section 6-20-3D are directed to be utilized so that, after taking into account any allocations still outstanding for or previously used by any issuing authority in that calendar year, no more than the education purpose allocation percentage of the state ceiling may be allocated to education purpose bonds, no more than the single family housing purpose allocation percentage of the state ceiling may be allocated to single family housing purpose bonds, no more than the multifamily housing purpose allocation percentage of the state ceiling may be allocated to multifamily housing purpose bonds, and no more than the other purpose allocation percentage of the state ceiling may be allocated to other purpose bonds except that the board may exceed an allocation percentage if the board determines it is not aware of any planned or pending requests for allocation by any issuing authority prior to November 1 of any year that could not be approved as a result of granting an allocation in excess of the applicable allocation percentage.

(2) The allocation expiration date for any allocation issued by the board on or after July 1 and prior to November 1 of any calendar year shall be the earlier of 120 days from the date of issuance by the board of the allocation or the date of the board's regularly scheduled meeting in December of that year, subject to automatic or discretionary extension pursuant to Section 6-20-10 NMSA 1978, and the board may condition any discretionary extension or extensions on the completion of both a sale and issuance of the private activity bonds within the extension period. For purposes of this part, the board hereby establishes the date of the board's regularly scheduled meeting in December, as that date may be set by the board annually, as the bond

issuance expiration date for private activity bonds that receive an allocation on or after July 1 and prior to November 1.

L. Allocations on or after November 1:

(1) On or after November 1 of any calendar year, no allocations of the state ceiling will be made by the board, unless the board in its discretion deems it advisable. In determining whether it may be advisable, the board may consider, among other factors, the ability of the issuing authority seeking the allocation to issue the private activity bonds prior to the bond issuance expiration date and whether the allocation will further the board's policy to share the state ceiling among single family housing purpose bonds, multifamily housing purpose bonds, education purpose bonds and other purpose bonds in accordance with their respective allocation percentages.

(2) The allocation expiration date for any allocation issued by the board on or after November 1 of any calendar year shall be the bond issuance expiration date established by the board annually pursuant to Subsection E of 2.61.4.8 NMAC.

M. Carryforward election allocations:

(1) Requests for carryforward election allocations may be made by any issuing authority for any carryforward purpose to the board at its regularly scheduled meeting in December of the calendar year, and shall be accompanied by any fees that may be required pursuant to Section 2.61.4.9 NMAC.

(2) If and to the extent requested by issuing authorities, carryforward election allocations of the state ceiling made pursuant to Section 6-20-7 NMSA 1978 are directed to be utilized so that of the balance of any state ceiling remaining unused after the bond issuance expiration date no more than the single family housing purpose carryforward allocation percentage will be allocated to single family housing purpose bonds, no more than the multifamily housing purpose carryforward allocation percentage will be allocated to multifamily housing purpose bonds, no more than the education purpose carryforward allocation percentage will be allocated to education purpose bonds and no more than the other purpose carryforward allocation percentage will be allocated to exempt facility purpose bonds. In determining the carryforward election allocation among housing purpose bonds, the board may give first preference to qualified mortgage bonds, next preference to issuances of mortgage credit certificates and final preference to multifamily housing purpose bonds. The board may also take into account, if in its discretion it so determines, allocations used in that calendar year for housing purpose bonds, education purpose bonds and exempt facility bonds. If the board does not receive sufficient carryforward election allocation requests for any category of carryforward purpose such that issuing authorities have not requested at least the applicable carryforward allocation percentage of the balance of the state ceiling, the board may in its discretion determine, to the extent requested by issuing authorities, to exceed the applicable carryforward allocation percentage for any category of carryforward purpose.

[2/29/96; 11/30/96; 11/29/97; 2.61.4.8 NMAC - Rn & A, 2.61.4.8 NMAC, 01/01/06; A, 10/15/08; A, 01/15/09]

#### **2.61.4.9 PRIVATE ACTIVITY BOND FEES CHARGED:**

The act provides, in Section 6-20-11C NMSA 1978, that the board may require a reasonable application fee, allocation deposit and extension fee to be paid by the issuing authority. Application and extension fees collected by the board shall be deposited in the general fund. Allocation deposits shall be deposited into a suspense account and after a determination has been made that the allocation has been used for the intended purpose, the board may direct the staff to refund in whole or in part the allocation deposit without interest. Otherwise, the allocation deposit shall be deposited in the general fund.

A. All fees shall be paid by bank cashier's check, certified check, money order, or by wire transfer in US funds.

B. An issuing authority will be required to pay an application fee, an allocation deposit, and an extension fee. The board shall charge the following fees:

- (1) application fee for allocations valued at \$15,000,000.00 or less: \$750.00
- (2) application fee for allocations valued at an amount greater than \$15,000,000.00 and up to \$30,000,000.00: \$1,500.00
- (3) application fee for allocations valued at an amount greater than \$30,000,000.00: \$3,000.00
- (4) allocation deposit: \$250.00 per million allocated
- (5) extension fee: \$750.00 if approved

C. Application and extension fees are due on the date a request to appear on the board's agenda is due; allocation deposits are due 7 business days following board approval of the allocation. If required fees are not paid within the time specified, the allocation will become void.

[2.61.4.9 NMAC - N, 01/01/06; A, 10/15/08]

### **PART 5: FINANCING APPROVALS**

#### **2.61.5.1 ISSUING AGENCY:**

State Board of Finance, 181 Bataan Memorial Building, Santa Fe, NM.

[2.61.5.1 NMAC - N, 4-28-2000]

### **2.61.5.2 SCOPE:**

Any financing which, by law, requires board of finance approval and agreements to exchange interest rate cash flows or to limit exposure which, by law, require board of finance approval.

[2.61.5.2 NMAC - N, 4-28-2000]

### **2.61.5.3 STATUTORY AUTHORITY:**

A. Section 6-12A-5 NMSA 1978 provides that the state treasurer may, with the approval of the Board, issue anticipation notes pursuant to the Short-Term Cash Management Act, Sections 6-12A-1 to 6-12A-15 NMSA 1978.

B. Section 6-13-17 NMSA 1978 provides that state institutions may not issue or sell bonds pursuant to the Institutional Bond Act, sections 6-13-1 to 6-13-26 NMSA 1978, until the issue has been approved by the unanimous vote of the board.

C. Section 6-17-3 NMSA 1978 provides that before a board of regents may issue income-producing project revenue bonds, the form of such bonds or other evidence of indebtedness, the time for which same shall run and times when payment of principal thereof shall be made, which shall be in yearly amounts as to payment of principal beginning not later than two years from and after the time when such money is borrowed and continuing to the end of the time for which the same shall run, and the manner and amount for which same shall be sold, and whether to be sold at public or private sale, and the amount which is to be so borrowed for each specific purpose, shall be approved by the board.

D. Section 6-17-9 NMSA 1978 provides that before the issuance of income-producing project bonds under sections 6-17-1 to 6-17-13 NMSA 1978, except 6-17-1.1 NMSA 1978, or system revenue bonds under section 6-17-14 (D) NMSA 1978, the board must approve the borrowing of such money and the amount to be borrowed.

E. Sections 16-6-15 and 16-6-16 NMSA 1978 provide that the New Mexico state fair, with the prior approval of the board, may issue negotiable bonds, negotiate loans and renegotiate loans.

F. Section 17-1-18 NMSA 1978 provides that prior to the issuance of bonds by the state game commission, the board must approve the purposes stated by the commission and the amount of each bond issue.

G. Section 19-10B-5 NMSA 1978 provides that the commissioner of public lands may issue revenue bonds to provide funds for the design, development, acquisition and implementation of the ONGARD system, subject to the approval of the terms, covenants and conditions of the bonds by the board.

H. Section 67-3-59.1(F) NMSA 1978 provides that the state highway commission may issue bonds to finance state highway projects, subject to the limitations contained in the section and subject to the approval of the issuance of the bonds and the principal amount and interest rate or maximum net effective interest rate on the bonds by the board.

I. Section 16-2-22 NMSA 1978 provides that whenever the secretary of the energy, minerals and natural resources department determines by written order that it is necessary to raise funds to provide for developing, operating and maintaining state parks or recreation areas, the state parks division of the energy, minerals and natural resources department may issue and sell bonds of the state as provided in the State Park and Recreation Bond Act, sections 16-2-20 to 16-2-29 NMSA 1978. The purposes for which the bonds are to be issued and the amount of each bond issue must be approved by the board before the issuance of the bonds.

J. Section 72-14-13 NMSA 1978 provides that the interstate stream commission may issue water conservation revenue bonds subject to the limitations of that section and subject to the approval of the board in accordance with the board's adopted policies and procedures on financing approvals.

K. Section 72-14-36 NMSA 1978 provides that the interstate stream commission may issue special water revenue bonds for the purpose of building, operating and maintaining dams on the Canadian river or its tributaries between Conchas dam and the Texas border. Pursuant to section 72-14-42 NMSA 1978, special water revenue bonds may not be issued and sold until after the issue is approved by a majority of the board.

L. Section 6-18-8.1 provides that a public body that has issued or proposes to issue bonds may enter into contracts to exchange interest rates if the governing body of that public issuer finds that such a contract would be in the best interests of that public body and if the board reviews and approves the contract and determines, in its discretion, that the contract results in a long-term financial benefit for the public body.

M. Section 6-14-3 (B) NMSA 1978 provides that a public body may not issue its public securities as provided in Section 6-14-3(A) NMSA 1978 at any net effective interest rate in excess of twelve percent a year, except for general obligation bonds which shall have a net effective interest rate of not more than ten percent a year, unless the board, at any time prior to delivery of the public securities approves such higher net effective interest rate in writing, based upon the determination of the board that the higher rate is reasonable under existing or anticipated bond market conditions.

[2.61.5.3 NMAC - N, 4-28-2000]

#### **2.61.5.4 DURATION:**

Permanent.

[2.61.5.4 NMAC - N, 4-28-2000]

**2.61.5.5 EFFECTIVE DATE:**

April 28, 2000, unless a later date is cited at the end of a section.

[2.61.5.5 NMAC - N, 4-28-2000]

**2.61.5.6 OBJECTIVE:**

This rule provides general guidance regarding the financial and legal requirements for board approval of certain bond issues and exchange agreements as required by state statute. The rule is intended to benefit the state and its agencies and political subdivisions in their financing policies. Board approval of a proposed bond issue or exchange agreement is not intended to protect investors and does not evidence the soundness of any investment. Board approval is based solely on information provided by the issuing authority or public body. The board has no duty to independently investigate, and does not independently investigate, the merits and risks involved in the financing, although it may require review and analysis by its advisors, under the terms and conditions set forth in Section 2.61.5.16 of this rule, whenever it deems such review and analysis advisable.

[2.61.5.6 NMAC - N, 4-28-2000; A, 7-15-2003]

**2.61.5.7 DEFINITIONS:**

A. "Anticipation notes" means tax and revenue anticipation notes issued by the state pursuant to the Short Term Cash Management Act, sections 6-12A-1 to 6-12A-15 NMSA, and approved by the board pursuant to Section 6-12A-5 NMSA 1978.

B. "Board" means the state board of finance.

C. "Bonds" means a written promise to pay a specified sum of money (par value or principal amount) at a specified date or dates in the future (maturity dates) together, if applicable, with interest. Bonds include, for these purposes, but without limitation, highway debentures, higher education institution system or income producing revenue bonds, state fair bonds, game and fish bonds, state park bonds, and anticipation notes.

D. "Costs of issuance" means all costs incurred by the issuing authority or public body incident to the planning and sale of bonds or the execution and delivery of exchange agreements. Costs of issuance include but are not limited to underwriters' spread, discount, or fees, counsel fees, financial advisor fees, credit enhancement costs, rating agency fees, trustee fees, accountant fees, printing costs, administrative costs and costs incurred in connection with the required public notice process.

E. "Exchange agreements" means interest rate swap contracts, forward payment conversion contracts, forward supply contracts, futures, or contracts providing for payments based on levels of or changes in interest rate, or contracts including, without limitation, options, puts or calls to hedge payment, rate, price spread or similar exposure.

F. "Financing documents" means any official statement, bond purchase agreement, indenture, liquidity facility, credit enhancement agreement or other similar agreement associated with the issuance of the bonds.

G. "Issuing authority" means the state treasurer with respect to anticipation notes and the governmental unit in the name of which other bonds are issued. For these purposes, issuing authorities include, but are not limited to, the state treasurer, state highway commission, state fair commission, regents of state universities, fish and game commission, state agencies, counties, and municipalities.

H. "Net effective interest rate" means the interest rate of public securities, compounded semi-annually in arrears necessary to discount the scheduled debt service payments of principal and interest to the date of the public securities and to the price paid to the public body for the public securities excluding any interest accrued to the date of delivery and based upon a year with the same number of days as the number of days for which interest is computed on the public securities.

I. "Parameters resolution" means a resolution of the board approving the issuance of bonds or other financing, including but not limited to interest rate exchange agreements, by a public body which by law require board approval and setting forth the maximum principal amount of the transaction, the maximum interest rate and other terms and conditions of the issuance.

J. "Public body" for purposes of any financing, including but not limited to bonds or interest rate exchange agreements, which by law requires board approval means any municipality, any county, any school district, any special district, any H-class county located in New Mexico, the New Mexico hospital equipment loan council, state institutions enumerated in Section 6-13-2 NMSA 1978, the water quality control commission, the board, the New Mexico finance authority, and the state.

K. "Public body" for purposes of net effective interest rate approval means the state or any department, board, agency or instrumentality of the state, any county, city, town village, school district, other district, educational institution or any other governmental agency or political subdivision of the state.

L. "Public securities" means any bonds, notes, warrants or other obligations now or hereafter authorized to be issued by any public body pursuant to the provisions of any general or special law enacted by this legislature, but does not include bonds, notes, warrants or other obligations issued pursuant to:

- (1) the Industrial Revenue Bond Act, Sections 3-32-1 to 3-32-16 NMSA 1978;
- (2) the County Improvement District Act, Sections 4-55A-1 to 4-55A-43 NMSA 1978;
- (3) Sections 3-33-1 through 3-33-43 NMSA 1978;
- (4) the Pollution Control Revenue Bond Act Sections 3-59-1 to 3-59-14 NMSA 1978;
- (5) the County Pollution Control Revenue Bond Act, Sections 4-60-1 to 4-60-15 NMSA 1978;
- (6) the County Industrial Revenue Bond Act, Sections 4-59-1 to 4-59-16 NMSA 1978;
- (7) the Metropolitan Redevelopment Code, Sections 3-60A-1 to 3-60A-48 NMSA 1978;
- (8) the Supplemental Municipal Gross Receipts Tax Act, Sections 7-19-10 to 7-19-18 NMSA 1978;
- (9) the Hospital Equipment Loan Act, Section 58-23-1 to 58-23-32 NMSA 1978; or,
- (10) the New Mexico Finance Authority Act, Sections 6-21-1 to 6-21-29 NMSA 1978.

M. "Refunding bonds" means bonds issued to refinance other bonds. These include current and advance refunding within the meaning of the Internal Revenue Code of 1986, as amended.

N. "State agency and commission bonds" means bonds issued by the

- (1) state fair pursuant to Section 16-6-15(E) NMSA 1978 and approved by the board pursuant to Section 16-6-15(E) NMSA 1978 and Section 16-6-16 NMSA 1978;
- (2) state game commission and approved by the board pursuant to Section 17-1-18 NMSA 1978;
- (3) commissioner of public lands and approved by the board pursuant to Section 19-10B-5 NMSA 1978;
- (4) state highway commission and approved by the board pursuant to Section 67-3-59.1 NMSA 1978;

(5) state parks division of the energy, minerals and natural resources department pursuant to sections 16-2-20 to 16-2-29 NMSA 1978 and approved by the board pursuant to Section 16-2-22 NMSA 1978; and

(6) the interstate stream commission pursuant to and approved by the board pursuant to Section 72-14-13 , as well as those issued pursuant to Section 72-14-36 NMSA 1978 and approved by the board pursuant to Section 72-14-42 NMSA 1978.

O. "State educational institution" means the university of New Mexico; New Mexico state university; New Mexico Highlands university; western New Mexico university; eastern New Mexico university; New Mexico institute mining and technology; northern New Mexico state school; New Mexico military institute; New Mexico school for the deaf; New Mexico school for the visually handicapped; San Juan college; New Mexico junior college; Santa Fe community college; and any post-secondary technical, vocational and area vocational institutes as defined in Sections 21-16-2 and 21-17-2 NMSA 1978.

P. "State educational institution bonds" means income-producing project bonds or system revenue bonds issued by the board of regents of a state educational institution pursuant to sections 6-17-1 to 6-17-13 NMSA 1978 (excluding 6-17-1.1) and approved by the board pursuant to Sections 6-17-9 NMSA 1978 and Section 6-17-14 NMSA 1978.

Q. "State institutions", within the meaning of the Institutional Bond Act, sections 6-13-1 to 6-13-26 NMSA 1978, means each state educational institution; Los Lunas community program, at Los Lunas, New Mexico; the penitentiary of New Mexico at Santa Fe, New Mexico; the Las Vegas medical center at Las Vegas, New Mexico; the New Mexico boys' school at Springer, New Mexico; and the miners' Colfax medical center at Raton, New Mexico.

R. "State institution bonds" means bonds issued by state Institutions pursuant to the Institutional Bond Act, sections 6-13-1 to 6-13-26 NMSA 1978, and approved by the board pursuant to Section 6-13-17 NMSA 1978.

S. "True-interest-cost" means that yield which if used to compute the present worth as of the date of the bonds of all payments of principal and interest to be made on the bonds from their date to their respective maturity dates (as specified in the maturity schedule and without regard to the possible optional prior redemption of the bonds), using the interest rate specified in the bid or purchase contract produces an amount equal to the principal amount of the bonds, plus any premium bid or stated in the purchase contract. No adjustment shall be made in such calculation for accrued interest on the bonds from their date to the date of delivery thereof. Such calculation shall be based on a 360-day year consisting of twelve 30-day months and a semi-annual compounding interval.

[2.61.5.7 NMAC - N, 4-28-2000; A, 7-15-2003]

#### **2.61.5.8 FINANCING PLAN FOR ANTICIPATION NOTES:**

A. In order to obtain approval of the issuance of anticipation notes, the board will require the state treasurer to prepare a financing plan for presentation to the board at a meeting of the board prior to the sale of the anticipation notes. The financing plan for anticipation notes shall address the following:

(1) Anticipation notes

(a) Debt structure and terms

- (i) Maturity date of proposed issue.
- (ii) Estimated interest rate on proposed bonds including true-interest-cost and coupon.
- (iii) Table showing, for the applicable fiscal year, total future debt payments by; (1) new issue, (2) outstanding issues, and (3) total debt payments (new and outstanding issues).
- (iv) Estimated terms and conditions of bonds including covenant and call provisions, if applicable.
- (v) Bond insurance or other credit enhancement costs and benefits, if applicable.
- (vi) Maximum principal amount and the maximum interest rate allowed for bond sale.
- (vii) Type of investments of proceeds, if applicable, the procedure to be used in selecting and purchasing the investments and representation that investment contracts will be competitively bid with documentation of the bidding process with at least three bona fide independent bidders.

(b) Sales management

- (i) Representation and compensation of financial advisor, if any, and method of selection.
- (ii) Method of sale, including justification for a negotiated sale, if any, and if negotiated, method of selection of underwriter.
- (iii) Representation and compensation of bond counsel, special tax counsel, if any, and disclosure counsel, if any, and indication of method of selection.

(iv) Breakout of costs of issuance. For negotiated sales, cost of issuance breakout should include underwriters' discount as broken out by management fee, structuring fee, takedown and estimated expenses.

(v) Ratings history, target and strategy.

(vi) Anticipated timing of sale.

(c) Legal documents

(i) All resolutions previously adopted by the state treasurer relating to the financing.

(ii) Drafts of all resolutions to be adopted by the state treasurer relating to the financing.

(iii) Draft parameters resolution of the board approving the bond issue.

(iv) Copies (or drafts if not in final form) of all financing documents.

(d) Additional information

(i) A certification of the state treasurer certifying that the state treasurer has complied with all statutory requirements for the issuance of anticipation notes.

(ii) Any other information that the board, in its discretion, needs in order to fulfill its duty to review and approve proposed anticipation notes.

[2.61.5.8 NMAC - N, 4-28-2000]

**2.61.5.9 FINANCING PLAN FOR STATE INSTITUTION BONDS:**

A. In order to obtain approval of the issuance of state institution bonds, the board will require the issuing authority to prepare a financing plan for presentation to the board at a meeting of the board prior to the sale of the state institution bonds. The financing plan for state institution bonds shall address the following:

(1) Capital program

(a) Use of bond proceeds, including individual type and cost of capital projects that bond proceeds will be used for.

(b) Need for capital project in relation to agency or institution's long-term strategic plan.

(2) Debt management

(a) Current outstanding debt and relation of the proposed issue to financial, parity bond and rate limits, if any.

(b) Five-year history and five-year forecast of total issuing authority revenue. Historical data should be from fiscal year audited financial statements.

(c) Five-year history and five-year forecast of pledged revenues used for proposed debt service. Historical data should be from fiscal year audited financial statements.

(d) Current and five-year projected coverage ratios on annual debt service requirements by:

(i) Pledged revenue.

(ii) Total revenue legally available for debt service.

(iii) Maximum fiscal year debt service as a percentage of prior fiscal year audited pledged revenue, if available.

(e) The basis for any projections or forecasts of future year revenue should be explained, and if future revenue needed to support debt service is to be derived from new facilities or projects, a feasibility study reflecting the likelihood of such revenue should be furnished. The study should clearly set forth any assumptions upon which the feasibility study is based.

(3) Debt structure and terms

(a) Maturity structure of proposed issue.

(b) Estimated interest rates on proposed bonds including true-interest-cost, all-inclusive interest cost, and average coupon.

(c) Estimated life of the bonds.

(d) Table showing, on a fiscal year basis, total future debt payments by:

(i) New issue.

(ii) Outstanding issues.

(iii) Total debt payments (new and outstanding issues).

(e) Estimated terms and conditions of bonds including covenant and call provisions, if applicable.

(f) Bond insurance or other credit enhancement costs and benefits, if applicable.

(g) Maximum principal amount and the maximum interest rate allowed for bond sale.

(h) Type of investments of proceeds, if applicable, the procedure to be used in selecting and purchasing the investments and representation that investment contracts will be competitively bid with documentation of the bidding process with at least three bona fide independent bidders.

(i) How the proposed debt structures relates to long-term strategic financing plan.

(4) Sales management

(a) Representation and compensation of financial advisor, if any, and method of selection.

(b) Method of sale, including justification for a negotiated sale, if any, and, if negotiated, method of selection of underwriter.

(c) Representation and compensation of bond counsel, special tax counsel, if any, and disclosure counsel, if any, and indication of method of selection.

(d) Breakout of costs of issuance. For negotiated sales, cost of issuance breakout should include underwriters' discount as broken out by management fee, structuring fee, takedown and estimated expenses.

(e) Ratings history, target and strategy.

(f) Anticipated timing of sale.

(5) Legal documents

(a) All resolutions previously adopted by the issuing authority relating to the financing.

(b) Drafts of all resolutions to be adopted by the issuing authority relating to the financing.

(c) Draft parameters resolution of the board approving the bond issue.

(d) Copies (or drafts if not in final form) of all financing documents.

(6) In addition, where state institution bonds are refunding bonds

(a) Estimated gross and net present value savings annually, if any, by each series of refunded bonds.

(b) Interest rate and debt service comparisons between refunding and refunded bonds.

(c) Description of sources and uses of funds.

(d) Redemption dates and call premiums on refunded bonds with an analysis of the potential costs and benefits of delay of issuing the refunding bonds.

(e) Description of re-structuring including reasons and special arbitrage issues, if applicable.

(f) Type of proposed investments used for escrow accounts, the procedure to be used in selecting and purchasing the investments.

(7) Additional information

(a) A certification of the issuing authority certifying that the issuing authority has complied with all statutory requirements for the issuance of state institution bonds.

(b) Any other information that the board, in its discretion, needs in order to fulfill its duty to review and approve proposed state institution bonds.

[2.61.5.9 NMAC - N, 4-28-2000]

#### **2.61.5.10 FINANCING PLAN FOR STATE EDUCATIONAL INSTITUTION BONDS:**

A. Pursuant to 6-17-9 NMSA 1978, in order to obtain board approval of the issuance of state educational institution bonds, the board of regents of a state educational institution must demonstrate to the satisfaction of the board that the building, facility or improvement is needed and that the cost of the building, facility or improvement is reasonable and should and probably will return sufficient net income to repay the money borrowed with interest as the same is due and payable. The board of regents of a state educational institution may seek approval of the issuance of state educational institution bonds by preparing a financing plan for presentation to the board at a meeting of the board prior to the sale of state educational institution bonds. The financing plan for state educational institution bonds shall address the following:

(1) Where Section 6-17-14 NMSA 1978 Is Not Relied Upon By Issuing Authority

(a) Project information

- (i) The need for the project in relation to the state educational institution's long-term strategic plan.
- (ii) Estimated amount of net income to be generated from the project.
- (iii) Estimated construction or acquisition costs of the building.

The basis for any projections or forecasts of future year revenue should be explained, and if future revenue needed to support debt service is to be derived solely from new facilities or projects, a feasibility study reflecting the likelihood of such revenue should be furnished. The study should clearly set forth any assumptions upon which the feasibility study is based.

(b) Debt management

- (i) Current outstanding debt and relation of the proposed issue to financial and parity bond limits.
- (ii) Five-year history and five-year forecast of pledged revenue used for proposed debt service. Historical data should be from fiscal year audited financial statements.
- (iii) Current and five-year projected coverage ratios on annual debt service requirements by; (1) pledged revenue, (2) total revenue legally available for debt service, and (3) maximum fiscal year debt service as a percentage of prior fiscal year audited pledged revenue, if available.

(c) Debt structure terms

- (i) Maturity structure of proposed issue.
- (ii) Estimated interest rates on proposed bonds including true-interest-cost, all-inclusive interest cost, and average coupon.
- (iii) Estimated average life of the bonds.
- (iv) Table showing, on a fiscal year basis, total future debt payments by; (1) new issue, (2) outstanding issues, and (3) total debt payments (new and outstanding issues).
- (v) Estimated terms and conditions of bonds including covenant and call provisions, if applicable.

(vi) Bond insurance or other credit enhancement costs and benefits, if applicable.

(vii) Maximum principal amount and the maximum interest rate allowed for bond sale.

(viii) Type of investments of proceeds, if applicable, the procedure to be used in selecting and purchasing the investments and representation that investment contracts will be competitively bid with documentation of the bidding process with at least three bona fide independent bidders.

How the proposed debt structures relates to long-term strategic financing plan.

(d) Sales management

(i) Representation and compensation of financial advisor, if any, and method of selection.

(ii) Method of sale, including justification for a negotiated sale, if any, and, if negotiated, method of selection of underwriter.

Representation and compensation of bond counsel, special tax counsel, if any, and disclosure counsel, if any, and indication of method of selection.

(iii) Breakout of costs of issuance. For negotiated sales, cost of issuance breakout should include underwriters' discount as broken out by management fee, structuring fee, takedown and estimated expenses.

(iv) Ratings history, target and strategy.

(v) Anticipated timing of sale.

(e) Legal documents

(i) All resolutions previously adopted by the issuing authority relating to the financing.

(ii) Drafts of all resolutions to be adopted by the issuing authority relating to the financing.

(iii) Draft parameters resolution of the board approving the bond issue.

(iv) Copies (or drafts if not in final form) of all financing documents.

(f) In addition, where bonds are refunding bonds

(i) Estimated gross and net present value savings annually, if any, by each series of refunded bonds.

(ii) Interest rate and debt service comparisons between refunding and refunded bonds.

(iii) Description of sources and uses of funds.

(iv) Redemption dates and call premiums on refunded bonds with an analysis of the potential costs and benefits of delay of issuing the refunding bonds.

(v) Description of re-structuring including reasons and special arbitrage issues, if applicable.

(vi) Type of proposed investments used for escrow accounts, the procedure to be used in selecting and purchasing the investments.

(g) Additional information

(i) A certification of board of regents of the state educational institution certifying that the board of regents of the state educational institution has complied with all statutory requirements for the issuance of income-producing revenue bonds.

(ii) Any other information that the board, in its discretion, needs in order to fulfill its duty to review and approve proposed income-producing revenue bonds.

(2) Where Section 6-17-14 NMSA 1978 Is Relied Upon By Issuing Authority

(a) System information

(i) The need for the building, facility or improvement in relation to the state educational institution's long-term strategic plan.

(ii) Estimated construction or acquisition costs of the building.

(iii) Estimated amount of net income to be generated from the system.

(iv) The basis for any projections or forecasts of future year revenue should be explained.

(b) Debt management

(i) Current outstanding debt and relation of the proposed issue to financial and parity bond limits.

(ii) Five-year history and five-year forecast of pledged revenue used for proposed debt service. Historical data should be from fiscal year audited financial statements.

(iii) Current and five-year projected coverage ratios on annual debt service requirements by; (1) pledged revenue, (2) total revenue legally available for debt service, and (3) maximum fiscal year debt service as a percentage of prior fiscal year audited pledged revenue, if available.

(c) Debt structure terms

(i) Maturity structure of proposed issue.

(ii) Estimated interest rates on proposed bonds including true-interest-cost, all-inclusive interest cost, and average coupon.

(iii) Estimated average life of the bonds.

(iv) Table showing, on a fiscal year basis, total future debt payments by; (1) new issue, (2) outstanding issues, and (3) total debt payments (new and outstanding issues).

(v) Estimated terms and conditions of bonds including covenant and call provisions, if applicable. Explain any absence of, or limitations on, call provisions.

(vi) Bond insurance or other credit enhancement costs and benefits, if applicable.

(vii) Maximum principal amount and the maximum interest rate allowed for bond sale.

(viii) Type of investments of proceeds, if applicable, the procedure to be used in selecting and purchasing the investments and representation that investment contracts will be competitively bid with documentation of the bidding process with at least three bona fide independent bidders.

(ix) How the proposed debt structures relates to long-term strategic financing plan.

(d) Sales management

(i) Representation and compensation of financial advisor, if any, and method of selection.

(ii) Method of sale, including justification for a negotiated sale, if any, and if negotiated, method of selection of underwriter.

(iii) Representation and compensation of bond counsel, special tax counsel, if any, and disclosure counsel, if any, and indication of method of selection.

(iv) Breakout of costs of issuance. For negotiated sales, cost of issuance breakout should include underwriters' discount as broken out by management fee, structuring fee, takedown and estimated expenses.

(v) Ratings history, target and strategy.

(vi) Anticipated timing of sale.

(e) Legal documents

(i) All resolutions previously adopted by the issuing authority relating to the financing.

(ii) Drafts of all resolutions to be adopted by the issuing authority relating to the financing.

(iii) Draft parameters resolution of the board approving the bond issue.

(iv) Copies (or drafts if not in final form) of all financing documents.

(f) In addition, where bonds are refunding bonds

(i) Estimated gross and net present value savings annually, if any, by each series of refunded bonds.

(ii) Interest rate and debt service comparisons between refunding and refunded bonds.

(iii) Description of sources and uses of funds.

(iv) Redemption dates and call premiums on refunded bonds with an analysis of the potential costs and benefits of delay of issuing the refunding bonds.

(v) Description of re-structuring including reasons and special arbitrage issues, if applicable.

(vi) Type of proposed investments used for escrow accounts, the procedure to be used in selecting and purchasing the investments.

(g) Additional information

(i) A certification of board of regents of the state educational institution certifying that the board of regents of the state educational institution has complied with all statutory requirements for the issuance of income-producing revenue bonds.

(ii) Any other information that the board, in its discretion, needs in order to fulfill its duty to review and approve proposed income-producing revenue bonds.

[2.61.5.10 NMAC - N, 4-28-2000]

#### **2.61.5.11 FINANCING PLAN FOR STATE AGENCY AND COMMISSION BONDS:**

A. In order to obtain approval of the issuance of state agency and commission bonds, the board will require the issuing authority to prepare a financing plan for presentation to the board at a meeting of the board prior to the sale of the state agency and commission bonds. The financing plan for state agency and commission bonds shall address the following:

(1) Debt management

(a) current outstanding debt and relation of the proposed issue to financial and parity bond limits.

(b) five-year history and five-year forecast of pledged revenue used for proposed debt service. Historical data should be from fiscal year audited financial statements.

(c) current and five-year projected coverage ratios on annual debt service requirements by:

(i) pledged revenue.

(ii) total revenue legally available for debt service.

(iii) maximum fiscal year debt service as a percentage of prior fiscal year audited pledged revenue, if available.

(d) the basis for any projections or forecasts of future year revenue should be explained, and if future revenue needed to support debt service is to be derived from new facilities or projects, a feasibility study reflecting the likelihood of such revenue should be furnished. The study should clearly set forth any assumptions upon which the feasibility study is based.

(2) Debt structure terms

(a) maturity structure of proposed issue.

(b) estimated interest rates on proposed bonds including true-interest-cost, all-inclusive interest cost, and average coupon.

(c) estimated average life of the bonds.

(d) table showing, on a fiscal year basis, total future debt payments by:

(i) new issue.

(ii) outstanding issues.

(iii) total debt payments (new and outstanding issues).

(e) estimated terms and conditions of bonds including covenant and call provisions, if applicable.

(f) Bond insurance or other credit enhancement costs and benefits, if applicable.

(g) Maximum principal amount and the maximum interest rate allowed for bond sale.

(h) Type of investments of proceeds, if applicable, the procedure to be used in selecting and purchasing the investments and representation that investment contracts will be competitively bid with documentation of the bidding process with at least three bona fide independent bidders.

(i) How the proposed debt structures relates to long-term strategic financing plan.

(3) Sales management

(a) Representation and compensation of financial advisor, if any, and method of selection.

(b) Method of sale, including justification for a negotiated sale, if any, and, if negotiated, method of selection of underwriter.

(c) Representation and compensation of bond counsel, special tax counsel, if any, and disclosure counsel, if any, and indication of method of selection.

(d) Breakout of costs of issuance. For negotiated sales, cost of issuance breakout should include underwriters' discount as broken out by management fee, structuring fee, takedown and estimated expenses.

(e) Ratings history, target and strategy.

(f) Anticipated timing of sale.

(4) Legal documents

(a) All resolutions previously adopted by the issuing authority relating to the financing.

(b) Drafts of all resolutions to be adopted by the issuing authority relating to the financing.

(c) Draft parameters resolution of the board approving the bond issue.

(d) Copies (or drafts if not in final form) of all financing documents.

(5) In addition, where state agency and commission bonds are refunding bonds

(a) Estimated gross and net present value savings annually, if any, by each series of refunded bonds.

(b) Interest rate and debt service comparisons between refunding and refunded bonds.

(c) Description of sources and uses of funds.

(d) Redemption dates and call premiums on refunded bonds with an analysis of the potential costs and benefits of delay of issuing the refunding bonds.

(e) Description of re-structuring including reasons and special arbitrage issues, if applicable.

(f) Type of proposed investments used for escrow accounts, the procedure to be used in selecting and purchasing the investments.

(6) Additional information

(a) A certification of the issuing authority certifying that the issuing authority has complied with all statutory requirements for the issuance of state agency and commission bonds.

(b) Any other information that the board, in its discretion, needs in order to fulfill its duty to review and approve proposed state agency and commission bonds.

[2.61.5.11 NMAC - N, 4-28-2000]

#### **2.61.5.12 FINAL STATUTORY APPROVAL BY THE STATE BOARD OF FINANCE ON ISSUANCE OF BONDS:**

A. After review of the financing plan, the board may approve the issuance of bonds by adopting a board resolution establishing parameters for the maximum principal amounts of bonds, the maximum interest rates, and other findings, terms and conditions of the sale. These are subject to confirmation to the board staff from the issuing authority after the sale of the bonds that the parameters and other terms and conditions established in the board resolution were or will be satisfied.

B. Following approval of the financing plan and the adoption of the parameters resolution by the board and the subsequent sale of the bonds, but prior to closing, the public body shall present to the board staff the following information:

- (1) results of the sale, including coupon, true-interest-cost and demonstration of compliance with all conditions established by the board.
- (2) comparisons to other similar sale issues that have same ratings, credit enhancements, and call options. Comparisons should be made by actual yields to maturities.
- (3) final versions of financing document.
- (4) compliance with terms and conditions set out in the parameters resolution.

C. The bonds shall not be delivered to the purchasers by the issuing authority until after the issuing authority has (1) presented the information required by Section 2.61.5.12.B to the board staff and (2) received written confirmation from board staff that the parameters established in the board resolution and any other terms or conditions set therein are satisfied.

D. The bonds must be delivered to the purchasers by the issuing authority no later than the date set in the parameters resolution adopted by the board. If the bonds are not delivered to the purchasers by the issuing authority by the date set in the parameters resolution, the issuing authority must prepare and present a new financing plan to the board at a subsequent board meeting.

[2.61.5.12 NMAC - N, 4-28-2000; A, 7-15-2003]

#### **2.61.5.13 APPROVAL BY THE STATE BOARD OF FINANCE OF EXCHANGE AGREEMENTS:**

A. After review of the information required under Section 2.61.5.13.B below, the board may approve a proposed exchange agreement by adopting a resolution establishing parameters relating to the proposed exchange agreement, subject to confirmation to the board staff from the public body after the final bidding or negotiation

of the exchange agreement that the parameters established in the board resolution were satisfied.

B. Information relating to the proposed exchange agreement provided to the board for its review shall include the following items:

(1) resolution or ordinance of the public body relating to the proposed exchange agreement.

(2) evaluation of financial risk including presentation of detailed scenarios of

(a) the transaction outcome at the maximum rate, representing the upside risk to the public body,

(b) the transaction outcome based on the current market, and

(c) the anticipated transaction outcome based upon the reasonable current expectations of the public body that are the bases for the decision to enter into the transaction

(3) demonstration that financial officials of the public body are knowledgeable regarding the market conditions required for or relevant to the exchange agreement, and explicit written acknowledgement of the range of potential outcomes as demonstrated in the response to item (2) and the acceptance of the financial risks and adverse potential outcomes presented therein.

(a) representation that legal counsel, the financial advisor or bank representing the public body have explained the legal and financial risks, respectively, of the transaction.

(b) explanation of the sizing of the transaction in relation to rating agency risk evaluation criteria.

(4) demonstration of an expected long-term financial benefit to the public body.

(5) representation by and compensation of financial advisor, if any.

(6) method of selection of provider.

(7) anticipated timing of transaction.

(8) on competitive bidding, if applicable, documentation of the bid process and that a minimum of three bona-fide bids will be received.

(9) evidence that the provider is rated in either of the two highest rating categories of a nationally recognized rating agency.

(10) estimated costs associated with the exchange agreement, with a break out of all fees paid to any natural person, firm, partnership, association or corporation involved in obtaining the exchange agreement.

(11) net amount or benefit estimated to be received from the exchange agreement.

(12) proposed term of the exchange agreement.

(13) draft of proposed exchange agreement reflecting termination provisions and collateralization or other requirements in event counter-party is downgraded below the two highest rating categories and the source of moneys to fund obligations or purchase price by issuing authority.

(14) draft parameters resolution of the board approving the exchange agreement.

C. The exchange agreement shall not be executed by the public body until after the public body has received written confirmation from board staff that the parameters established in the board resolution have been or will be satisfied.

D. The public body must execute the exchange agreement no later than the date set in the parameters resolution as adopted by the board. If the public body does not execute the exchange agreement by the date set in the parameters resolution, then the public body must submit the information required in Section 2.61.5.13.B to the board at a subsequent board meeting.

[2.61.5.13 NMAC - N, 4-28-2000; A, 7-15-2003]

#### **2.61.5.14 APPROVAL BY THE STATE BOARD OF FINANCE OF NET EFFECTIVE INTEREST RATES:**

A. After review of the information required under Section 2.61.5.14.B below, the board may approve a proposed net effective interest rate for public securities by adopting a resolution establishing parameters relating to the proposed net effective interest rate for public securities, subject to confirmation to the board staff from the public body that the parameters established in the board resolution were satisfied.

B. Information relating to the proposed net effective interest rate for public securities provided to the board for its review shall include the following items:

(1) Rationale for the request to exceed the statutory net effective interest rate ceiling.

(2) Resolution or ordinance of the public body relating to the proposed net effective interest rate for public securities.

(3) Demonstration that financial officials of the public body are knowledgeable regarding the market conditions required for or relevant to the net effective interest rate for public securities.

(4) Demonstration of an expected long-term financial benefit to the public body.

(5) Draft parameters resolution of the board approving the exchange agreement.

(6) Any other information that the board, in its discretion, needs in order to fulfill its duty to review and approve the net effective interest rate for the securities.

C. The securities shall not be issued or sold by the public body until after the public body has received written confirmation from board staff that the parameters established in the board resolution are satisfied.

[2.61.5.14 NMAC - N, 4-28-2000]

**2.61.5.15 SUBMISSION OF FINANCING PLANS, EXCHANGE AGREEMENT APPROVAL REQUESTS AND NET EFFECTIVE INTEREST RATE APPROVAL REQUESTS TO THE STATE BOARD OF FINANCE:**

A. Financing plans and exchange agreement approval requests submitted to the board should address each of the specific items in this policy, if applicable, and packages should be tabbed for easy reference.

B. The original and ten copies of the financing plan or exchange agreement approval request should be submitted to the board. In addition, one copy should also be submitted to the board's financial advisor and one copy to the board's bond counsel.

C. Completed packages, in their entirety, must be submitted on or before the board's meeting deadline, as set by the board, and must meet application-formatting criteria. Packages must be three-hole-punched, and page length must be standard letter size, 8 inches by 11 inches.

[2.61.5.15 NMAC-N, 4-28-2000]

**2.61.5.16 PAYMENT BY PUBLIC BODY OF FEES AND COSTS OF REVIEW AND ANALYSIS BY BOARD'S FINANCIAL ADVISOR AND/OR BOND COUNSEL:**

A. Effective October 1, 2003, any public body whose financings, including but not limited to issuance of bonds or interest rate exchange agreements, must be law by

approved by the board shall, as a condition of such approval, be responsible for the payment, upon closing of the proposed financing, of any fees or costs of the board's financial advisor arising from that advisor's review, analysis and recommendations regarding its proposed financing, should such review, analysis and recommendation be deemed advisable by the board in its discretion. These costs may also include the preparation, printing and making of documents and any other costs approved by the board. Such fees and expenses shall be charged as costs of issuance, and thus shall not be reimbursed if the financing does not close. The public body's payment of any such fees and costs shall be a condition of board approval, and set forth as a parameter in every resolution approving a financing.

B. Effective February 25, 2004, any public body whose financings, including but not limited to issuance of bonds or interest rate exchange agreements, must be law by approved by the board shall, as a condition of such approval, be responsible for the payment, upon closing of the proposed financing, of any fees or costs of the board's bond counsel arising from that advisor's review, analysis and recommendations regarding its proposed financing, should such review, analysis and recommendation be deemed advisable by the board in its discretion. These costs may also include the preparation, printing and making of documents and any other costs approved by the board. Such fees and expenses shall be charged as costs of issuance, and thus shall not be reimbursed if the financing does not close. The public body's payment of any such fees and costs shall be a condition of board approval, and set forth as a parameter in every resolution approving a financing.

[2.61.5.16 NMAC - N, 7-15-2003]

## **PART 6: BOND PROJECT DISBURSEMENTS**

### **2.61.6.1 ISSUING AGENCY:**

State Board of Finance, 181 Bataan Memorial Building, Santa Fe, NM 87501.

[2.61.6.1 NMAC - N, 02-28-02]

### **2.61.6.2 SCOPE:**

All agencies with respect to draw down of bond proceeds from severance tax bonds, supplemental severance tax bonds, or general obligation bonds.

[2.61.6.2 NMAC - N, 02-28-02; A, 01-15-09]

### **2.61.6.3 STATUTORY AUTHORITY:**

Section 6-1-1 (E) NMSA 1978 provides for the state board of finance to have general supervision of the fiscal affairs of the state and securities belonging to or in custody of

the state, and that the board may make rules and regulations for carrying out these provisions.

[2.61.6.3 NMAC - N, 02-28-02]

**2.61.6.4 DURATION:**

Permanent.

[2.61.6.4 NMAC - N, 02-28-02]

**2.61.6.5 EFFECTIVE DATE:**

February 28, 2002, unless a later date is cited at the end of a section.

[2.61.6.5 NMAC - N, 02-28-02]

**2.61.6.6 OBJECTIVE:**

This rule provides general guidance regarding the financial and legal requirements for draw down of bond proceeds.

[2.61.6.6 NMAC - N, 02-28-02]

**2.61.6.7 DEFINITIONS:**

**A.** "Agency" means any department, commission, council, board, committee, institution, legislative body, agency, government corporation, educational institution or official of the executive, legislative or judicial branch of the government of the state. It also includes the purchasing division of the general services department and the state purchasing agent, but does not include local public bodies.

**B.** "Board" means state board of finance.

**C.** "Capital expenditure" means cost of a type that is properly chargeable to a capital account under general federal income tax principles.

**D.** "Draw requests" means agency request for bond proceeds on a form approved from time to time by board staff.

[2.61.6.7 NMAC - N, 02-28-02; A, 01-15-09]

**2.61.6.8 INTERPRETATION OF AUTHORIZING LANGUAGE:**

**A.** In accordance with New Mexico law, bond proceed expenditures shall not be made for purposes other than those specified in an appropriation and any other relevant

law, and must meet the definition of capital expenditure unless otherwise authorized by law. It is crucial to determine whether the purpose for a draw request falls within an appropriation's permitted use. The following provides general direction and clarification in the interpretation of authorizing language. Agencies may also refer to the Uniform Statute and Rule Construction Act, 12-2A NMSA 1978 for guidance.

**(1)** Straight-forward language - some appropriation language is relatively unambiguous, either because it is quite specific or quite general, and it should not be difficult to determine whether the draw request falls within the appropriation language. The following examples use both specific and general language.

**(a)** "To purchase a van" - the specificity would not permit the purchase of a bus or truck or multiple vans. Using the appropriation to prepay rent on a leased vehicle would not be permitted.

**(b)** "For (a jail, an engineering study, specific type of equipment, etc.)" - "for" permits the broadest interpretation of the items that could be covered. The words act as a substitute for a particular verb or verbs that might raise interpretive questions or otherwise limit the use of funds. For example, "for a jail" could include purchasing an existing building, purchasing real estate, demolition, the planning and designing, constructing, equipping, furnishing and all other things of capital nature incident to completing the jail.

**(2)** Standard appropriation language - appropriation language uses certain verbs routinely to anticipate how appropriations will be applied. In order for agencies to be able to make draw requests with certainty based on frequently used verbs or combinations thereof, the following are the board's interpretations of frequently used verbs in authorizing language.

**(a)** Acquire - obtain something already in existence; does not mean to construct, build or otherwise create the thing to be acquired.

**(b)** Build - construct a structure or space including fixtures and other built-ins, but not including furnishings or moveable equipment; may include demolition and the design and planning process but does not include acquisition of underlying land; may include the use of modular and prefabricated buildings; may include the cost of commissioning a building for energy efficient green building standards (i.e. LEED certification), as required by law; used interchangeably with "construct".

**(c)** Construct or construct improvements - see "build".

**(d)** Design - planning process including location and feasibility studies, architectural drawings and plans, engineering, archaeological and environmental surveys or clearances, zoning, design activities necessary if seeking LEED certification, and all other steps incident to creating a plan for a final product.

**(e)** Develop - establish the process for future implementation of a project; similar to "design" however less tangible and more conceptual.

**(f)** Equip or equip improvements - supply tools, furnishing and other implements that are of a permanent or non-depletable nature and are reasonably necessary in the use of the building or other asset for its intended purpose; for example: wood chips and shade structures for playgrounds; used interchangeably with "furnish" (however the nouns "equipment" and "furniture" have different meanings, the former referring to mechanical, technological or recreational items, while the latter is generally limited to objects necessary to make a room comfortable).

**(g)** Expand - increase size or capacity.

**(h)** Feasibility study - a preliminary study undertaken to determine and document a project's viability, the results of which are used to make a decision whether or not to proceed with the project.

**(i)** Furnish - is generally interpreted to mean provide furniture for a building; however, may be used interchangeably with "equip" to mean the provision of items essential for the use of a building or asset for its intended purpose.

**(j)** Furniture - see "furnish".

**(k)** Governmental entity - a public body such as state agencies, cities, counties, school districts (including charter schools), governmental instrumentalities created by statute.

**(l)** Improve - enhance the quality or function of something; encompasses "construct", "equip", "remodel", "renovate" and "upgrade"; may include items such as the purchase of books and desks for a library.

**(m)** Information technology - includes hardware, software when the software is needed for the intended use of the facility and is a one-time expense, wiring, cooling (where necessary) and related costs, but does not include remodeling, space dividers or other furniture; does not include consumables such as toner, batteries, CD-ROMs, etc, unless included as part of the package or otherwise allowed.

**(n)** Install - bring into service, including necessary labor and parts directly related to the installation, but does not include the cost of the item actually being installed.

**(o)** Plan - see "develop".

**(p)** Prepare - make ready for a future purpose, use or activity.

**(q)** Purchase - see "acquire".

**(r)** Remodel - see "improve".

**(s)** Renovate - see "improve".

**(t)** Repair - return to usefulness.

**(u)** Replace - substitute with identical or similar item.

**(v)** Upgrade - see "improve".

**B.** Special meanings in road/street context - Unless specifically limited by the legislature, "to improve a road" includes anything that will make the existing road better and is deemed appropriate in the discretion of the agency responsible for the project, and could include acquisition of rights-of-way. However, the department of transportation has taken the position that "to construct a road" does not include planning, designing, right-of-way activities and acquisition, environmental documentation, environmental clearances, and other pre-construction project development tasks. Preliminary activities such as those would only be included if the legislature specified for "planning and designing."

**C.** Training of government employees - if training is purchased from the vendor or other third party in connection with the acquisition of any permitted property, which training is necessary to the initial use of the property, the appropriation may be used for such training costs. However, no part of the appropriation shall be used to pay for the salaries or wages of government employees during training, or travel costs for government employees to attend training.

**D.** Litany - when multiple verbs are listed in the appropriation, assume that they are used deliberately and to the exclusion of those not listed. When "and" is used in a list, the appropriation must be applied to all the purposes listed, unless the appropriation act provides that when the amount appropriated is not enough to pay for all the purposes listed, the funds may be expended on fewer than all of them. When "or" is used, the appropriation may be applied to any or all of the purposes listed.

**E.** Unusual or special appropriation language - if the appropriation language is not clear, the following interpretation guidelines may be helpful. Technical term - determine whether a technical term or term of art has an established meaning within a particular field, industry or context, such as the following examples:

**(1)** Software - software that is a one-time expenditure if necessary for intended use of hardware;

**(2)** Accounting term - if the term is commonly thought of as an accounting term, apply generally accepted accounting principles (GAAP) and government accounting standards board (GASB) interpretations;

**(3)** Tax term - if the term is commonly thought of as a tax term, consult the Internal Revenue Code for meaning.

**F.** Errors in appropriation language - if the entity, location or object erroneously referenced in the appropriation actually exists, then the funds cannot be applied otherwise, regardless of a suspected different legislative intent. If the entity, location or object erroneously referenced in the appropriation is non-existent, then the funds can be applied to the appropriate cause, if there is sufficient evidence that was the intended use.

**G.** Other considerations - the interpretations must make sense and not violate applicable law.

**(1)** Avoid unconstitutional results:

**(a)** Anti-donation - the appropriation cannot be given to a non-governmental entity; the item to be purchased or constructed must be owned by a governmental entity.

**(b)** Control of state - no appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state.

**(2)** Consider the appropriation in terms of the current context/situation of a project.

**(3)** Favor an interpretation that would make full use of the appropriation and avoid unachievable results.

**(4)** Assess the sufficiency of funds to support the interpretation (however, if an appropriation for a project is not sufficient to complete all the purposes specified, the appropriation may be expended for any portion of the purposes specified in the appropriation, if the appropriation act so states).

**(5)** Avoid interpretations that may jeopardize any tax-exempt bonds issued to finance the appropriation:

**(a)** Capital expenditure - appropriations should be used for a capital expenditure.

**(b)** Private use - if the item acquired or created will be used principally by one or a few private sector entities (including a non-profit organization) this should be brought to the attention of the board, unless previously discussed.

**(6)** Operating expenses - unless expressly provided for by statute, bond proceeds may not be used to pay for operating expenses (e.g. salaries and in-house labor).

**(7)** Indirect expenses - generally, the legislation authorizing the issuance of bonds prohibits the use of its proceeds for indirect expenses (e.g. penalty fees or damages other than pay for work performed, attorney fees, and administrative fees). Such use of bond proceeds shall not be allowed unless specifically authorized by statute.

**H.** Interpretive memoranda - in order to develop consistency in interpretations, the board will document specific interpretive decisions that arise. The interpretive memoranda will be provided to agencies making draw requests based on interpreting language, and may be relied on for future interpretations of the same or similar terms.

[2.61.6.8 NMAC - N, 02-28-02; A, 01-15-09; A, 10-15-09; A, 08-14-2015]

#### **2.61.6.9 PAYMENT OF CAPITAL PROJECT EXPENSES, DRAW REQUEST PROCEDURES:**

**A.** The recipient of bond proceeds is the governmental entity that will carry-out the completion of the project. In many cases, the agency named to receive the appropriation will also be the entity responsible for the project. In other cases, the named agency will be an intermediate agency that is expected to make a grant to a local government entity to carry out the completion of the project. Either an intermediate agency may make a draw request to the board on behalf of a local government entity as recipient, or an agency itself as recipient may make the request directly to the board, unless otherwise approved by the board director.

**(1)** Documentation to support draw requests from agency:

**(a)** one draw request form for each project (1 original and 2 copies);

**(b)** proof of payment - notarized certification from an authorized signatory that expenditures are valid or actual receipts;

**(c)** evidence that conditions have been satisfied if applicable;

**(d)** certification that the statements made in the original certification and questionnaire remain true, including use of facility;

**(e)** additional documentation to be submitted for requests by state educational institutions:

**(i)** if the capital project only requires higher education department approval, a higher education department approval letter;

**(ii)** if the capital project requires both higher education department and board approval, a higher education department approval letter and a copy of the board action sheet;

**(iii)** if the capital project does not require higher education department approval, a higher education department project review approval verification.

**(2)** Intermediate agencies typically submitting draw requests to the board on behalf of local entity recipients: environment department, department of transportation, Indian affairs department, local government division, public education department, higher education department and aging and long term services department:

**(a)** one draw request form for each project (1 original and 2 copies);

**(b)** proof of payment - a notarized certification from an authorized signatory that expenditures are valid or actual receipts;

**(c)** evidence that conditions have been satisfied if applicable;

**(d)** certification that the statements made in the original certification and questionnaire remain true, including use of facility.

**B.** Frequency - draw requests are due in the board office by 3:00 p.m. on the 1st and 15th day of each month or by 9:00 a.m. the next business day if the 1st or 15th falls on a weekend or holiday (the "draw request deadline"). Draw requests submitted on or before the draw request deadline will result in funds available six business days after the draw request deadline.

**C.** The minimum draw request amount per project shall be \$1,500 unless it is the final draw request or otherwise recommended by the intermediate agency.

**D.** State executive agencies may request a direct payment to a contractor or other entity.

**(1)** The agency must submit the payment voucher to department of finance and administration financial control division six business days after the board deadline unless notified by the board of processing delay due to additional information or legal review being required.

**(2)** If a direct payment to a contractor or other entity is requested and the agency mails the payment directly to the payee or transfers the funds electronically via automated clearing house (ACH), the agency must send state treasurer's office a copy of the warrant or a copy of the ACH no later than two business days after the payment has been made.

#### **2.61.6.10 ART IN PUBLIC PLACES (AIPP) ACT:**

**A.** A portion of appropriations for construction and major renovations shall be set aside for the acquisition or commissioning of works of art to be used in, upon or around public buildings.

**(1)** "Appropriations for construction and major renovations" include appropriations for that purpose to any public entity from severance tax bonds, general obligation bonds, or supplemental severance tax bonds, both taxable and tax-exempt.

**(2)** Under the AIPP Act, all agencies shall set aside the lesser of \$200,000 or one percent of the amount appropriated for new construction or major renovation (exceeding \$100,000) to use for art in, upon or around the building being constructed or renovated. In addition, an amount of money equal to the lesser of \$200,000 or one percent of the amount appropriated for new construction or major renovations of auxiliary buildings, as defined in the AIPP Act, shall be accounted for separately and expended for acquisition and installation of art for existing public buildings, as defined.

**B.** The board's role in administering the AIPP Act is as follows.

**(1)** After each bond issue, the board submits a list of approved projects to the arts division of the department of cultural affairs, which administers the AIPP fund. The arts division determines which projects the AIPP Act applies to and advises the board accordingly. Based on that determination, the board sets aside the requisite amount from each applicable project in a separate AIPP pooled fund for each bond issue.

**(2)** When the arts division of the department of cultural affairs is ready to purchase or commission art, the office submits a draw request to the board which then makes the disbursement out of the AIPP project.

**C.** Frequency - Draw requests are due in the board office by 3:00 p.m. on the 1st and 15th day of each month or by 9:00 a.m. the next business day if the 1st or 15th falls on a weekend or holiday (the "draw request deadline"). Draw requests submitted on or before the draw request deadline will result in funds available six business days after the draw request deadline.

[2.61.6.10 NMAC - N, 02-28-02; A, 01-15-09; A, 10-15-09; A, 06-28-13; A, 08-14-2015]

#### **2.61.6.11 EXCEPTIONS TO THE RULE:**

In the absence of specific legislative authority or board-issued guidance to the contrary, this rule governs the disbursement of all bond proceeds to agencies. Further, the executive director of the board, in consultation with bond and board counsel, may approve exceptions to the provisions herein when circumstances warrant.

[2.61.6.11 NMAC - N, 01-15-09]

## **PART 7: DISTRIBUTION OF QUALIFIED ENERGY CONSERVATION BOND ALLOCATIONS**

### **2.61.7.1 ISSUING AGENCY:**

State Board of Finance, 181 Bataan Memorial Building, Santa Fe, New Mexico.

[2.61.7.1 NMAC – N, 9/30/13]

### **2.61.7.2 SCOPE:**

State agencies, counties, municipalities, and Indian tribal governments.

[2.61.7.2 NMAC – N, 9/30/13]

### **2.61.7.3 STATUTORY AUTHORITY:**

Section 6-21E-1 NMSA 1978.

[2.61.7.3 NMAC – N, 9/30/13]

### **2.61.7.4 DURATION:**

Permanent.

[2.61.7.4 NMAC – N, 9/30/13]

### **2.61.7.5 EFFECTIVE DATE:**

September 30, 2013 unless a later date is cited at the end of a section.

[2.61.7.5 NMAC – N, 9/30/13]

### **2.61.7.6 OBJECTIVE:**

To establish rules and regulations governing the distribution of allocations of qualified energy conservation bonds provided for in Section 6-21E-1 NMSA 1978.

[2.61.7.6 NMAC – N, 9/30/13]

### **2.61.7.7 DEFINITIONS:**

**A. "Board"** means the state board of finance.

**B. "Bond counsel"** means an attorney or a firm of attorneys listed in the most recently available "directory of municipal bond dealers of the United States", published

by the bond buyer and commonly known as the "red book", in the section listing municipal bond attorneys of the United States or the successor publication thereto.

**C. "Federal act"** means Section 54(d) of the federal internal revenue code and includes federal rules and guidelines adopted to carry out the provisions of that section.

**D. "Large local government"** means a municipality or county with a population greater than one hundred thousand, as determined pursuant to the provisions of the federal act, or an Indian tribal government.

**E. "Qualified conservation purpose"** means:

(1) capital expenditures incurred for the purposes of:

(a) reducing energy consumption in publicly owned buildings by at least twenty percent;

(b) implementing green community programs, including the use of loans, grants or other repayment mechanisms to implement the programs;

(c) rural development involving the production of electricity from renewable energy resources; or

(d) any qualified facility as determined under Section 45(d) of the federal internal revenue code without regard to Paragraphs (8) and (10) of that section and without regard to any placed in service date;

(2) expenditures with respect to research facilities and research grants to support research in:

(a) development of cellulosic ethanol or other nonfossil fuels;

(b) technologies for the capture and sequestration of carbon dioxide produced through the use of fossil fuel;

(c) increasing the efficiency of existing technologies for producing nonfossil fuels;

(d) automobile battery technologies and other technologies to reduce fossil fuel consumption in transportation; or

(e) technologies to reduce energy use in buildings;

(3) mass commuting facilities and related facilities that reduce the consumption of energy, including expenditures to reduce pollution from vehicles used for mass commuting;

- (4) demonstration projects designed to promote the commercialization of:
- (a) green building technology;
  - (b) conversion of agricultural waste for use in the production of fuel or otherwise;
  - (c) advanced battery manufacturing technologies;
  - (d) technologies to reduce peak use of electricity; or
  - (e) technologies for the capture and sequestration of carbon dioxide emitted from combusting fossil fuels in order to produce electricity;
- (5) public education campaigns to promote energy efficiency.

**F. "Qualified energy conservation bond"** means a bond of a qualified issuer, the net proceeds from the sale of which are used exclusively for qualified conservation purposes and that meets all of the other requirements of the federal act for a qualified energy conservation bond.

**G. "Qualified issuer"** means the state, a county, a municipality or an Indian tribal government.

**H. "Remaining allocation"** means the state allocation, less the amounts required by the federal act to be allocated to large local governments, and plus any amount not used by a large local government and reallocated by that large local government to the state pursuant to Subsection B of 2.61.7.8 NMAC.

**I. "State allocation"** means the maximum amount of qualified energy conservation bonds that may be issued by qualified issuers in New Mexico pursuant to the federal act.

[2.61.7.7 NMAC – N, 9/30/13]

#### **2.61.7.8 STATE BOARD OF FINANCE DETERMINATIONS:**

A. The board hereby determines that the following amounts of the state allocation totaling \$20,587,000 are allocated to each of the following large local governments, subject to these amounts being returned to the board pursuant to Subsection B of 2.61.7.8 NMAC:

- (1) to Bernalillo county \$1,173,788, of which not more than \$352,136 may be used for private activity bonds;

(2) to Dona Ana county \$2,091,561, of which not more than \$627,468 may be used for private activity bonds;

(3) to Sandoval county \$1,268,799, of which not more than \$380,639 may be used for private activity bonds;

(4) to San Juan county \$1,270,895, of which not more than \$381,268 may be used for private activity bonds;

(5) to Santa Fe county \$1,493,296, of which not more than \$447,988 may be used for private activity bonds;

(6) to the City of Albuquerque \$5,415,557, of which not more than \$1,624,667 may be used for private activity bonds.

B. Unused large local government allocations may be reallocated by a large local government, and such unused large local government allocations shall revert to the board and shall become available to other qualified issuers. Large local governments are hereby directed to advise the board in writing no later than September 30, 2014 of any portion of their large local government allocation that will not be used by December 31, 2014. After being advised of a return of large local government allocation, the board shall make an announcement of the amount of the return at its next board meeting. The board shall not consider any requests for reallocation of the returned large local government allocation until the meeting following the announcement of the return.

C. Up to thirty percent of the total state allocation totaling \$20,587,000, an amount equal to \$6,176,100, may be used for private activity bonds, the proceeds of which may be loaned or otherwise made available to private companies or for privately owned or operated projects.

[2.61.7.8 NMAC – N, 9/30/13]

#### **2.61.7.9 DISTRIBUTION OF QUALIFIED ENERGY CONSERVATION BOND ALLOCATIONS:**

A. Qualified issuers, including large local governments requesting allocations in excess of the amount determined pursuant to Subsection A of 2.61.7.8 NMAC, requesting distributions of allocations shall submit the following:

(1) For all requests:

(a) a letter from the qualified issuer setting forth the amount of the state allocation requested, the actual or expected date of adoption of the bond resolution or similar documentation by the qualified issuer, the expected date of the sale of the bonds, the expected date of closing of the bonds, and a statement of any significant conditions that need to be satisfied before the bonds can be issued;

(b) a letter from the qualified issuer stating why the purpose to be served by the issuance of the qualified energy conservation bonds could not be as economically or effectively served by a means not involving an allocation of the state allocation;

(c) a letter from the qualified issuer stating that the project and use of bond proceeds will comply with all federal restrictions, including but not limited to compliance with Davis-Bacon prevailing wage rules, restrictions on qualified energy conservation bonds contained in the American Recovery and Reinvestment Act of 2009, and restrictions imposed by the United States department of the treasury, and a statement from the qualified issuer that it will provide the board with evidence from an independent entity annually no later than January 1 that the project and use of bond proceeds continues to be in compliance therewith as long as the bonds are outstanding;

(d) a letter from the qualified issuer, with a statement that it has consulted with its bond counsel, describing any private use, ownership or operation associated with the project, and the amount of the state allocation requested that will be used for private activity bonds;

(e) a letter from bond counsel for the qualified issuer, with supporting citations to state statutes, stating that the qualified energy conservation bonds can validly be issued under state law by the qualified issuer, which the board may refer to its bond counsel or to the state's attorney general for review and comment; if the board is advised by its bond counsel or the attorney general that the opinion of the issuing authority's bond counsel is incorrect, the board may refuse to approve the allocation requested;

(f) a letter from bond counsel for the qualified issuer, with supporting citations to the federal act and the regulations, stating that the bonds are qualified energy conservation bonds requiring an allocation of the state allocation and that all requirements of the federal act have been satisfied;

(g) a copy of the inducement resolution, certified by an official of the qualified issuer;

(h) a detailed description of the project, including the qualified conservation purpose to which the project relates, and the project's specific location;

(i) information on the economic development benefits the project will create in the state, including creation of jobs, contributions to energy security, reductions in consumer energy costs, environmental protection and resource conservation, or other benefits;

(j) the estimated number and types of jobs, both construction and permanent, indicating which are expected to be filled by persons who are residents of the state at the time of submission of the request for allocation and which are expected to be filled

by persons who are non-residents at the time of submission of the request for allocation;

(k) information on how the project furthers the qualified issuer's successful implementation of its mission or master plan, or otherwise furthers the qualified issuer's ability to provide critical services or benefits to its constituents;

(l) the present use or conditions of the project site and evidence that the proposed user of the project has obtained a legally enforceable right to acquire the project site; evidence of approved zoning of the proposed site must be submitted; this requires that project types for which the cap is being requested are not prohibited by the existing zoning of the proposed site;

(m) the maximum amount of the qualified energy conservation bonds and other obligations to be issued;

(n) an estimated starting month and estimated completion month of the construction of the project, the date anticipated for initial expenditure of bond proceeds, and the percent of bond proceeds likely to be expended within three years of the issuance of the bonds;

(o) a project budget, including all funding sources and an itemized list of all project costs including but not limited to personnel, equipment, materials, supplies, construction and any profits; assumptions underlying the project budget should be noted in detail;

(p) information relating to the feasibility of the proposed project showing that the project or the user will generate revenues and cash flow sufficient to make payments to pay debt service on the bonds, if applicable;

(q) the amount and source of private capital that will be used for the project in addition to proposed qualified energy conservation bond financing, as well as a table showing estimated sources and uses of funds;

(r) conceptual site plans for the project and a map locating the project area;

(s) detailed information relating to the feasibility of any technologies to be used in the project, including the maturity of the technology and whether such technologies have been implemented previously on the proposed scale;

(t) any other information regarding the economic benefits to the project's community and to the state or which the qualified issuer believes will aid the board in considering the request for allocation;

(u) résumés of the staff or development team that will oversee completion of the project;

(v) an explanation of how the qualified energy conservation bonds will be financed, including whether they will be sold at competitive or negotiated sale; whether they will be issued as private activity bonds, general obligation bonds requiring voter approval; or other types of bonds; the terms of any loan agreement that will be the source of bond debt service;

(w) if applicable, a commitment letter or letter of intent, which may be subject to common contingencies or closing conditions, from the proposed underwriter, placement agent or bond purchaser to underwrite, place or purchase the qualified energy conservation bonds; and

(x) an indication of whether an approval of a lesser amount of qualified energy conservation bond allocation than the amount requested would be beneficial.

(2) The board or its staff may ask for additional supplemental information from the qualified issuer to aid the board in considering the request.

B. Within seven business days after a qualified issuer issues any qualified energy conservation bonds, the qualified issuer or its bond counsel shall advise the board by letter of the date the bonds were issued and the total aggregate amount of the issue.

C. Qualified issuers shall comply with the following restrictions.

(1) Any qualified issuer desiring to make a request to the board for an allocation must comply with established board rules for inclusion on the board's agenda. In order to be considered for inclusion on the agenda, all materials required to be submitted to the board must be submitted by the established time period prior to the meeting date, which may be found on the board's website. It is a qualified issuer's responsibility to ascertain that deadline and comply with it. All requests for allocations of the state allocation appearing on the board's agenda for a particular meeting will be deemed to have been received simultaneously.

(2) A qualified issuer, excluding large local governments with allocations determined pursuant to Subsection A of 2.61.7.8 NMAC, shall advise the board in writing of any unusable allocation of the state allocation promptly after it becomes aware the allocation will not be used in full prior to the allocation expiration date. After being advised of a return of an allocation of the state allocation, the board shall make an announcement of the amount of the return at its next board meeting. The board shall not consider any requests for allocation of the state allocation relating to the amount of any returned allocation until the meeting following the announcement of the return.

(3) The board will not consider a request for a new allocation of the state allocation for a project whose previous allocation has expired or was voluntarily returned until the qualified issuer has resubmitted all of the information required by Subsection A of 2.61.7.9 NMAC. Such request for a new allocation will not be given a priority over other requests for allocations.

D. In the event that the face amount of all proposed qualified energy conservation bonds in valid, timely submitted applications exceeds the remaining allocation, the board will decide how the remaining allocation will be distributed to applicants by considering:

(1) the dates anticipated for the initial expenditure of bond proceeds and for completion of the project;

(2) the percent of the bond proceeds that are likely to be expended within three years of the date of the issuance of the bonds;

(3) whether the bond proceeds, together with all other money available for the project, are sufficient to complete the project; and

(4) any additional information received by the board pursuant to Paragraph (1) of Subsection A of 2.61.7.9 NMAC in the discretion of the board.

E. The allocation expiration date for any allocation approved by the board in any calendar year shall be December 31 of that calendar year, subject to discretionary extension, which the board may condition on the completion of both a sale and issuance of the qualified energy conservation bonds within the extension period.

[2.61.7.9 NMAC – N, 9/30/13]

## **PART 8: APPROVAL OF REFUNDING BONDS**

### **2.61.8.1 ISSUING AGENCY:**

Department of Finance and Administration, 180 Bataan Memorial Building, Santa Fe, NM 87501.

[2.61.8.1 NMAC - N, 2/29/2016]

### **2.61.8.2 SCOPE:**

Any issuance of refunding bonds that, pursuant to Section 3-31-9 NMSA 1978, Section 4-62-8 NMSA 1978, or Section 6-15-11 NMSA 1978, requires department of finance and administration approval.

[2.61.8.2 NMAC - N, 2/29/2016]

### **2.61.8.3 STATUTORY AUTHORITY:**

A. Section 3-31-9 NMSA 1978 provides that a municipality shall receive from the department of finance and administration written approval of any gross receipts tax refunding revenue bonds, gasoline tax refunding revenue bonds or project refunding

revenue bonds pursuant to the provisions of Sections 3-31-8 through 3-31-12 NMSA 1978.

**B.** Section 4-62-8 NMSA 1978 provides that a county shall receive from the department of finance and administration written approval of any non-utility gross receipts tax refunding bonds, gasoline tax refunding revenue bonds, fire protection refunding revenue bonds, environmental refunding revenue bonds, or non-utility project refunding revenue bonds issued pursuant to the provisions of Sections 4-62-7 through 4-62-10 NMSA 1978.

**C.** Section 6-15-11 NMSA 1978 provides that the governing body of any county, municipality or school district in this state may, with the approval of the department of finance and administration, issue bonds in such form as the governing body may determine, to be denominated refunding bonds, for the purpose of refunding any of the general obligation bonded indebtedness of the county, municipality or school district which has or will become due and payable or which has or will become payable at the option of the county, municipality or school district by consent of the bondholders or by any lawful means.

**D.** Section 6-15-12 NMSA 1978 provides that whenever a governing body of a county, municipality or school district deems it expedient to issue refunding bonds under the provisions of Sections 6-15-11 to 6-15-22 NMSA 1978, the governing body shall adopt an ordinance or resolution setting out the facts making the issuance of such refunding bonds necessary or advisable, the determination of such necessity or advisability of said governing body, and the amount of such refunding bonds which it is deemed necessary and advisable to issue.

[2.61.8.3 NMAC - N, 2/29/2016]

**2.61.8.4 DURATION:**

Permanent.

[2.61.8.4 NMAC - N, 2/29/2016]

**2.61.8.5 EFFECTIVE DATE:**

February 29, 2016, unless a later date is cited at the end of a section.

[2.61.8.5 NMAC - N, 2/29/2016]

**2.61.8.6 OBJECTIVE:**

This rule provides general guidance regarding the financial and legal requirements for department approval of certain refunding bond issues as required by state statute. The rule is intended to benefit the state's political subdivisions in their refunding bond

policies. Department approval of proposed refunding bonds is not intended to protect investors and does not evidence the soundness of any investment. Department approval is based solely on information provided by the issuing authority. The department has no duty to independently investigate, and does not independently investigate, the merits and risks involved in the refunding bonds.

[2.61.8.6 NMAC - N, 2/29/2016]

#### **2.61.8.7 DEFINITIONS:**

**A. "All-inclusive interest cost"** means the total cost of the refunding bonds, expressed as a discount rate calculated using the present value of all debt service payments on the refunding bonds and the total proceeds of the refunding bonds. The amount of refunding proceeds is adjusted by any accrued interest, original issue discount, original discount premium, costs of issuance, credit enhancement fees, and underwriter's spread.

**B. "Costs of issuance"** means all costs incurred by the issuing authority incident to the planning and sale of the refunding bonds. Costs of issuance include but are not limited to underwriters' spread, discount, or fees, counsel fees, financial advisor fees, credit enhancement costs, rating agency fees, trustee fees, accountant fees, printing costs, loan origination fees, administrative costs and costs incurred in connection with the required public notice process.

**C. "Department"** means the department of finance and administration.

**D. "Financing documents"** means any official statement, bond purchase agreement, indenture, liquidity facility, credit enhancement agreement, loan agreement or other similar agreement associated with the issuance of the refunding bonds.

**E. "Issuing authority"** for purposes of refunding bonds that by law require department approval, means the governmental unit or public body in the name of which refunding bonds are issued. For these purposes, issuing authorities include, but are not limited to, counties, school districts and municipalities.

**F. "Refunded bonds"** means a written promise to pay a specified sum of money (par value or principal amount) at a specified date or dates in the future (maturity dates) together, if applicable, with interest, that is proposed to be refunded through the issuance of refunding bonds. Refunded bonds include, for these purposes, but without limitation:

(1) tax revenue bonds, gasoline tax revenue bonds, or project revenue bonds issued by a municipality pursuant to Sections 3-31-1 through 3-31-7 NMSA 1978;

(2) non-utility gross receipts tax bonds, gasoline tax revenue bonds, fire protection revenue bonds, environmental revenue bonds, or non-utility project revenue

bonds issued pursuant to the provisions of Sections 4-62-1 through 4-62-6 NMSA 1978;  
or

(3) general obligation bonds issued by a county, municipality or school district pursuant to Sections 6-15-3 through 6-15-10 NMSA 1978.

**G. "Refunding bonds"** means bonds issued to refinance refunded bonds. These include current and advance refunding within the meaning of the Internal Revenue Code of 1986, as amended.

**H. "True-interest-cost"** means that yield, which if used to compute the present worth as of the delivery date of the refunding bonds of all payments of principal and interest to be made on the refunding bonds from their delivery date to their respective maturity dates (as specified in the maturity schedule and without regard to the possible optional prior redemption of the refunding bonds), using the interest rate specified in the bid or purchase contract produces an amount equal to the principal amount of the refunding bonds, plus any premium or minus any discount bid or stated in the purchase contract. Such calculation shall be based on a 360 day year consisting of 12, 30-day months and a semi-annual compounding interval.

[2.61.8.7 NMAC - N, 2/29/2016]

#### **2.61.8.8 FINANCING PLAN FOR REFUNDING BONDS:**

**A.** In order to obtain approval of the issuance of refunding bonds, the issuing authority must prepare a financing plan prior to the sale of the refunding bonds that addresses the following:

(1) Refunding details:

(a) Estimated gross and net present value savings annually, if any, by each series of refunded bonds. If the refunding bonds are being issued together with new money bonds, the net present value savings calculation on the refunding bonds should exclude any interest payments or proceeds associated with the new money bonds.

(b) Interest rate and debt service comparisons between refunding bonds and their respective refunded bonds.

(c) Description of sources and uses of funds.

(d) If request is for approval of advance refunding bonds, redemption dates and call premiums on refunded bonds with an analysis of the potential costs and benefits of delay of issuing the refunding bonds, description of any special arbitrage issues, and type of proposed investments to be used for escrow accounts.

(2) Debt management:

**(a)** Current outstanding debt and relation of the proposed refunding bonds to financial, parity bond and rate limits, if any.

**(b)** Five-year history of pledged revenues used for proposed debt service based on fiscal year audited financial statements.

**(c)** Current and five-year projected coverage ratios, based on current revenues, on annual debt service requirements by:

**(i)** Pledged revenue.

**(ii)** Total revenue legally available for debt service.

**(iii)** Maximum fiscal year debt service as a percentage of prior fiscal year audited pledged revenue, if available.

**(d)** For general obligation refunding bonds, current ad valorem mill levy imposed, maximum mill levy allowable by law, and the anticipated impact the refunding bonds will have on the mill levy.

**(3)** Debt structure and terms:

**(a)** Maturity structure of proposed refunding bonds.

**(b)** Estimated interest rates on proposed refunding bonds including true-interest-cost, all-inclusive interest cost, and average coupon.

**(c)** Estimated life of the refunding bonds.

**(d)** Table showing, on a fiscal year basis, total future debt payments by:

**(i)** New refunding issue.

**(ii)** Outstanding issues less refunded bonds.

**(iii)** Total debt payments (new refunding issue and outstanding issues less refunded bonds).

**(e)** Estimated terms and conditions of refunding bonds including covenant and call provisions, if applicable.

**(f)** Maximum principal amount and the maximum interest rate allowed for refunding bond sale.

**(4)** Sales management:

(a) Representation and compensation of financial advisor, if any, and method of selection.

(b) Method of sale, including justification for a negotiated sale, if any, and, if negotiated, method of selection of underwriter.

(c) Representation and compensation of bond counsel, special tax counsel, if any, and disclosure counsel, if any, and indication of method of selection.

(d) Breakout of costs of issuance. For negotiated sales, cost of issuance breakout should include underwriters' discount as broken out by management fee, structuring fee, take down and estimated expenses.

(e) Anticipated timing of sale.

(5) Legal documents:

(a) All resolutions and ordinances previously adopted by the issuing authority relating to the refunding bonds.

(b) Drafts of all resolutions and ordinances to be adopted by the issuing authority relating to the refunding bonds.

(c) Copies (or drafts if not in final form) of all financing documents.

(6) Additional information:

(a) A certification of the issuing authority certifying that the issuing authority has complied with all statutory requirements for the issuance of refunding bonds.

(b) Any other information that the department, in its discretion, needs and requests in order to fulfill its duty to review and approve the refunding bonds.

**B.** The department shall make its determination to approve or disapprove of refunding bonds based on its assessment of the financing plan, including, in part, whether the refunding bonds will achieve net present value savings of at least three percent of the par amount of refunded bonds. The department may approve refunding bonds that generate less than three percent savings or disapprove refunding bonds that generate more than three percent savings in its sole discretion, depending upon other factors related to the refunding bonds.

**C.** The department, in its sole discretion, may waive specific provisions of this rule when circumstances warrant.

#### **2.61.8.9 FINAL STATUTORY APPROVAL BY THE DEPARTMENT ON ISSUANCE OF REFUNDING BONDS:**

**A.** If the refunding bonds have not yet been sold at the time department approval is contemplated, the department may approve the issuance of refunding bonds by sending correspondence establishing parameters including the maximum principal amount, the maximum true interest cost, maximum coupon on each maturity, the maximum final maturity date, and final closing date for the refunding bonds. The issuing authority must include proposed parameters in its request to the department for approval and the department may request changes to the proposed parameters as a condition of its approval. Following the sale but at or before closing, the issuing authority will certify in writing to the department that the results of the sale are in compliance with all parameters, terms and conditions set by the department and include in the certification a report of the results of the sale with respect to each parameter. An issuing authority's failure to provide a full and accurate certification to the department on or before the final closing date will result in the department not having provided its approval to the issuing authority.

**B.** If the refunding bonds have been sold but not yet issued or closed at the time department approval is contemplated, the department may approve the issuance of the refunding bonds by sending correspondence communicating its final approval.

**C.** The issuing authority shall not deliver the refunding bonds to the purchasers until after the issuing authority has received written confirmation from the department that it has given its final approval.

**D.** The refunding bonds must be delivered to the purchasers by the issuing authority no later than any date established in the department correspondence. If the refunding bonds are not delivered to the purchasers by the issuing authority by any date set in the department correspondence, the issuing authority must prepare and present a new financing plan to the department.

**E.** If the department denies approval of the refunding bonds, the department will send written communication to the issuing authority stating that the request for approval of refunding bonds has been denied and summarizing the basis for its denial.

[2.61.8.9 NMAC - N, 2/29/2016]

#### **2.61.8.10 SUBMISSION OF FINANCING PLAN TO THE DEPARTMENT:**

**A.** A financing plan submitted to the department must address each of the specific items in this rule, if applicable.

**B.** One original hard copy and one identical electronic version of the financing plan must be submitted to the department. Municipalities and counties must also submit copies to the local government division of the department, and school districts must also

submit copies to the public education department. The hard copy must be tabbed for easy reference and the electronic version should be bookmarked.

**C.** A financing plan, in its entirety, must be submitted at least 15 business days before the date on which established parameters or final approval is requested to be communicated by the department.

[2.61.8.10 NMAC - N, 2/29/2016]

## **PART 9: DETERMINATIONS OF THE STATE BOARD OF FINANCE**

### **2.61.9.1 ISSUING AGENCY:**

State Board of Finance, 181 Bataan Memorial Building, Santa Fe, New Mexico.

[2.61.9.1 NMAC - N, 12/15/2015]

### **2.61.9.2 SCOPE:**

**A.** Counties requesting a determination from the state board of finance that a proposed county industrial revenue bond project will not directly or substantially compete with an existing business or enterprise located within the boundaries of the county or within five (5) miles of the proposed project.

**B.** Commissions, departments, institutions, bureaus or agencies thereof and political subdivisions of the state requesting a determination from the board of greater public need when public property is taken.

[2.61.9.2 NMAC - N, 12/15/2015]

### **2.61.9.3 STATUTORY AUTHORITY:**

**A.** Section 4-59-15 NMSA 1978 provides that if any representative of an existing business or enterprise located within the boundaries of the county or within five (5) miles of the proposed county industrial revenue bond project alleges, in a written complaint filed with the county governing body within fifteen (15) days of the meeting at which an ordinance or resolution authorizing the issuance of county industrial revenue bonds is adopted, that the proposed project would directly and substantially compete with such an existing business or enterprise located within the boundaries of the county or within five (5) miles of the proposed project, the bonds in connection with that project shall not be issued until the board has determined that the proposed project will not directly or substantially compete with an existing business or enterprise located within the boundaries of the county or within five (5) miles of the proposed project. The board shall conduct a hearing and make a determination within ninety (90) days of receiving a request for determination from the county. An existing business or enterprise for which

county industrial revenues bonds were previously issued by the county shall not be entitled to file a complaint pursuant to Section 4-59-15 NMSA 1978.

**B.** As with other matters before the board, records submitted to the board pursuant to Section 4-59-15 NMSA 1978 and this rule are subject to inspection pursuant to the Inspection of Public Records Act, Sections 14-2-1 to -12 NMSA 1978, as amended, unless exempted from inspection pursuant to Subsection A of Section 14-2-1 NMSA 1978.

**C.** There is no provision in law placing the board or its procedures under the Administrative Procedures Act, Sections 12-8-1 to -25 NMSA 1978, as amended (see Section 12-8-23 NMSA 1978). As such, determinations by the board made pursuant to Sections 4-59-15 NMSA 1978 and 42-2-3 NMSA 1978 are not adjudicatory proceedings as described in Section 12-8-2 NMSA 1978 and may be conducted through administrative hearings, as described therein. See *State ex rel. King v. Lyons*, 2011-NMSC-004, 26, 149 N.M. 330.

**D.** Section 42-2-3 NMSA 1978 provides that the state may acquire, either temporarily or permanently, public or privately owned lands, real property or any interests therein, including water rights or any easements deemed necessary or desirable for present or future public road, street or highway purposes by gift, agreement, purchase, exchange, condemnation or otherwise. Such lands or interests in real property may be acquired in fee simple. The state may use the special alternative procedure to acquire lands or any interest therein for any public purpose for which the power of eminent domain may be properly exercised. And for purposes of Section 42-2-3 NMSA 1978, when state-owned property must be taken, the board shall first determine the greater public need, unless the state defendant in whom title is vested concedes that the purposes for which the property is sought to be taken is the greater public need.

[2.61.9.3 NMAC - N, 12/15/2015]

**2.61.9.4 DURATION:**

Permanent.

[2.61.9.4 NMAC - N, 12/15/2015]

**2.61.9.5 EFFECTIVE DATE:**

December 15, 2015, unless a later date is cited at the end of a section.

[2.61.9.5 NMAC - N, 12/15/2015]

**2.61.9.6 OBJECTIVE:**

**A.** The board finds that increased economic competition, wages, and demand for labor are positive outcomes of economic development incentives, including industrial revenue bonds. Therefore, the board will exercise its authority to determine whether direct or substantial competition exists in a manner that allows healthy competition to occur in the interest of economic development, but that avoids material negative impact to an existing business that files a complaint pursuant to Section 4-59-15 NMSA 1978.

**B.** This rule establishes criteria that will be considered and administrative hearing procedures that will be followed to ensure compliance with the mandates of Section 4-59-15 NMSA 1978 and Section 42-2-3 NMSA 1978.

[2.61.9.6 NMAC - N, 12/15/2015]

#### **2.61.9.7 DEFINITIONS:**

**A. "Administrative hearing"** means a public hearing for which notice and an opportunity to be heard are provided prior to the Board's consideration and issuance of the determinations contemplated by this rule. Administrative hearings under this rule do not require that the parties thereto be afforded all the elements of a traditional judicial proceeding.

**B. "Board"** means the state board of finance.

**C. "Ex parte communications"** means any oral, written or electronic communications between one party (or its attorney) and any board member(s) that occur out of the presence of, or without the consent of an opposing party (or its attorney). Communications included in this definition, in addition to direct communications, include indirect communications as where a party requests or suggests to a non-party to contact a board member on any matter related to a pending determination. Ex parte communications also occur when individuals sympathetic to one party make oral, written or electronic communications to any board member out of the presence of, or without the consent of the opposing party (or his/her attorney) on any matter related to a pending determination.

**D. "State" or "state defendant"** includes, with respect to determinations of the greater public need described at 2.61.9.9 NMAC, any commission, department, institution, bureau or agency thereof as well as all political subdivisions of the state.

[2.61.9.7 NMAC - N, 12/15/2015]

#### **2.61.9.8 PROCEDURE FOR BOARD DETERMINATION OF DIRECT OR SUBSTANTIAL COMPETITION PURSUANT TO THE COUNTY INDUSTRIAL REVENUE BOND ACT:**

**A.** A county with which a complaint has been filed pursuant to Section 4-59-15 NMSA 1978 shall submit the following to the board to request the board to make a determination:

- (1) a cover letter stating the action requested from the board;
- (2) a copy of the complaint filed with the county;
- (3) a map depicting the location of the existing business or enterprise and the proposed project that allows verification that the existing business or enterprise is located within the boundaries of the county or within five (5) miles of the proposed project;
- (4) a certification by an authorized county official verifying that county industrial revenue bonds have not previously been issued by that county for the existing business or enterprise that filed the complaint, and noting whether the existing business or enterprise has ever in the past been denied the issuance of industrial revenue bonds;
- (5) a copy of the final industrial revenue bond application submitted to the county by the new business; and
- (6) a copy of any resolution or ordinance adopted by the county related to the proposed industrial revenue bonds.

**B.** Within seven (7) days of receipt of a request that the board make a determination pursuant to Section 4-59-15 NMSA 1978, the board's staff will cause notice to be published in a newspaper of general circulation in the state and in a newspaper published in the county in which the complaint has been filed or in a neighboring county if no publishing newspaper exists in said county. The form of notice will be as follows, subject to any revision that may be necessary in the discretion of the board's staff to ensure accuracy, coherency or to comply with instructions from the board:

"NOTICE OF PUBLIC HEARING: The State Board of Finance (SBOF) is accepting public comments from all interested persons related to a request by (county) for a determination pursuant to Section 4-59-15 NMSA 1978. This statute provides that if a written complaint is filed with a county governing body within fifteen (15) days of the meeting at which an ordinance or resolution authorizing the issuance of county industrial revenue bonds is adopted, alleging that the proposed project would directly or substantially compete with an existing business or enterprise located within the county or within five (5) miles of the proposed project, the bonds shall not be issued until the SBOF has determined that the proposed project will not directly or substantially compete with the existing business or enterprise. The SBOF shall conduct an administrative hearing and make a determination within ninety (90) days of receiving a request for determination from the county. The request for determination was received by the SBOF from (county) on (date). Interested persons are invited to submit public comments that will assist the SBOF in making its determination by demonstrating that

the proposed project to benefit (new business) either does or does not directly or substantially compete with existing business or enterprise (existing business or enterprise). Criteria that the SBOF may consider in making its determination are established in its rule governing this matter at Subsection F of 2.61.9.8 NMAC, and include information about business inputs and the impact on input costs, competition for sales and the impact on sales prices, information about the local labor market and workforce training costs, specific business models employed by the two (2) businesses, whether the businesses are part of a cluster economy, information on regional transportation, transmission, pipeline or other infrastructure constraints, information on the geographical distribution of sales for the existing business or enterprise and the new business, and any other information that an interested person believes will assist the SBOF in making its determination. (Insert description of any other information the board solicits in relation to a particular request for determination.) Public comments must be submitted in writing to Director, 181 Bataan Memorial Building, 407 Galisteo Street, Santa Fe, NM 87501, and shall not be submitted directly to SBOF members. Initial public comments should be submitted by (first public comment deadline). Initial public comments received by (first public comment deadline) will be published on the SBOF website, (website address). In response to public comments published on the SBOF website, additional public comments may be submitted by (second public comment deadline). Copies of the request for determination and the written complaint are available in room 181, Bataan Memorial Building, Santa Fe, NM 87501 and on the SBOF website. It is anticipated that the SBOF will schedule a public administrative hearing on this issue, which is expected to take place (meeting date) subject to notice requirements established in the SBOF's Open Meetings Resolution, SBOF Policy (policy number), to hear presentations from (county), (existing business or enterprise), and (new business). Following this administrative hearing, the SBOF may deliberate and make a determination pursuant to Section 4-59-15 NMSA 1978 or may take action at a later date. The SBOF in its discretion may require persons participating in administrative hearings related to this issue to do so under oath. The SBOF may employ experts to assist it in making its determination. Interested persons are instructed to refrain from communicating directly with board members concerning matters related to the request for determination. All commentary, either written or oral, shall be submitted to the board via the process for submitting written public comment described in this notice of public comment period, or through comment or testimony received at the administrative hearing."

**C.** At its next regular meeting or at a special meeting called for this purpose following receipt of a complaint, the board chairperson will appoint a member of the board as hearing officer to preside over administrative hearings related to the request for determination. The hearing officer will be delegated the authority to consider and dispose of non-dispositive motions, respond to procedural questions that arise between the board's meetings, to take all measures necessary for maintenance of order and for the efficient, fair and impartial consideration of issues arising before and during administrative hearings including but not limited to keeping the administrative hearing on schedule, taking or admitting written public comment, and making such orders as

may be necessary to preserve decorum and protect the orderly administrative hearing process.

**D.** At a regular or special meeting following the conclusion of the second public comment deadline established in the notice of public comment period, the board will hear presentations from the county, the existing business or enterprise, and the new business. By a preponderance of the evidence, the existing business or enterprise shall have the burden of proving that the proposed project will directly and substantially compete with the existing business. Following these presentations, the board may ask questions of all persons appearing before it to elicit information it deems necessary to make its determination. The board may then deliberate, make a determination at that time, or make a determination at a later date.

**E.** The board will make its determination at a regular or special meeting within 90 days of receiving the request for determination. Upon announcing its determination, the hearing officer will direct the board's staff and counsel to draft a written determination containing findings of fact and citations to the administrative hearing record. The written determination will be approved by the board at the next regular or special meeting, which may occur more than ninety (90) days after the board's receipt of the written complaint from the county.

**F.** In making its determination, the board may consider the following information contained in the administrative hearing record as a result of written public comment and verbal testimony, as well as any other criteria the board deems relevant in its sole discretion:

**(1)** competition for business inputs such as raw materials, manufacturing technology, capital and labor, including whether any increased competition for business inputs is likely to be met by increased supply for business inputs without generating a substantial increase in the costs of business inputs for the existing business or enterprise;

**(2)** competition for sales, including whether any increased competition for sales will likely be absorbed in the market without a substantial reduction of prices received by the existing business or enterprise;

**(3)** information about the local labor market, including the county unemployment rate, the size of the existing workforce relative to the employment levels of the existing business or enterprise and the new business, training costs of the workforce at the existing business or enterprise and the new business, and any factors that may suggest whether or not labor is likely to relocate to the area if labor demand increases as a result of the new business;

**(4)** specific business models employed by the two (2) businesses and commentary on whether the two (2) businesses are likely to compete directly or

substantially either in a geographic sense or in providing goods or services in the same specific market segments;

(5) whether the new business and existing business are part of a cluster economy, in which a group of interconnected firms benefit from co-location;

(6) information on regional transportation, transmission, pipeline, or other infrastructure constraints; and

(7) information on the geographical distribution of sales for the existing business or enterprise and the new business.

[2.61.9.8 NMAC - N, 12/15/2015]

#### **2.61.9.9 PROCEDURE FOR BOARD DETERMINATION OF GREATER PUBLIC NEED RELATED TO SPECIAL ALTERNATIVE CONDEMNATION PROCEDURE:**

When state-owned property must be taken and the state defendant in whom title is vested does not concede that the purpose for which the property is sought is the greater public need, the state entity that seeks to take the property may submit the following to the board to request the board to make a determination:

**A.** A submission from the state entity seeking to take the property that includes:

(1) a cover letter stating the action requested from the board;

(2) a description of its public need for the property, including copies of any master planning documents that require the property to be taken;

(3) a description of the selection process it used to identify the property and describing its efforts to identify other property that would be suitable to meet the public need;

(4) a description of efforts it has made with the state defendant to attempt to resolve the dispute prior to seeking a determination from the board;

(5) documentation to allow verification of the legal description of the property;  
and

(6) a resolution of the state entity's governing body requesting the board's determination, or a letter from the head of the state entity if such state entity has no governing body.

**B.** A submission from the state defendant, through the state entity seeking to take the property that includes the following items:

(1) a resolution of the state defendant's governing body stating that it does not concede that the purpose for which the property is sought is the greater public need, or a letter from the head of the state defendant if such state defendant has no governing body;

(2) a description of its public need for the property, including copies of any master planning documents that require the property to be retained; and

(3) a description of its use and maintenance of the property during the past five (5) years.

**C.** A state defendant that fails to submit these requirements through the state entity seeking to take the property within a reasonable timeframe, in the board's sole discretion, may be found to be nonresponsive and, as a result, the board may make its determination of greater public need in favor of the state entity seeking to take the property.

**D.** At a regular or special meeting called for this purpose, the board will hear presentations from the state entity seeking to take the property and the state defendant. Following these presentations, the board may ask questions of all persons appearing before it to elicit information it deems necessary to make its determination. The board may then deliberate, make a determination at that time, or make a determination at a later date.

**E.** The board will announce its determination at a regular or special meeting. Upon announcing its determination, the board will direct the board's staff and counsel to draft a written determination containing findings of fact and citations to the hearing record. The written determination will be approved by the board at a subsequent regular or special meeting.

**F.** In making its determination, the board may consider the following information contained in the hearing record as a result of written public comment and verbal testimony, as well as any other criteria the board deems relevant in its sole discretion:

(1) the competing public needs for the property demonstrated by the state entity seeking to take the property and by the state defendant, with primary consideration given to public needs it finds are substantially related to public peace, health, safety, welfare, and secondary consideration given to public needs it finds are substantially related to economic development, recreation, speculative, and undefined use;

(2) whether the state entity seeking to take the property made reasonable efforts to identify other properties that would be suitable to meet the public need; and

(3) whether the state defendant has actively used or maintained the property for any purpose during the past five (5) years.

[2.61.9.9 NMAC - N, 12/15/2015]

**2.61.9.10 EX PARTE COMMUNICATIONS PROHIBITED:**

No party or its attorney shall engage in ex parte communications regarding a pending determination with any hearing officer appointed to preside over an administrative hearing. Likewise, a hearing officer shall not engage in ex parte communications on any matter to which that hearing officer has been appointed with any party or its attorney. However, there may be occasions when brief ex parte communications are warranted, for example, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits. A summary of what was communicated shall be promptly disclosed to the individual who did not participate in the ex parte communication. Board members and staff shall not engage in any ex parte communications on any matter or for any reason related to a pending determination with any party, attorney or interested person.

[2.61.9.10 NMAC - N, 12/15/2015]

**CHAPTER 62-64: [RESERVED]**

**CHAPTER 65: DEPOSIT OF PUBLIC FUNDS  
[RESERVED]**

**CHAPTER 66-69: [RESERVED]**

**CHAPTER 70: CAPITAL EXPENDITURES**

**PART 1: GENERAL PROVISIONS [RESERVED]**

**PART 2: [RESERVED]**

**PART 3: [RESERVED]**

**PART 4: POLICY ON CAPITAL EXPENDITURES BY STATE  
EDUCATIONAL INSTITUTIONS**

**2.70.4.1 ISSUING AGENCY:**

State Board of Finance.

[2.70.4.1 NMAC - Rp, 2.70.4.1 NMAC 12/23/2024]

**2.70.4.2 SCOPE:**

All institutions of higher education confirmed by Article 12, Section 11 of the New Mexico Constitution.

[2.70.4.2 NMAC - Rp, 2.70.4.2 NMAC 12/23/2024]

#### **2.70.4.3 STATUTORY AUTHORITY:**

Section 21-1-21, NMSA 1978, as amended, which requires prior approval by the higher education department and state board of finance of any expenditure by any state educational institution confirmed by Article 12, Section 11 of the state constitution for the purchase of real property or construction of buildings or other major structures or major remodeling projects. Section 21-1-21.1, NMSA 1978, as amended, which requires evidence of adequate parking. Executive Order 2006-001, which establishes energy efficiency green building standards for state of New Mexico executive buildings, including the higher education department.

[2.70.4.3 NMAC - Rp, 2.70.4.3 NMAC 12/23/2024]

#### **2.70.4.4 DURATION:**

Permanent.

[2.70.4.4 NMAC - Rp, 2.70.4.4 NMAC 12/23/2024]

#### **2.70.4.5 EFFECTIVE DATE:**

December 23, 2024, unless a later date is cited at the end of a section.

[2.70.4.5 NMAC - Rp, 2.70.4.5 NMAC 12/23/2024]

#### **2.70.4.6 OBJECTIVE:**

**A.** Section 21-1-21 NMSA 1978 states: "No expenditure shall be made by any state educational institution confirmed by Article 12, Section 11 of the state constitution for the purchase of real property or the construction of buildings or other major structures or for major remodeling projects without prior approval of the proposed purchase or construction or remodeling by the board of educational finance and the state board of finance".

**B.** Involvement of the state board of finance in the approval of capital outlay projects and capital expenditures at New Mexico colleges and universities is specified by this statute. This involvement is substantially different from the involvement with state building projects, where the state board of finance is the final authority for accepting bids and determining whether the project will be constructed. In the case of educational institutions, the authority for the actual construction of the project resides with the board of regents of the institution. However, New Mexico statute requires the higher education

department and the state board of finance to provide prior approval to the board of regents before they are allowed to proceed with the project.

**C.** Since the statute requires the higher education department and the state board of finance to provide "prior" approval of the project, these two bodies should review all major capital projects to determine that the proposed project is in keeping with the overall statewide plan for higher education. The source of funding for the project should also be carefully reviewed to determine that sufficient funds are available for the project and the use of the funds will not have an adverse effect on other portions of the institution's budget. The sufficiency of planning for the project, and the completeness of the review of the project by the board of regents should also be determined.

[2.70.4.6 NMAC - Rp, 2.70.4.6 NMAC 12/23/2024]

#### **2.70.4.7 DEFINITIONS:**

For these purposes, "major" is defined as:

**A. "Appraisal report"** for the purpose of real property purchases means a report of an opinion of value conducted by a general certified appraiser and that meets all requirements under the Uniform Standards of Professional Appraisal Practice (USPAP).

**B. "Board"** means the state board of finance.

**C. "Current"** means:

(1) in the context of a title binder dated within six months of the proposed closing date;

(2) in the context of an appraisal an appraisal report with an effective date within one year of the date of submission of the proposed transaction to the board for approval.

**D. "Equipment costs"** for the purpose of construction or remodeling are defined as costs for equipment, machinery, apparatus, appliances, furniture, and fixtures, either moveable or non-moveable.

**E. "Major"** for the purpose of remodeling projects is defined as any project meeting the cost thresholds established in this subparagraph E so long as equipment costs do not exceed fifty percent of the total project cost.

(1) any project funded, in whole or in part, by capital outlay legislation signed into law for which costs exceed \$1,600,000.00, at institutions with FTE enrollments under 1,500;

(2) any project funded, in whole or in part, by capital outlay legislation signed into law for which costs exceed \$2,400,000.00, at institutions with FTE enrollments of 1,500 or more;

(3) any project funded exclusively by sources other than legislative appropriations for which costs exceed \$160,000.00, at institutions with enrollments of 1,500 FTE or less; or

(4) any project funded exclusively by sources other than legislative appropriations for which costs exceed \$950,000.00, at institutions with enrollments exceeding 1,500 FTE.

**F. "Public entity"** means a local public body, a state agency, a school district, a state educational institution, or other governmental instrumentality created by statute.

**G. "Remodel"** means to change, modify, or transform a space in a way that alters its use, design, or function, including the reconfiguration of spaces. Remodel encompasses renovation and repair when the use, design, or function of a space is altered.

**H. "Renovation"** means the change, strengthening, or addition of load-bearing elements; or the refinishing, replacement, bracing, strengthening, upgrading, or extensive repair of existing materials, elements, components, equipment or fixtures. To revive, restore, or repair an existing space.

**I. "Repair"** means the reconstruction, replacement, or renewal of any part of an existing building for the purpose of its maintenance or to correct damage. Repair may include infrastructure systems replacements (e.g., elevators, roofs, HVAC, signage, stucco, windows, lighting, electrical, plumbing, flooring).

[2.70.4.7 NMAC - Rp, 2.70.4.7 NMAC 12/23/2024]

#### **2.70.4.8 PROJECTS REQUIRING REVIEW:**

**A.** All projects that fall under the following categories must be submitted for review by the state board of finance:

- (1) any purchase of real property;
- (2) any construction of a new building;
- (3) any project involving a bond issue which requires state board of finance approval;

(4) any other major project, including construction of facilities such as parking lots or radio towers; site improvements or landscaping; and remodeling of an existing building, but not demolition unless part of a larger project that requires approval.

**B.** In-house labor applied to a project must be included as part of the cost of the project. Projects may not be artificially segmented or phased in a manner designed to avoid review by the state board of finance.

[2.70.4.8 NMAC - Rp, 2.70.4.8 NMAC 12/23/2024]

#### **2.70.4.9 INFORMATION REQUIRED FOR SUBMISSION FOR PURCHASE OF REAL PROPERTY:**

**A.** To ensure that the state board of finance will have sufficient information to review capital expenditures at New Mexico's educational institutions, the following information must be submitted to the board after the higher education department has approved the request:

- (1) legal description of the property;
- (2) a copy of a current appraisal report completed by a general certified appraiser for commercial property or a general certified appraiser or a residential certified appraiser for residential property and report of review from the property tax division of the taxation and revenue department if the appraisal was not done by the property tax division; the educational institution seeking property tax division review must submit necessary information to the property tax division within the time frame specified by the property tax division; when the seller is another governmental entity, neither an appraisal nor property tax division review is required;
- (3) a site improvement survey to verify the legal description and to uncover the existence of recorded and unrecorded easements and encroachments;
- (4) a description of the use to which the property will be placed;
- (5) the source of funds for the purchase to include citation of the relevant section of the law when source of funds is legislative appropriation and in the case of bond funding, representation that bond proceeds are available;
- (6) current title binder in the form required by 13.14.5 NMAC evidencing clear title, including all required statements. For any special exceptions listed in Schedule B, the public body shall provide an explanation of each exception and measures it is taking to mitigate any risks associated with the exception;
- (7) the form of general warranty deed by which the educational institution will take title in fee simple absolute containing a legal description of the property and

warranty covenants; when the seller is another governmental entity, transfer of title shall be by quitclaim deed;

(8) phase I of an environmental assessment to verify prior use of the land with regard to possible environmental hazards;

(9) a copy of the purchase agreement containing a provision making the purchase subject to the approval of higher education department and the state board of finance; and

(10) evidence of approval of the purchase by the applicable state educational institution's governing board and the higher education department.

**B.** Waivers of certain provisions may be granted at the discretion of the board of finance, on a case by case basis.

**C.** Requirements affecting bond approvals are set forth in 2.61.5 NMAC.

[2.70.4.9 NMAC - Rp, 2.70.4.9 NMAC 12/23/2024]

#### **2.70.4.10 INFORMATION REQUIRED FOR SUBMISSION FOR CONSTRUCTION OF BUILDINGS OR OTHER FACILITIES; MAJOR REMODELING:**

**A.** To ensure that the state board of finance will have sufficient information to review capital expenditures at New Mexico's educational institutions, the following must be submitted to the board after the higher education department has approved the request:

(1) a description of the facility to be constructed or remodeled, including the types of space to be included, the function of the facility, and the relationship of the project to the institution's five-year master plan;

(2) the total square footage of the facility, both net assignable square feet and gross square feet;

(3) the cost per square foot for the construction or remodel of the facility and the cost per square foot for the total project;

(4) a budget for the project, including equipment costs, architect and engineering fees and contingencies;

(5) source of funds to include citation of the relevant section of the law when source of funds is legislative appropriation and in the case of bond funding, representation that bond proceeds are available;

(6) certificate of adequate parking as required in Section 21-1-21.1, NMSA 1978, as amended;

(7) evidence of approval of expenditure by applicable board of regents and higher education department;

(8) evidence of approval by higher education department and the energy, minerals, and natural resources department of the following criteria as it may be amended from time to time:

(a) certification and demonstration of compliance with all commercial energy conservation requirements as set forth in 14.7.9 NMAC. Certification and demonstration means showing of qualifications or attributes that comply with or meet the specified requirements or standards set forth in 14.7.9 NMAC by either officially attesting to or authoritatively confirming through review by the energy, minerals, and natural resources department or the higher education department; and

(b) if the facility is less than or equal to 5,000 square feet, evidence of energy efficient measures;

(c) if the facility is greater than 5,000 square feet and less than or equal to 15,000 square feet, evidence of fifty percent reduction in energy use compared to existing facilities of similar type as defined by the United States department of energy; or

(d) if the facility is greater than 15,000 square feet, evidence of fifty percent reduction in energy use compared to existing facilities of similar type as defined by the United States department of energy and the achievement of a LEED silver rating or better.

**B.** Waivers of certain provisions may be granted at the discretion of the board of finance, on a case by case basis.

**C.** Requirements affecting bond approvals are set forth in 2.61.5 NMAC.

[2.70.4.10 NMAC - Rp, 2.70.4.10 NMAC 12/23/2024]

#### **2.70.4.11 REVISED PROJECTS:**

To ensure that the project actually constructed will be substantially the same as that approved by the higher education department and the state board of finance, any change in the project resulting in a change in the budget of more than ten percent will require separate review and approval by the state board of finance. The same information will be required for such changes as is required for the original submission of the project. Any additional information which can help in evaluating a proposed project can be requested by the state board of finance prior to approval.

[2.70.4.11 NMAC - Rp, 2.70.4.11 NMAC 12/23/2024]

## **PART 5: POLICY FOR USE OF CAPITOL BUILDINGS REPAIR FUND**

### **2.70.5.1 ISSUING AGENCY:**

State Board of Finance.

[2.70.5.1 NMAC - Rn, SBOF Policy 94-5, 10/15/08]

### **2.70.5.2 SCOPE:**

Property control division of the general services department and all other agencies that own or use capitol buildings.

[2.70.5.2 NMAC - N, 10/15/08]

### **2.70.5.3 STATUTORY AUTHORITY:**

Section 15-3B-17, NMSA 1978, as amended, which establishes the capitol buildings repair fund and limitations on the use of money in the fund. Executive Order 2006-001, which establishes energy efficiency green building standards for state of New Mexico executive buildings.

[12/5/94; 2.70.5.3 NMAC - Rn, SBOF Policy 94-5, Section 1 & A, 10/15/08]

### **2.70.5.4 DURATION:**

Permanent.

[2.70.5.4 NMAC - N, 10/15/08]

### **2.70.5.5 EFFECTIVE DATE:**

December 5, 1994.

[2.70.5.5 NMAC - Rn, SBOF Policy 94-5, 10/15/08]

### **2.70.5.6 OBJECTIVE:**

To establish guidelines to be used by the property control division, general services department, in reviewing and recommending expenditures from the capitol buildings repair fund for qualifying state-owned buildings; and seeking authorization from the state board of finance.

[12/5/94; 2.70.5.6 NMAC - Rn, SBOF Policy 94-5, Section 2, 10/15/08]

### **2.70.5.7 DEFINITIONS (as used in this policy):**

A. "Capitol building" is any building, located in Santa Fe, New Mexico, owned by the executive, legislative or judicial branch of state government that is not an income beneficiary from a specific grant of land from the United States congress in the state's enabling act.

B. "Capitol buildings repair fund" is a fund that may be used to repair, remodel and equip capitol buildings and adjacent lands, to repair or replace building machinery and building equipment located in capitol buildings. Fund monies cannot be utilized for acquisition of furniture.

[12/5/94; 2.70.5.7 NMAC - Rn, SBOF Policy 94-5, Section 3 & A, 10/15/08]

#### **2.70.5.8 POLICY:**

A. The capitol buildings repair fund will only be utilized when the property control division director, upon approval of the state board of finance, determines:

(1) that an immediate need or emergency exists or that the expenditure is consistent with an approved schedule of repairs; and

(2) that no other sources of funding are readily available; it is not the intent of this policy to fund new capital outlay projects or agency personnel costs.

B. Priority will be given to projects that achieve:

(1) correction of code violations or any other applicable codes; compliance with ADA requirements or any other applicable laws; structural repairs including repairs to roofs, supporting walls and foundations; repairs of electrical and mechanical systems; or increased energy efficiency with a payback of five years or less; or

(2) projects that are consistent with an approved schedule of repairs.

[12/5/94; 2.70.5.8 NMAC - Rn, SBOF Policy 94-5, Section 4 & A, 10/15/08]

#### **2.70.5.9 REPORTS:**

A. Property control division will report semi-annually to the state board of finance regarding:

(1) updated inventory of buildings including an approved check list of conditions;

(2) status report of approved projects;

(3) proposed schedules of repairs;

(4) evidence that projects in the proposed schedule of repairs complies with Executive Order 2006-001 as it may be amended from time to time, with respect to the following criteria:

(a) if the facility is greater than 15,000 square feet or uses over 50 kilowatt peak electrical demand and the project comprises upgrades or replacement of two of the three major systems (HVAC, lighting, and plumbing), evidence of a minimum rating of "LEED" silver and a minimum delivered energy performance standard of one half the U.S. energy consumption for that building type as defined by the United States department of energy; and

(b) if the facility is greater than 5,000 square feet and less than or equal to 15,000 square feet, evidence of achieving a minimum delivered energy performance standard of one half the U.S. energy consumption for that building type as defined by the United States department of energy; or

(c) for all other projects, evidence of the use of cost-effective, energy-efficient, green building practices to the maximum extent possible; and

(5) financial projections for the capitol buildings repair fund.

B. Property control division shall report monthly to the state board of finance on monthly and year-to-date revenues and expenses on an accrual basis.

[12/5/94; 2.70.5.9 NMAC - Rn, SBOF Policy 94-5, Section 5 & A, 10/15/08]

#### **2.70.5.10 PROCEDURES AND REVISED PROJECTS:**

A. All requests for capitol buildings repair funds shall be made to the director, property control division, general services department, 1100 St. Francis Drive, Santa Fe, New Mexico 87501, telephone (505) 827-2141.

B. The state board of finance director shall review and recommend action to the state board of finance. No money shall be expended from the capitol buildings repair fund without authorization of the state board of finance.

C. To ensure that projects requested from the capitol buildings repair fund approved by the state board of finance will be completed in substantially the same form as approved, any change in a project resulting in a change in the project's budget of more than 10 percent will require separate review and approval by the state board of finance. The same information will be required for such changes as is required for the original submission of the project.

D. Any additional information that can help in evaluating a proposed project can be requested by the state board of finance prior to final approval.

[12/5/94; 2.70.5.10 NMAC - Rn, SBOF Policy 94-5, Section 6 & A, 10/15/08]

#### **2.70.5.11 OTHER USES FOR CAPITOL BUILDINGS REPAIR FUND:**

A. The capitol buildings repair fund may also be used:

(1) to contract for options to purchase real estate, such real estate, if purchased, to be put to state use; provided that no more than ten thousand dollars (\$10,000) shall be expended for any single option; any money used for consideration in acquiring an option to purchase real estate shall be applied against the purchase price of the real estate if the option is exercised;

(2) in the event any capital outlay project exceeds authorized project cost by no more than five percent, the state board of finance may authorize the property control division to supplement the authorized cost by an allocation not to exceed five percent of the authorized cost from the capitol buildings repair fund to the extent of the unencumbered and unexpended balance of the fund.

B. The director of the property control division may expend funds for emergency repairs during a specified period and up to a maximum amount determined, from time to time, by the state board of finance. Such expenditures can only be used for the purposes established in Paragraph (1) of Subsection B of 2.70.5.8 NMAC and shall be reported to the state board of finance at its next regular meeting for review and approval.

[12/5/94; 2.70.5.11 NMAC - Rn, SBOF Policy 94-5, Section 7 & A, 10/15/08]

## **CHAPTER 71-78: [RESERVED]**

## **CHAPTER 79: INDIVIDUAL DEVELOPMENT ACCOUNTS**

### **PART 1: GENERAL PROVISIONS**

#### **2.79.1.1 ISSUING AGENCY:**

New Mexico Department of Finance and Administration, Local Government Division.

[2.79.1.1 NMAC - N, 04/29/2005]

#### **2.79.1.2 SCOPE:**

All individual development account program administrators funded pursuant to the Act, state agencies and other stakeholders affected by the rule. The scope of these rules includes, but is not limited to:

**A.** policies concerning the eligible uses for and establishment of individual development accounts;

**B.** selection criteria and requirements for participating individual development account program administrators; and

**C.** eligibility criteria for individual account owners.

[2.79.1.2 NMAC - N, 04/29/2005]

### **2.79.1.3      STATUTORY AUTHORITY:**

The Individual Development Account Act, Section 58-30-5, NMSA 1978 and Section 9-6-5 Subsection E, NMSA 1978.

[2.79.1.3 NMAC - N, 04/29/2005]

### **2.79.1.4      DURATION:**

Permanent.

[2.79.1.4 NMAC - N, 04/29/2005]

### **2.79.1.5      EFFECTIVE DATE:**

04/29/2005 unless a later date is cited at the end of a section.

[2.79.1.5 NMAC - N, 04/29/2005]

### **2.79.1.6      OBJECTIVE:**

The Individual Development Account Act (Sections 58-30-1 through 58-30-12 NMSA 1978; being Laws 2003, Chapter 362) established a structure to provide oversight to individual development account programs in New Mexico funded through the act. These rules are designed to:

**A.** identify and promote quality individual development account initiatives throughout the state while encouraging innovation and diversity;

**B.** ensure accountability of account owners, account programs, program administrators as well as other stakeholders; and

**C.** provide standards of eligibility and program administration for individual development account programs in New Mexico.

[2.79.1.6 NMAC - N, 04/29/2005]

#### **2.79.1.7 DEFINITIONS:**

**A. "Account owner"** means the person in whose name an individual development account is originally established.

**B. "Act"** means the Individual Development Account Act, Sections 58-30-1 through 58-30-12 NMSA 1978.

**C. "Allowable use"** means monies expended from an individual development account for the account owner or the account owner's spouse or dependents for a use listed below:

(1) expenses to attend an approved post-secondary or vocational educational institution, including, but not limited to, payment for tuition, books, supplies and equipment required for courses;

(2) costs to acquire or construct a principal residence that is the first principal residence acquired or constructed by the account owner;

(3) costs of major home improvements or repairs on the principal residence of the account owner;

(4) capitalization or costs to start or expand a business including equipment, tangible personal property, operational and inventory expenses, legal and accounting fees and other costs normally associated with starting or expanding a business;

(5) acquisition of a vehicle necessary to obtain or maintain employment by an account owner or the spouse of an account owner, and

(6) in the case of a deceased account owner, amounts deposited by the account owner and held in an individual development account shall be distributed to a beneficiary if not in conflict with the New Mexico Uniform Probate Code Sections 45-1-101 through 45-1-404, NMSA 1978. If the beneficiary is eligible to maintain the account, according to the provisions of the act and these rules, then the account as well as matching funds designated for that account from the program reserve fund of the program administrator may be transferred and maintained in the name of the surviving spouse, dependent or beneficiary.

**D. "Authorized financial institution"** means a financial institution authorized by the division to hold and manage individual development accounts and reserve accounts.

**E. "Business"** means a sole proprietorship, business venture or corporate structure in which the account owner will be an owner of greater than 50 percent.

**F. "Director"** means the director of the division.

**G. "Division"** means the local government division of the New Mexico department of finance and administration.

**H. "Earned income"** means wages from employment, payment in lieu of wages, disability payments, tribal distributions or earnings from self-employment or acquired from the provision of services, goods or property, production of goods, management of property or supervision of services.

**I. "Education"** means a job training or related educational program approved by the program administrator and the division.

**J. "Eligible individual"** means a person who meets the criteria for opening an individual development account.

**K. "Emergency withdrawal"** means a withdrawal by an account owner that:

(1) is a withdrawal of only those funds, or a portion of those funds, deposited by the account owner in the individual development account of the account owner;

(2) is permitted by a program administrator on a case-by-case basis; and

(3) is made due to a personal crisis, including but not limited to illness, eviction, potential foreclosure, job loss or urgent family reasons and approved in writing by a program administrator.

**L. "Financial institution"** means a bank, bank and trust, savings bank, savings association or credit union authorized to be a trustee of individual retirement accounts as defined by federal law, the deposits of which are insured by the federal deposit insurance corporation or the national credit union administration.

**M. "Financial literacy"** means a basic understanding of budgets and savings accounts, credit and interest and how to use financial services including, but not limited to having a savings plan to reach the account owner's savings goal for an individual development account.

**N. "First principal residence"** means a principal residence to be acquired or constructed by an account owner who has no ownership interest in a principal residence during the three-year period ending on the date of acquisition of the principal residence.

**O. "Individual development account"** means an account established and maintained in an authorized financial institution by an eligible individual participating in an individual development account program pursuant to the act.

**P. "Individual development account program"** means a program established by a program administrator approved by the division to establish and administer individual

development accounts and reserve accounts for eligible individuals and to provide financial training required by the division for account owners.

**Q. "Major home improvement or repair"** means a home improvement to a residential location that has been occupied continuously by the account owner for at least 12 months and is the principal residence of the account owner who is named as the mortgage holder. The home improvement must be one that increases the value of the residence or that will sustain the value of the home as approved by the program administrator. These improvements include, but are not limited to structural alterations and reconstruction, changes for improved functions and modernizations, elimination of health and safety hazards, and energy conservation improvements.

**R. "Matching funds"** means money deposited in a reserve account at a ratio of not less than one dollar (\$1.00) of program administrator funds to one dollar (\$1.00) of account owner deposits to match the withdrawals for allowable uses from an individual development account.

**S. "Non-profit organization"** means an instrumentality of the state or an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. X 501(c)(3)) and exempt from taxation pursuant to Section 501(a) of that code.

**T. "Post-secondary or vocational education"** means a post-secondary university, community college, vocational-technical school, institution or specialized degree-granting college or school legally authorized to grant degrees or certificates.

**U. "Program administrator"** means only 501(c)(3) nonprofit organizations, tribes and instrumentalities of the state that are determined by the director to be eligible to offer an individual development account program.

**V. "Reserve account"** means an account established pursuant to the act in an authorized financial institution in which matching funds are maintained and available for payment for a predetermined allowable use following completion of all program requirements by the account owner.

**W. "Savings plan"** means a plan developed with an account owner and a program administrator defining savings goals and program requirements, including the allowable use of both the individual development account and the matching funds. The approved plan shall serve as the contract between the account owner and the program administrator.

**X. "Tribe"** means an Indian nation, tribe or pueblo located in whole or in part within New Mexico.

[2.79.1.7 NMAC - N, 04/29/2005]

## **2.79.1.8 RESPONSIBILITIES OF THE DIVISION:**

**A.** Annually, based on the availability of state funds including administrative costs of program administrators, the division shall solicit requests for proposals from non-profit organizations or tribes interested in establishing or further developing an individual development account program.

**B.** The director shall determine if the entity is eligible to be a program administrator under the act and these rules. Individual development account programs and program administrators are subject to review and approval by the director.

**C.** Prior to receiving funds pursuant to the act, an individual development account program and program administrator shall be approved the director.

**D.** The director shall monitor all individual development account programs and program administrators subject to the act and these rules and consult with the regional planning and development councils (COGs/EDDs) on program implementation as needed to ensure that account owners' accounts and the reserve fund accounts are being operated according to federal law, the provisions of the act and these rules.

**E.** Each November, the division shall provide a report of the activities under the act to the governor and to an appropriate interim committee of the legislature.

**F.** The division shall provide staff support and administrative services for the individual development account advisory committee in accordance with the act.

[2.79.1.8 NMAC - N, 04/29/2005]

#### **2.79.1.9 RESPONSIBILITIES OF THE ADVISORY COMMITTEE:**

Pursuant to the act and these rules, the advisory committee shall provide oversight of the administration of individual development account programs operated by program administrators and subject to the act and these rules, suggest possible changes that benefit account owners or improve the effectiveness of the individual development account programs throughout the state.

**A.** The advisory committee shall meet at least two times in a calendar year to review the implementation of the act and these rules.

**B.** The advisory committee members are appointed by the governor and consist of the lieutenant governor and eight members to represent the state geographically. The director or his designee serves as an ex-officio member of the advisory committee.

[2.79.1.9 NMAC - N, 04/29/2005]

#### **2.79.1.10 PARTICIPATION CRITERIA FOR PROGRAM ADMINISTRATORS:**

**A.** In order to receive state funds and be approved by the director, a program administrator shall demonstrate, to the satisfaction of the division, that it meets the criteria below.

**(1)** It shall qualify as a tax-exempt, not-for-profit organization under Sections 501(a) and 501(c)(3) of the Internal Revenue Code of 1986, a tribe or an instrumentality of the state.

**(2)** It shall establish a reserve account with an authorized financial institution sufficient to meet the matching fund commitments made to all account owners participating in the program and shall report at least quarterly to each account owner the amount of money available in the reserve account to match the account owner's withdrawal for an allowable use following completion of all program requirements.

**(3)** It shall offer a comprehensive financial literacy program and other necessary training pertinent to the allowable uses agreed to by the account owner either with its own staff or through a plan of action utilizing qualified providers.

**(4)** It shall develop partnerships with financial institutions, develop account owner matching funds and manage the operations of an individual development account that is established by the program administrator with fiduciary care.

**(5)** It shall have access to facilities that are reasonably accessible to account owners and comply with state and federal building laws.

**(6)** It shall have human and material resources sufficient to implement an individual development account program and shall have a successful history of providing service to low-income persons and of success in raising funds for that purpose. If it is a new organization, it shall have staff and board members who have had such experience in other organizations.

**(7)** It shall present a workable plan for development, implementation, fiduciary care and management of an individual development account program. The plan shall include endorsement from at least one cooperating local financial institution. The plan shall indicate the length of time, in months and years, of the operation of the program by the organization, taking into account the resources that are or will be available.

**(8)** It shall provide a description of its contingency plan in the event the program administrator is no longer able to operate the program. Such contingency plan shall include, but not be limited to:

**(a)** a requirement of immediate notice to all account owners and the division;  
and

**(b)** all actions the program administrator shall take to ensure the orderly closing of the program.

(9) It shall not possess any other deficit that may raise doubt as to its ability to administer an individual development account program, including but not limited to, conviction of a crime by any officer of the program administrator.

(10) It shall enter into a contract with the division delineating its responsibilities in a form prescribed by the division.

B. The division may conduct site reviews of any individual development account program administrator at any time for compliance with applicable regulations and contracts. The program administrator shall provide the division with full access to any program records upon request.

[2.79.1.10 NMAC - N, 04/29/2005]

#### **2.79.1.11 ACCOUNT OWNER AGREEMENT:**

The program administrator operating an approved individual development account program shall be required to enter into an account owner agreement containing the following minimum requirements with an eligible individual:

A. a provision that the program administrator and account owner shall establish, in a timely manner, an individual development account in an authorized financial institution;

B. a deposit plan specifying the amount, form and schedule of deposits to be made by the account owner;

C. the rate at which the account owner's deposits will be matched;

D. the allowable use for which the account is maintained;

E. a provision that the program administrator shall provide financial literacy and asset-specific training approved by the division;

F. a provision that the account owner shall attend the financial literacy and asset-specific training;

G. an explanation of the withdrawal policies, including:

(1) the policies governing withdrawal of savings upon completion of the program,

(2) early withdrawal due to an account owner's decision to leave the program,

(3) termination of account due to non-compliance by the account owner, and

(4) emergency withdrawals including the provision that if an account owner withdraws money from his individual development account for a use other than an allowable use, he forfeits a proportionate amount from the reserve account unless an amount equal to the withdrawn money is deposited into his individual development account within the twelve months following the withdrawal;

H. a provision that the account owner may request an emergency withdrawal;

I. a provision allowing for the development of a contingency plan in the event the account owner exceeds or fails to meet the savings goals outlined in the savings agreement;

J. a provision that the program administrator shall implement the contingency plan on record with the division in the event the organization is no longer able to operate the program [Paragraph (8) of Subsection A of 2.79.1.10 NMAC];

K. a provision that any agreement for the investment of assets shall be at the direction of the account owner after consultation with the program administrator;

L. a provision that the program administrator shall not require an account owner to make any purchase or enter into any commercial transaction with a specific individual, business, financial institution, or other entity, other than the authorized financial institution in which the individual development account savings account is held;

M. a provision designating one or more beneficiaries of the funds, plus accrued interest, deposited by the account owner in the individual development account in the event of the account owner's death;

N. a verification that the eligible individual maintains no other individual development account; and

O. a provision that the agreement may be modified only with the written concurrence of the program administrator and the account owner.

[2.79.1.11 NMAC - N, 04/29/2005]

## **2.79.1.12 FINANCIAL INSTITUTIONS:**

A program administrator operating an approved state individual development account program shall be required to enter into a written governing instrument with an authorized financial institution. The written governing agreement shall provide for:

A. the establishment of individual development accounts in the form of trust or custodial accounts for the benefit of the account owners, which meet the requirements of Section 404(5) of the Assets for Independence Act, as amended, and into which accounts the account owners shall make deposits;

**B.** an assurance that the financial institution shall pay at least a market rate of interest on the individual development accounts;

**C.** an assurance that the financial institution shall not charge fees on the account;

**D.** an assurance that if an account owner appears on ChexSystems, the financial institution will open the account as long as it does not violate the internal administrative rules of the financial institution; refusal to open an account based upon this may occur only in extreme circumstances such as the account owner having a previous conviction of fraud or other crime;

**E.** an assurance that the financial institution shall provide monthly savings statements to both the account owner and the program administrator; and

**F.** an assurance that the financial institution shall not require an account owner to make any purchase or enter into any commercial transaction with a specific individual, business, financial institution or other entity.

[2.79.1.12 NMAC - N, 04/29/2005]

#### **2.79.1.13 INDIVIDUAL DEVELOPMENT ACCOUNT SAVINGS ACCOUNTS:**

**A.** A program administrator shall apply criteria for minimum and maximum levels of deposit and minimum number of months that may go by without a deposit into the account. These criteria may be determined based upon the circumstances of the population to be served.

**B.** A program administrator approved by the director shall maintain a separate trust or custodial account for each account owner in an authorized financial institution. The trust account shall be an interest-bearing savings instrument not less favorable to the depositor than the rates and fees of prevailing market rate accounts of each participating financial institution, applicable to like deposits by financial institutions in this state, bearing rates and fees at least as favorable to the depositor as the best terms available to other customers with similar accounts at each participating financial institution.

**C.** To the extent that available funding, including funding from both public and non-public sources may allow, the match rate shall be at least one dollar (\$1.00) for each one dollar (\$1.00) deposited by the account owner into his individual development account.

**D.** An eligible individual may open an individual development account upon verification by the program administrator that the individual maintains no other individual development account and fulfillment of all other requirements of the act and these rules.

**E.** An account owner shall complete a financial education program and all requirements made by the program administrator prior to the withdrawal of money from the account.

**F.** No withdrawal of funds from any individual development savings account may be permitted by a financial institution without signatures of both the account owner and an authorized representative of the program administrator. The financial institution in which an individual development account is held shall not be liable for withdrawals made for uses other than allowable uses. Prior to consenting to any withdrawal of funds, a representative of the program administrator shall discuss with the account owner the consequences of the intended withdrawal of funds. The program administrator may not unreasonably withhold its consent to the withdrawal.

**G.** The account owner may, upon the approval of the program administrator, withdraw moneys from the account owner's individual development account in the form of a joint check or transfer of funds made payable to the account owner and the payee of the approved withdrawal for any of the following allowable uses:

**(1)** expenses to attend an approved post-secondary or vocational educational institution, including, but not limited to, payment for tuition, books, supplies and equipment required for courses;

**(2)** costs to acquire or construct a principal residence that is the first principal residence acquired or constructed by the account owner;

**(3)** costs of major home improvements or repairs on the principal residence of the account owner;

**(4)** capitalization or costs to start or expand a business including equipment, tangible personal property, operational and inventory expenses, legal and accounting fees and other costs normally associated with starting or expanding a business; and

**(5)** acquisition of a vehicle necessary to obtain or maintain employment by an account owner or the spouse of an account owner.

**H.** In the case of a deceased account owner, amounts deposited by the account owner and held in an individual development account shall be distributed directly to the account owner's spouse, or if the spouse is deceased or there is no spouse, to a dependent or other named beneficiary of the deceased if not in conflict with the New Mexico Uniform Probate Code, Sections 45-1-101 through 45-1-404 NMSA 1978. If the spouse, dependent or beneficiary is eligible to maintain the account, according to the provisions of Section 58-30-4, NMSA 1978 and 2.79.1.14 NMAC, then the account as well as matching funds designated for that account from the program reserve fund of the program administrator may be transferred and maintained in the name of the surviving spouse, dependent or beneficiary.

I. In the event that an account owner withdraws any money from an individual development account for a purpose other than an allowable use, there shall be a proportional reduction in the amount of money held by the program administrator in the reserve account maintained for that account owner. However, if within twelve months following the withdrawal of funds the account owner deposits an amount equal to the withdrawn money, the proportional amount held by the program administrator shall be maintained.

J. More than one eligible individual per household may hold an individual development account.

K. At the request of the account owner and with the written approval of the program administrator, amounts may be withdrawn from the account owner's individual development account and deposited in another individual development account established for an eligible individual who is the account owner's spouse or dependent.

[2.79.1.13 NMAC - N, 04/29/2005]

#### **2.79.1.14 ELIGIBLE ACCOUNT OWNERS:**

A. To participate as an account owner in an individual development account program approved by the director an individual, at the time of application, shall be a member of a household located in New Mexico whose adjusted gross income is not in excess of 200 percent of the federal poverty guidelines and shall:

- (1) have earned income;
- (2) be eighteen years of age or older; and
- (3) be a citizen or legal resident of the United States.

B. A child in foster care is an eligible individual if he:

- (1) is sixteen years of age or older;
- (2) has earned income that is no more than 200 percent of the federal poverty guidelines when the child's income is evaluated separately from the income of his foster household;
- (3) is a citizen or legal resident of the United States; and
- (4) is a resident of New Mexico.

[2.79.1.14 NMAC - N, 04/29/2005]

#### **2.79.1.15 REPORTING REQUIREMENTS OF PROGRAM ADMINISTRATORS:**

A program administrator whose individual development account program is approved by the director shall report to the division no later than November 1st of each year. The report shall not identify individual account owners and shall include, but not be limited to:

- A.** the number of individual development accounts established, by savings objective, and their status;
- B.** verification that deposits are being made by the account owners pursuant to the approved savings plans;
- C.** the balance and sources of funding in the program administrator's local reserve fund;
- D.** the total money in the aggregate deposited in individual development accounts and reserve accounts administered by the program administrator;
- E.** the amounts withdrawn from individual development accounts for either allowable uses or for uses other than allowable uses;
- F.** the projected balance of savings to be deposited by account owners, by quarter, in order to complete their savings goal;
- G.** levels of participation in financial literacy education courses differentiating between individual development account participants and the general public; and
- H.** other information requested by the director to monitor the costs and outcomes of the individual development account program.

[2.79.1.15 NMAC - N, 04/29/2005]

#### **2.79.1.16 TERMINATION OF INDIVIDUAL DEVELOPMENT ACCOUNT PROGRAMS APPROVED UNDER THE ACT:**

- A.** An individual development account program shall be terminated if:
  - (1)** the division determines that the individual development account program or program administrator is not operating pursuant to the provisions of the Individual Development Account Act or these rules;
  - (2)** the provider of the program no longer retains its status as a program administrator;
  - (3)** the program administrator ceases to provide an individual development account program; or

**(4)** the division provides written notice to the program administrator.

**B.** If a program is terminated the division shall seek to transfer management of the terminated program to another qualified entity awarded a contract under previous RFP processes.

**C.** If the division is unable to identify and approve a program administrator to assume the authority to continue to operate a terminated individual development account program, money held in the terminated program administrator's reserve fund shall be deposited into the individual development accounts of the account owners for whom the proportionate share of the reserve account was established as of the first day of termination of the program.

**D.** If a program with active individual development accounts is terminated, the division shall assume the responsibilities of the program administrator until such time as a new program administrator is assigned to manage the individual development accounts of the account holders of a terminated program.

[2.79.1.16 NMAC - N, 04/29/2005]

#### **2.79.1.17 NON-DISCRIMINATION:**

**A.** No eligible individual, as defined by the act and these rules, shall be excluded from participation in, be denied benefits of, or be subjected to discrimination under any activity or program funded in whole or in part with division funds on the grounds of the race, religion, color, national origin, sex, sexual preference, age, or handicap of any person.

**B.** If an individual believes that he has been unfairly denied access to an approved state individual development account program or otherwise treated inequitably as an account owner, the individual may file a complaint with the division no later than thirty days after the alleged injury. The division shall investigate the complaint and shall attempt to informally resolve it. Where applicable, the division may refer the individual to the appropriate state or federal agency for potential relief.

[2.79.1.17 NMAC - N, 04/29/2005]

## **CHAPTER 80: PUBLIC EMPLOYEES RETIREMENT**

### **PART 1-99: [RESERVED]**

### **PART 100: GENERAL PROVISIONS**

#### **2.80.100.1 ISSUING AGENCY:**

Public Employees Retirement Association, 33 Plaza La Prensa, Santa Fe, New Mexico 87507.

[10/15/1997; 2.80.100.1 NMAC - Rn, 2 NMAC 80.100.1, 12/28/2000; A, 12/28/2021]

#### **2.80.100.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, public employers, retirement board, and the association under the Public Employees Retirement Act.

[10-15-97; 2.80.100.2 NMAC - Rn, 2 NMAC 80.100.2, 12-28-00]

#### **2.80.100.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-11-2 and 10-11-130, as amended.

[10-15-97; 2.80.100.3 NMAC - Rn, 2 NMAC 80.100.3, 12-28-00]

#### **2.80.100.4 DURATION:**

Permanent.

[10-15-97; 2.80.100.4 NMAC - Rn, 2 NMAC 80.100.4, 12-28-00]

#### **2.80.100.5 EFFECTIVE DATE:**

December 15, 1995 unless a different date is cited at the end of a section.

[10-15-97; 2.80.100.5 NMAC - Rn & A, 2 NMAC 80.100.5, 12-28-00]

#### **2.80.100.6 OBJECTIVE:**

The objective of Part 100 of Chapter 80 is to define terms used in the Public Employees Retirement Act and its rules and regulations.

[10-15-97; 2.80.100.6 NMAC - Rn, 2 NMAC 80.100.6, 12-28-00]

#### **2.80.100.7 DEFINITIONS:**

As used in the Public Employees Retirement Act:

**A. "Accumulated member contributions"** means amounts deducted from the salary of a member and credited to the member's individual account, together with interest if any, credited to that account; it also includes repaid withdrawn contributions

not including interest paid thereon, or amounts paid to purchase service credit as allowed under the PERA Act.

**B. "Active duty"** for purposes of acquiring service credit under Section 10-11-7 NMSA 1978, as amended, for periods of active duty with uniformed service of the United States, means full-time duty in the active uniformed service of the United States, including full-time training duty, annual training duty, and attendance while in the active military service, at a school designated as a service school by law or by the secretary of the military department concerned. "Active duty" does not include full-time national guard duty, which is training or other duty performed by a member of the air or army national guard of a state or territory, for which the member is entitled to pay from the United States or for which the member has waived pay from the United States. "Active duty" includes duty in the full-time military service reserve components activated pursuant to a federal call to duty, deployment for a peacekeeping mission or other declared national emergency.

**C. "Adult correctional officer member"** means a person who is an adult correctional officer or an adult correctional officer specialist employed by the corrections department or its successor agency.

**D. "Adult probation and parole officer member"** means a person who is an adult probation and parole officer employed by the corrections department or its successor agency.

**E. "Another retirement program"** means retirement plans established by the Judicial Retirement Act, Magistrate Retirement Act, and the Educational Retirement Act.

**F. "Elected official"** means a person elected to a public office by registered voters, who is paid a salary; "elected official" includes a person who is appointed to fill an unexpired term of an elected public office, who is paid a salary.

**G. "Filed"** means that PERA has received the complete document as evidenced by a writing on the document indicating the date of receipt by PERA.

**H. "Fire member"** means any member who is employed as a firefighter by an affiliated public employer, is paid a salary and has taken the oath prescribed for firefighters. The term shall not include volunteer firefighters or any civilian employees of a fire department.

**I. "Juvenile correctional officer member"** means a member who is employed as a juvenile correctional officer by the children, youth and families department or its successor agency, but does not include any member who is a "police member" or a "fire member".

**J. "Juvenile probation and parole officer member"** means a person who is a juvenile probation and parole officer employed by the children, youth and families department or its successor agency.

**K. "Leave office"** means an elected official's successor has been duly elected or appointed and qualified for office, or upon the date of death of an elected official.

**L. "Legal representative"** means "personal representative" as defined in the Probate Code of New Mexico which includes executor, administrator, successor personal representative, special administrator and persons who perform substantially the same functions under the law governing their status, or an attorney or a person acting pursuant to a power of attorney for a member, retired member or beneficiary.

**M. "Municipal detention officer"** means a member who is employed by an affiliated public employer other than the state who has inmate custodial responsibilities at a facility used for the confinement of persons charged or convicted of a violation of a law or ordinance. "Municipal detention officer" includes both juvenile and adult municipal detention officers.

**N. "Permissive service credit"** means service credit recognized by the retirement system for purposes of calculating a member's retirement benefit, which is available only by making a voluntary additional contribution which does not exceed the amount necessary to fund the benefit attributable to such service credit.

**O. "Police member"** means any member who is employed as a police officer by an affiliated public employer, who is paid a salary, and who has taken the oath prescribed for police officers. The term shall not include volunteers, juvenile correctional officer members, or employees who do not perform primarily police functions including, but not limited to jailers, cooks, matrons, radio operators, meter checkers, pound employees, crossing guards, police judges, park conservation officers, and game wardens. A member who is employed by an affiliated public employer as a police officer and as a non-police officer employee shall be regarded as a police member if more than fifty percent of the member's total salary is paid as a police officer.

**P. "Private retirement program"** for the purpose of exclusion from membership under Paragraph (5) of Subsection B of Section 10-11-3 NMSA 1978, means a retirement program of the affiliated public employer which meets the internal revenue service minimum standards regarding benefits as outlined in 26 C.F.R. Section 31.3121(b) (7)F of the Employment Tax Regulations and IRS Rev. Proc. 91-40.

**Q. "Reenlistment"** as used in Paragraph (3) of Subsection A of Section 10-11-6 NMSA 1978, means enlistment or voluntary entry into one of the armed services as either enlisted personnel or as a commissioned officer.

**R. "Retired member"** means a person who is being paid a normal, deferred or disability pension on account of that person's membership in the association. "Retired

member" shall not include any persons receiving a pre-retirement survivor pension, post-retirement survivor pension, or reciprocity retirement pension where the payer system is not PERA, or any other person unless specifically included by definition as a "retired member".

**S. "Salary"** means the base salary or wages paid a member, including longevity pay, for personal services rendered to an affiliated public employer. "Salary" includes a member's fixed, periodical compensation from full or part time employment; shift differentials; and wages paid while absent from work on account of vacation, holiday, injury or illness, which means payment made by continuing the member on the regular payroll. "Salary" includes incentive pay that is not temporary and becomes part of member's base salary. "Salary" also includes temporary promotions, temporary salary increases, but no other temporary differentials. "Salary" shall not include overtime pay, unless the overtime payment is required for a regular scheduled tour of duty as set forth in Section 207 (k) of Title 29 of the United States code and is made on the regular payroll for the period represented by the payment. "Salary" for overtime pay required for a regular tour of duty does not include on-call or special events duty, or other duty performed by a member on a voluntary or ad hoc basis, which is temporary and does not become part of the member's base salary. "Salary" shall not include allowances for housing, clothing, equipment or travel, payments for unused sick leave, unless the unused sick leave payment is made through continuation of the member on the regular payroll for the period represented by that payment. "Salary" also shall not include lump sum payments which are not part of the member's fixed periodical compensation, such as lump sum annual and sick leave or occasional payments to elected officials for attending meetings, allowances for any purpose, employer contributions to a private retirement program, or other fringe benefits, even if they are paid to or for a member on a regular basis, and any other form of remuneration not specifically designated by law as included in salary for Public Employees Retirement Act purposes.

**T. "State legislator member"** means a person who is currently serving or who has served as a state legislator or lieutenant governor and who has elected to participate in a state legislator member coverage plan. A former legislator or former lieutenant governor may be a "state legislator member" whether or not currently receiving a pension under a state legislator member coverage plan.

**U. "State system"** means a retirement program provided for in the Public Employees Retirement Act, Magistrate Retirement Act, or Judicial Retirement Act.

**V. "Terminate employment"** means that a member has a complete break in service and an absolute cessation of employment with all affiliated public employers, including employment as an elected official, as evidenced by a personnel action form or other equivalent document, and the member is not reemployed by an affiliated public employer for 30 days; or upon the date of death of a member.

[10/15/1997; 11/15/1997; 1/15/1999; 12/15/1999; 2.80.100.7 NMAC - Rn & A, 2 NMAC 80.100.7, 12/28/2000; A, 12/28/2001; A, 9/30/2003; A, 6/30/2005; A, 12/15/2009; A, 12/30/2013; A, 12/28/2021]

## **PART 101-199: [RESERVED]**

## **PART 200: ORGANIZATION AND OPERATION OF THE PUBLIC EMPLOYEES RETIREMENT BOARD**

### **2.80.200.1 ISSUING AGENCY:**

Public Employees Retirement Association (PERA), 33 Plaza La Prensa, Santa Fe, New Mexico 87507.

[2.80.200.1 NMAC - Rp, 2.80.200.1 NMAC, 12/30/15]

### **2.80.200.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, public employers, retirement board and the association under the Public Employees Retirement Act.

[2.80.200.2 NMAC - Rp, 2.80.200.2 NMAC, 12/30/15]

### **2.80.200.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-11-130, 10-11A-4, 10-12B-3, 10-12C-3 NMSA 1978, as amended.

[2.80.200.3 NMAC - Rp, 2.80.200.3 NMAC, 12/30/15]

### **2.80.200.4 DURATION:**

Permanent.

[2.80.200.4 NMAC - Rp, 2.80.200.4 NMAC, 12/30/15]

### **2.80.200.5 EFFECTIVE DATE:**

December 30, 2015, unless a different date is cited at the end of a section.

[2.80.200.5 NMAC - Rp, 2.80.200.5 NMAC, 12/30/15]

### **2.80.200.6 OBJECTIVE:**

The objective of this rule is to establish procedures for the organization and operation of the retirement board.

[2.80.200.6 NMAC - Rp, 2.80.200.6 NMAC, 12/30/15]

**2.80.200.7 DEFINITIONS:**

**[RESERVED]**

**2.80.200.8-9 [RESERVED]**

**2.80.200.10 RULES AND REGULATIONS:**

**A.** Except as otherwise provided in the Public Employees Retirement Act and rules and regulations periodically adopted in accordance therewith, the board may provide for its organization, operation and procedures by vote of the board at any meeting of the board.

**B.** The board may promulgate rules and regulations for the administration of the Public Employees Retirement Act, Judicial Retirement Act, Magistrate Retirement Act, Volunteer Firefighters Retirement Act and Deferred Compensation Act.

**(1)** Prior to the adoption, amendment or repeal of any rule, the board shall, at least 30 days prior to its proposed action:

**(a)** publish notice of its proposed action in a newspaper with a general statewide circulation; the notice shall:

**(i)** give the time and place of any public hearing and state the manner in which data, views or arguments may be submitted to the board by any interested person;

**(ii)** describe the substance of the proposed action, or state the subjects and issues involved;

**(iii)** include any additional matter required by any law, together with specific reference to the statutory authority under which the rule is proposed; and

**(b)** afford all interested persons reasonable opportunity to submit data, views or arguments orally or in writing; if the board finds that oral presentation is unnecessary or impracticable, it may require that presentation be made in writing; the board shall consider fully all written and oral submissions addressing the proposed rule; upon adoption of a rule contested at hearing or otherwise, the board shall issue a concise statement of its principal reasons for adoption of the rule; all persons heard or represented at any hearing, or who submit any writing to be considered in connection

with the proposed rule, shall promptly be given a copy of the rule, by mail or otherwise, if such persons so request in writing.

**(2)** If the board finds that immediate adoption, amendment or suspension of a rule is necessary for the preservation of the soundness of the fund or general welfare of the association, or if the board for good cause finds that observance of the requirements of notice and public hearing would be contrary to the interests of the association, the board may dispense with such requirements and adopt, amend or suspend the rule as an emergency. The board's finding and a brief statement of the reasons for its finding shall be incorporated in the emergency rule, amendment or suspension. No emergency rule, amendment or suspension shall remain in effect for longer than 60 days, unless notice shall be given within 15 days of the adoption of the emergency rule and a hearing held as provided in this section within 90 days of the notice.

[2.80.200.10 NMAC - Rp, 2.80.200.10 NMAC, 12/30/15]

#### **2.80.200.11 ACTUARIAL ASSUMPTIONS AND USE OF TRUST FUND:**

**A.** Whenever the amount of any benefit is to be determined on the basis of actuarial assumptions, the assumptions shall be specified by the board in a manner that precludes employer discretion.

**B.** No part of the corpus or income of the fund may be used for or diverted to a purpose other than the exclusive benefit of the members and their beneficiaries.

**C.** The board may not engage in a transaction prohibited by Section 503(b) of the Internal Revenue Code.

[2.80.200.11 NMAC - Rp, 2.80.200.11 NMAC, 12/30/15]

#### **2.80.200.12-19 [RESERVED]**

#### **2.80.200.20 OFFICERS:**

**A.** At the first regular meeting of each calendar year, the board shall elect a chair and a vice-chair. The duties of the officers shall include the following.

**(1)** The chair shall preside at all regular and special meetings of the board.

**(2)** The vice-chair shall serve as chair in the absence of the chair.

**B.** In the absence of the chair and vice-chair, the board may elect a temporary chair to preside at a meeting from which both officers are absent.

[2.80.200.20 NMAC - Rp, 2.80.200.20 NMAC, 12/30/15]

#### **2.80.200.21 BOARD TRAINING AND EDUCATION:**

**A.** New board members shall attend a new board member orientation within two months of being elected or appointed to office. New board member orientation shall be provided by PERA staff and shall include fiduciary responsibility, investing principles, an actuarial primer and an overview of the operations of the association.

**B.** Each board member shall annually certify his or her compliance with the statutory requirements of Section 10-11-133(F) NMSA 1978 on the form prescribed by the association on or before December 31<sup>st</sup> of each calendar year.

[2.80.200.21 NMAC - Rp, 2.80.200.21 NMAC, 12/30/15]

#### **2.80.200.22-29 [RESERVED]**

#### **2.80.200.30 VACANCY ON THE BOARD:**

**A.** In the event any member of the PERA board retires from his or her job, resigns from the board, is removed from the board or dies, except the ex-officio members of the board, that member shall be considered to have resigned from the board and the board shall, by resolution, declare that office vacant as of the date of the adoption of such resolution. Such resolution shall be adopted within 30 days after the board member's retirement, resignation, removal or death. Members of the retirement board shall serve until their successors have qualified.

**B.** In the event any member of the PERA board, except the ex-officio members of the board, ceases employment with an affiliated public employer, and is not reemployed by an affiliated public employer from the same membership (state, county or non-county municipal) group from which that member was elected within 30 days, that member shall be considered to have resigned from the board. For purposes of 2.80.200.30 NMAC, the term "ceases employment" shall include leave without pay status that extends for more than 12 weeks.

**C.** The resolution declaring the vacancy shall be publicized immediately in conjunction with a notice inviting eligible individuals to apply for appointment to the position within 30 days of the publication of notice of vacancy. Publication shall be, at the minimum, by special notice to employees in the affected membership group through their employers. The board shall select the new member from among the interested persons who apply pursuant to the publication of the notice of vacancy. If no applications are received, the board shall entertain nominations by the members present.

**D.** Any vacancy of member, except ex-officio member, occurring on the board shall be filled by a quorum of the remaining board members, at a regularly scheduled board meeting or special board meeting within 90 days after the adoption of the resolution declaring the vacancy. The member selected to fill the vacancy shall be selected from

the membership group, whether state, county or non-county municipal or retired member, which experienced the vacancy. If a vacancy in the municipal membership group is that of a county member, the replacement member shall be a county employee. The selected member must meet all eligibility requirements of elected members and shall be appointed to serve for the remainder of the vacated term.

[2.80.200.30 NMAC - Rp, 2.80.200.30 NMAC, 12/30/2015; A, 2/13/2024]

#### **2.80.200.31-39 [RESERVED]**

#### **2.80.200.40 BOARD MEETINGS:**

**A.** The board shall hold regular meetings on the last Thursday of each month, unless otherwise established by resolution of the board. The board may establish by resolution a different meeting schedule for regular meetings of the board.

**B.** A board member may participate in a board or committee meeting by means of a conference telephone or other similar communications equipment after receiving written approval by the board chair or committee chair when it is otherwise difficult or impossible for the member to attend the meeting in person. Participation by such means shall constitute presence in person at a meeting. The authorization of a board member to attend a board or committee meeting by means of a conference telephone or other similar communications equipment must be communicated to all board members by the approving board chair or committee chair. Each member participating must be identified prior to speaking and, if participating virtually, shall remain on camera throughout the meeting. All participants shall be able to hear any other participant who speaks during the meeting at the same time, and members of the public shall be able to hear any member who speaks during the meeting.

**C.** A majority of the board members shall constitute a quorum at any meeting of the board and each attending member, including the chair, shall be entitled to one vote on each issue.

**D.** No "proxy" votes shall be allowed.

[2.80.200.40 NMAC - Rp, 2.80.200.40 NMAC, 12/30/2015; A, 01/31/2023]

#### **2.80.200.41-49 [RESERVED]**

#### **2.80.200.50 COMMITTEES:**

**A.** The chair shall appoint no more than six board members to each of the following standing committees: rules and administration, audit and budget, legislative, investments, deferred compensation, investment plan, and governance. The disability review committee shall have at least three but no more than five board members. The chair of the board shall appoint the chair of each committee. Though the board shall

have standing committees, the board chair reserves the right to cancel any committee meeting and allow the entire board to discuss and act on matters that may be within the subject matter of standing committees.

**(1)** The rules and administration committee shall consider and recommend to the board new rules and amendments to or repeal of existing rules governing the organization and operation of the board and the association. Administrative matters requiring specific direction from the board may also be considered by the committee.

**(2)** The audit and budget committee shall provide policy assistance to the board and the executive director of PERA in fulfilling PERA's responsibilities for accounting, auditing, budgeting, and the quality and integrity of the financial reports of the association.

**(3)** The legislative committee shall consider and recommend to the board proposals for new statutes and amendments to or repeal of existing statutes. The committee shall also monitor the introduction and progress of proposed legislation affecting the board or association and report this information to the board.

**(4)** The disability review committee is described in 2.80.1000.20 NMAC.

**(5)** The investment committee shall review and monitor the administration of the investment policy adopted by the board.

**(6)** The deferred compensation committee shall review and monitor the administration of the deferred compensation plan investment policy adopted by the board.

**(7)** The governance committee shall develop, review and monitor compliance with the board's policies and procedures, code of conduct, and board complaint procedure and recommend to the board proposed board disciplinary actions.

**B.** The chair, with the advice and consent of the board, may appoint an election committee to consist of nine members of the association: four members from state departments, two members from non-county municipal employers, one member from a county employer and two retired members.

**(1)** The election committee shall serve until replaced by the chair and shall receive no compensation other than that authorized by the Per Diem and Mileage Act.

**(2)** The duties of the election committee are described in 2.80.200.60, 2.80.200.70 and 2.80.200.80 NMAC.

**C.** From time to time, the board may authorize, and the chair may appoint, such ad hoc committees as the board finds necessary.

**D.** Board members appointed to committees shall adhere to the standards set forth in and be subject to the enforcement provisions of the New Mexico Governmental Conduct Act.

[2.80.200.50 NMAC - Rp, 2.80.200.50 NMAC, 12/30/2015; A, 12/28/2021]

**2.80.200.51-59 [RESERVED]**

**2.80.200.60 ELECTION OF RETIRED BOARD MEMBERS:**

**A.** During the January monthly meeting, the retirement board shall adopt a resolution specifying when nominating petitions are due to be returned to PERA or an independent contractor hired by PERA to assist with the election. These nominating petitions are due not earlier than six months prior and not later than one month prior to the election for the position of retired board member. The resolution shall also specify whether the method of voting shall include mailed paper ballots, online electronic ballots or other method approved by the board.

**B.** Except as provided in Subsection F of this section, only a retired member who is receiving a disability or normal retirement pension under the Public Employees Retirement Act, Judicial Retirement Act or the Magistrate Retirement Act shall be eligible for election to a retired board member position.

**C.** Nominating petitions shall be signed only by retired members under the Public Employees Retirement Act, Judicial Retirement Act or the Magistrate Retirement Act. To be eligible for inclusion on the ballot, a candidate must have a minimum of 50 valid nominations by retired members and the candidate shall otherwise be eligible as provided in this section for the retired board member position. A valid nomination shall include a signature, legible printing of the retiree's name, and one of the following:

(1) the last four digits of the retiree's social security number;

(2) the retiree's date of birth;

(3) the retiree's PERA identification number. A nomination that does not include at least one of these elements shall not be counted. For purposes of this subsection, "signature" shall include an electronic signature, in any digital format, from a single identifiable e-mail address. A retired member may sign more than one nominating petition for different candidates. The five eligible candidates with the highest number of valid nominations shall be included on the ballot and the other or others shall be eliminated. The names of the five retired members receiving the highest number of valid nominations shall be placed on the election ballot in descending order according to the number of valid signatures received. In case of a nominating tie, the election committee may recommend to the board a method to determine the names and order and the board shall determine the names and order in which the eligible candidates subject to the nominating tie are placed on the ballot by lottery or similar method.

**D.** In the event any nominee is unable or unwilling to accept a nomination or is otherwise ineligible for the position, that nominee's name shall be removed from the ballot and the resulting vacancy on the ballot shall not be filled. If a nominee who is unable or unwilling to accept a nomination or a nominee who is ineligible for election is included on the ballots, the election committee and board shall treat all votes cast for that nominee as void.

**E.** If only one eligible retiree is nominated for a retired board member position, the election shall be cancelled and that retiree shall automatically be declared the winner for the retired board member position pursuant to 2.80.200.80 NMAC.

**F.** Notwithstanding the provisions of Subsection B of this section, a candidate shall be ineligible for election to a retired board member position if the candidate previously served on the board, representing any membership group, and during that previous tenure the candidate was:

(1) subject to three or more separate board resolutions of reprimand and censure; or

(2) removed from the board.

**G.** The campaign contribution limit of \$25.00 contained in Subsection B of Section 10-11-130.1 NMSA 1978 (2000) shall apply to each four year term retired board member election.

[2.80.200.60 NMAC - Rp, 2.80.200.60 NMAC, 12/30/2015; A, 3/14/2017; A, 12/28/2021; A, 2/13/2024]

## **2.80.200.61-69 [RESERVED]**

## **2.80.200.70 ELECTION OF NON-RETIRED BOARD MEMBERS:**

**A.** During the January monthly meeting, the retirement board shall adopt a resolution specifying when nominating petitions are due to be returned to PERA or an independent contractor hired by PERA to assist with the election. These nominating petitions are due not earlier than six months prior and not later than one month prior to the election for the position of non-retired board member. The resolution shall also specify whether the method of voting shall include mailed paper ballots, online electronic ballots or other method approved by the board.

(1) Except as provided in Paragraph (2) of this subsection, only non-retired, vested members under the Public Employees Retirement Act, Judicial Retirement Act or the Magistrate Retirement Act shall be eligible for election to a non-retired board member position. Only state members, including members under the Judicial Retirement Act or the Magistrate Retirement Act, may nominate state member candidates for state board member positions. Only county members may nominate

county member candidates for the county board member position. Only non-county municipal members may nominate non-county municipal member candidates for the non-county municipal board member positions.

(2) Notwithstanding the provisions of Paragraph (1) of this subsection, a candidate shall be ineligible for election to a non-retired board member position if the candidate previously served on the board, representing any membership group, and during that previous tenure the candidate was:

(a) subject to three or more separate board resolutions of reprimand and censure; or

(b) removed from the board.

(3) To be eligible for inclusion on the ballot, a candidate must provide nominating petitions to PERA with a minimum of 150 valid nominations of non-retired PERA members from the candidate's membership group and the candidate shall otherwise be eligible as provided in this section for that board member position. A valid nomination shall include a signature, a legible printing of the member's name, the member's current employer and one of the following:

(a) the last four digits of the member's social security number;

(b) the member's date of birth; or

(c) the member's PERA identification number.

A nomination that does not include at least one of these elements shall not be counted. For purposes of this subsection, "signature" shall include an electronic signature, in any digital format, from a single identifiable e-mail address. A member may sign more than one nominating petition for different candidates.

(4) The five eligible candidates with the highest number of valid nominations for each non-retired position shall be included on the ballot and the other or others shall be eliminated. The names of the five non-retired members receiving the highest number of valid nominations for a position shall be placed on the election ballot in descending order according to the number of valid signatures received. In case of a nominating tie, the election committee may recommend to the board a method to determine the names and order and the board shall determine the names and order in which the eligible candidates subject to the nominating tie are placed on the ballot by lottery or similar method.

(5) In the event any nominee is unable or unwilling to accept the nomination, or is otherwise ineligible for the position, that nominee's name shall be removed from the ballot and the vacancy on the ballot shall not be filled. If a nominee who is unable or unwilling to accept a nomination or a nominee who is ineligible for election is included

on the ballots, the election committee and board shall treat all votes cast for that candidate as void.

(6) If only one eligible member is nominated for a non-retired board member position, the election shall be cancelled and that member shall automatically be declared the winner for the non-retired board member position pursuant to 2.80.200.80 NMAC.

(7) All members of record of the membership group for which the election is held shall be eligible to receive a ballot as provided in Paragraphs (8) and (9) of this subsection and members shall only be eligible to vote in those elections in which they are eligible to receive a ballot. The applicable membership group for any member who is no longer a currently employed, contributing employee of an affiliated public employer shall be determined as of the last date on which the member was a currently employed, contributing employee of an affiliated public employer.

(8) For purposes of the election of non-retired board members, "member of record" shall mean the following:

(a) all persons listed in PERA electronic membership history records as members, including members covered under the Public Employees Retirement Act, Judicial Retirement Act or the Magistrate Retirement Act, no more than 60 days prior to the date of mailing ballots;

(b) all persons who have filed with PERA a valid application for membership form 60 days or more prior to the date of mailing ballots;

(c) while members of record shall qualify to receive a ballot, in the case of those new members listed in Subparagraph (b) of Paragraph (8) of Subsection A of 2.80.200.70 NMAC, a written request for a ballot must be made to PERA.

(9) For purposes of the election of non-retired board members:

(a) ballots shall be mailed to all non-county municipal members of record in the case of an election of a non-county municipal board position;

(b) ballots shall be mailed to all county municipal members of record in the case of an election of the county municipal board position; and

(c) ballots shall be mailed to all state members of record in the case of an election of a state board position.

**B.** The campaign contribution limit of \$25.00 contained in Subsection B of Section 10-11-130.1 NMSA 1978 (2000) shall apply to each four-year term non-retired board member election.

[2.80.200.70 NMAC - Rp, 2.80.200.70 NMAC, 12/30/2015; A, 3/14/2017; A, 12/28/2021; A, 2/13/2024]

**2.80.200.71-79 [RESERVED]**

**2.80.200.80 ELECTIONS:**

The call of the annual meeting and secret election ballots shall be mailed at least 30 days prior to the annual meeting of the association. Mailed ballots shall be returned to a designated United States post office locked box and picked up by the election committee or an independent contractor hired by PERA to assist with the election. To be counted, ballots must be returned to the designated United States post office locked box by 12:00 noon on the date set by the association. The call of the annual meeting and secret election ballots may also be made available at least 30 days prior to the annual meeting of the association online via a secure website maintained by an independent contractor hired by PERA to assist with the election or by another method specified in the resolution adopted by the board each January. To be counted, online ballots or votes cast by another approved method must be received by 12:00 noon on the date set by the association. An independent contractor hired by PERA to assist with the election shall assign unique identifiers to members to prevent voting more than one ballot per eligible member.

**A.** Each ballot shall contain an affirmation of the member's eligibility to vote.

**B.** Ballots shall be self-proving and shall be counted by the election committee or an independent contractor hired by PERA to assist with the election. The candidate receiving the greatest number of votes shall be declared the winner for each position. In the event of a tie, the election committee may recommend to the board a method to name the winner and the board shall select by lottery or similar method the name of the winner. The election committee or an independent contractor hired by PERA to assist with the election shall report the results of the election to the membership at the annual meeting.

**C.** Members whose ballots have not been delivered to them may request and receive another ballot if the original ballot is returned by the United States post office undelivered to PERA or an independent contractor hired by PERA to assist with the election prior to the close of the election. Members whose ballots have been mutilated or spoiled may request and receive another ballot when, prior to the close of the election, the original mailed ballot is returned by the member to PERA or an independent contractor hired by PERA to assist with the election. In addition, PERA or an independent contractor hired by PERA to assist with the election may assign unique identifiers to members and issue replacement ballots using procedures to prevent voting more than one ballot per eligible member.

**D.** If the election committee or an independent contractor hired by PERA to assist with the election recommends for good cause that the results of the election be

invalidated, and the board adopts such recommendation, a new election shall be held as soon as possible thereafter and the annual meeting at which the election results are announced shall be continued until completion of the new election.

**E.** Insignificant departures from the requirements set forth in these regulations pertaining to the conduct of elections shall not invalidate the election unless the results of the election are proven to have been substantially affected.

**F.** A member shall be considered to be "qualified" for office pursuant to Subsection D of Section 10-11-130 NMSA 1978 when the board has accepted the election results and the newly-elected member has been sworn into office.

[2.80.200.80 NMAC - Rp, 2.80.200.80 NMAC, 12/30/2015; A, 3/14/2017; A, 2/13/2024]

## **2.80.200.81-89 [RESERVED]**

### **2.80.200.90 BUILDING AND LAND USE:**

Restrictions on building and land use shall be provided for by the executive director as needed subject to the advice and consent of the board.

[2.80.200.90 NMAC - Rp, 2.80.200.90 NMAC, 12/30/15]

## **PART 201-299: [RESERVED]**

## **PART 300: INVESTMENT POLICIES AND PRACTICES**

### **2.80.300.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.80.300.1 NMAC - Rn, 2 NMAC 80.300.1, 12-28-00]

### **2.80.300.2 SCOPE:**

This rule applies to the public employees retirement board and its investment managers and brokerage firms.

[10-15-97; 2.80.300.2 NMAC - Rn, 2 NMAC 80.300.2, 12-28-00]

### **2.80.300.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-11-130, 10-11-132, 10-11-133 and 10-11-133.1, as amended.

[10-15-97; 2.80.300.3 NMAC - Rn, 2 NMAC 80.300.3, 12-28-00; A, 9-30-10]

**2.80.300.4 DURATION:**

Permanent.

[10-15-97; 2.80.300.4 NMAC - Rn, 2 NMAC 80.300.4, 12-28-00]

**2.80.300.5 EFFECTIVE DATE:**

May 4, 1994 unless a different date is cited at the end of a section.

[10-15-97; 2.80.300.5 NMAC - Rn, 2 NMAC 80.300.5, 12-28-00]

**2.80.300.6 OBJECTIVE:**

The objective of this rule is to set the public employees retirement board's investment policy for investments of funds under NMSA 1978, Sections 10-11-132 and 10-11-133, as amended.

[10-15-97; 2.80.300.6 NMAC - A, 2 NMAC 80.300.6, 12-28-01; A, 8-15-01]

**2.80.300.7 DEFINITIONS:**

**[RESERVED]**

[2.80.300.7 NMAC - A, 2 NMAC 80.300.7, 12-28-00]

**2.80.300.8-9 [RESERVED]**

**2.80.300.10 INVESTMENT COMMITTEE:**

**[RESERVED]**

[2.80.300.10 NMAC - A, 2 NMAC 80.300.10, 12-28-00]

**2.80.300.11-19 [RESERVED]**

**2.80.300.20 MANAGEMENT AND PHILOSOPHY:**

**[RESERVED]**

[2.80.300.20 NMAC - A, 2 NMAC 80.300.20, 12-28-00]

**2.80.300.21-29 [RESERVED]**

### **2.80.300.30 BEST EXECUTION AND BEST PRICE**

A. Statement of policy: The New Mexico public employees retirement board adopts the following statement as its policy with respect to securities transactions of the PERA investment funds.

(1) The board serves as trustee of the retirement funds created under the Public Employees Retirement Act, NMSA 1978, Section 10-11-1 et seq.; the Judicial Retirement Act, NMSA 1978, Section 10-12B-1 et seq.; the Magistrate Retirement Act, NMSA 1978, Section 10-12C-1 et seq.; and the Volunteer Firefighters Retirement Act, NMSA 1978, Section 10-11A-1 et seq.

(2) As trustee of these funds, the board has a fiduciary responsibility to invest these funds solely in the interest of the members, retirees, and beneficiaries and exclusively to provide benefits to the members, retirees, and beneficiaries and to pay reasonable administrative costs. The board also has a fiduciary obligation to give primacy to the preservation of trust funds and to insure the procurement of a reasonable income while avoiding undue investment risks.

(3) The board has delegated the investment of the funds under its jurisdiction to external investment managers.

(4) By contractual agreement, the board has delegated to its investment managers full discretion with regard to securities transactions so long as they conform to New Mexico state statutes, the PERA investment policy and the specific PERA investment objectives and guidelines for each particular investment portfolio.

(5) Both by contract and by virtue of common law trust principles, the investment managers serve as fiduciaries to PERA and must at all times act in a fiduciary capacity to PERA and the investment accounts assigned to them.

(6) As fiduciaries of the funds, both the board and its investment managers are obligated to require that all securities transactions be made on the basis of best execution under the circumstances at the lowest available price.

(7) The board's policy is that all securities transactions shall be executed on the basis of best execution under the circumstances at the lowest available price and that all investment decisions shall be made solely for the benefit of the members, retirees and their beneficiaries.

#### **B. [RESERVED]**

[10-15-97; 2.80.300.30 NMAC - Rn & A, 2 NMAC 80.300.30, 12-28-00; A, 8-15-01, A, 9-30-10]

### **PART 301-399: [RESERVED]**

## **PART 400: EMPLOYEE MEMBERSHIP**

### **2.80.400.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.80.400.1 NMAC - Rn, 2 NMAC 80.400.1, 12-28-00]

### **2.80.400.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, affiliated public employers, retirement board, and the association under the Public Employees Retirement Act.

[10-15-97; 2.80.400.2 NMAC - Rn, 2 NMAC 80.400.2, 12-28-00]

### **2.80.400.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-11-3, 10-11-4, 10-11-124, 10-11-130, as amended.

[10-15-97; 2.80.400.3 NMAC - Rn, 2 NMAC 80.400.3, 12-28-00]

### **2.80.400.4 DURATION:**

Permanent.

[10-15-97; 2.80.400.4 NMAC - Rn, 2 NMAC 80.400.4, 12-28-00]

### **2.80.400.5 EFFECTIVE DATE:**

July 1, 1993 unless a different date is cited at the end of a section.

[10-15-97; 2.80.400.5 NMAC - Rn & A, 2 NMAC 80.400.5, 12-28-00]

### **2.80.400.6 OBJECTIVE:**

The objective of this rule is to clarify issues related to membership in the public employees retirement association.

[10-15-97; 2.80.400.6 NMAC - Rn, 2 NMAC 80.400.6, 12-28-00]

### **2.80.400.7 DEFINITIONS:**

**[RESERVED]**

[2.80.400.7 NMAC - Rn, 2 NMAC 80.400.7, 12-28-00]

**2.80.400.8-2.80.400.9 [RESERVED]**

**2.80.400.10 MEMBER COVERAGE UNDER PERA**

A. Full-time employees who work 40 or more hours in a week and part-time employees who work 20 or more hours but fewer than 40 hours in a week shall be members.

B. The following employees are excluded from coverage:

(1) Retired members of PERA or retired members from any other state system as defined in subsection D of 2.80.100.7 NMAC who subsequently become employees of affiliated public employers. This exclusion does not apply to a previously retired member whose pension has been suspended.

(2) Independent contractors. Persons who render services to an affiliated public employer as independent contractors are not employees who are entitled to PERA membership unless the employment contract provides that they are "employees" for federal and state taxation purposes, or the IRS had determined that they are "employees" under the contract.

(3) Seasonal or student employees.

(a) "Seasonal employee" or "temporary employee" means an employee who works in a position designated by the affiliated public employer as seasonal or temporary and created to last no more than 9 consecutive months. Retired members returning to work with an affiliated public employer shall not be re-employed under this subsection 3(a).

(b) "Student employee" means an employee who during at least 8 months in any calendar year, or during the period of employment, is enrolled at an educational institution whose academic credits would be accepted by a state educational institution or a public school district and carrying at least 12 credit hours or is enrolled in an educational institution's graduate studies program and carrying at least 9 credit hours. Any person who is a regular full-time employee is not a "student" for purposes of exclusion from PERA membership.

(4) Elected officials who file with the association a written application for exemption from membership using the form prescribed by the association within twenty-four (24) months of taking office. Prior to filing the application for exemption, the elected official shall be a member. An application for exemption may be subsequently withdrawn by filing with PERA an executed PERA membership application form.

[10-15-97; 12-15-99; 2.80.400.10 NMAC - Rn & A, 2 NMAC 80.400.10, 12-28-00; A, 8-15-01; A, 9-30-03; A, 8-31-04; A, 9-30-10]

**2.80.400.11-19 [RESERVED]**

**2.80.400.20 REINSTATEMENT OF PERA BACK BENEFITS AND BACK-PAY**

A. Members or former members whose employment has been terminated and who are reinstated PERA back benefits and the associated back-pay from an affiliated public employer pursuant to a settlement agreement, court order, or administrative decision may acquire service credit and remit employee and employer contributions to PERA for the period reinstated under the following conditions:

(1) the settlement agreement, court order, or administrative decision provides that the member or former member was reinstated PERA back benefits and the associated back-pay;

(2) the service credit reinstated shall not exceed the period of unemployment from affiliated public employment between termination and the date designated in the settlement agreement, court order or administrative decision. No service credit shall be allowed for future service or future employment;

(3) the employee received back-pay in the same amount as salary that would have been paid during the period of unemployment or an amount that is 50% or more of the employee's regular monthly salary; the back-pay may be offset by amounts of salary earned by the employee in other employment; contributions shall be remitted on the full amount of back-pay without any offset, unless contributions have previously been remitted on the offset; salary shall not be posted for the member from more than one affiliated public employer, except when the back-pay brings the employee's salary to the level it would have been absent the termination;

(4) all employee and employer contributions due, plus interest at the rate set by the board pursuant to subsection C of 2.80.500.8 NMAC, from the date the contributions should have been paid until the date of payment, shall be paid before service credit and salary will be posted for the member;

(5) service credit shall be calculated in accordance with NMSA 1978, Section 10-11-4 and 2.80.600 NMAC; and

(6) this subsection does not apply to retired members; no adjustment in pension shall be made after the first pension payment.

B. Members or former members who are demoted or fail to receive a promotion and who are reinstated PERA back benefits and the associated back-pay from an affiliated public employer pursuant to a settlement agreement, court order, or administrative

decision may remit employee and employer contributions to PERA for the period reinstated under the following conditions:

- (1) the settlement agreement, court order, or administrative decision provides that the member or former member was reinstated PERA back benefits and the associated back-pay;
- (2) the employee received back-pay in the same amount as salary that would have been paid had the employee not received the adverse employment decision;
- (3) salary shall not be posted for the member from more than one affiliated public employer, except when the back-pay brings the employee's salary to the level it would have been absent the adverse employment decision;
- (4) all employee and employer contributions due, plus interest at the rate set by the board pursuant to subsection C of 2.80.500.8 NMAC, from the date the contributions should have been paid until the date of payment, shall be paid before salary will be posted for the member; and
- (5) this subsection does not apply to retired members; no adjustment in pension shall be made after the first pension payment.

[10-15-97; 12-15-99; 2.80.400.20 NMAC - Rn & A, 2 NMAC 80.400.20, 12-28-00]

#### **2.80.400.21-29 [RESERVED]**

#### **2.80.400.30 ADDRESS UPDATE:**

The member is responsible for providing in writing to the association any change of the member's address.

[1-15-99; 2.80.400.30 NMAC - Rn, 2 NMAC 80.400.30, 12-28-00; A, 8-31-04]

#### **2.80.400.31-39 [RESERVED]**

#### **2.80.400.40 MEMBERSHIP REQUIRED:**

All employees of an affiliated public employer are required to be members of PERA, except for those employees excluded by statute. Except in the case of elected officials who file with the association a written application for exemption from membership using the form prescribed by the association within twenty-four (24) months of taking office as provided in paragraph 4 of subsection B of 2.80.400.10 NMAC, within thirty (30) days of hire, job change, or change to a part-time, seasonal or student employee, employers shall file with PERA an executed PERA membership application form or PERA exclusion from membership form on all employees.

[12-15-99; 2.80.400.40 NMAC - Rn, 2 NMAC 80.400.40, 12-28-00; A, 12-28-01; A, 8-31-04]

## **PART 401-499: [RESERVED]**

## **PART 500: REMITTANCE OF CONTRIBUTIONS**

### **2.80.500.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.80.500.1 NMAC - Rn, 2 NMAC 80.500.1, 12-28-01]

### **2.80.500.2 SCOPE:**

This rule affects affiliated public employers, their employees, the retirement board and the association under the Public Employees Retirement Act.

[10-15-97; 2.80.500.2 NMAC - Rn, 2 NMAC 80.500.2, 12-28-01]

### **2.80.500.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-11-124 and 10-11-130, as amended.

[10-15-97; 2.80.500.3 NMAC - Rn, 2 NMAC 80.500.3, 12-28-01]

### **2.80.500.4 DURATION:**

Permanent.

[10-15-97; 2.80.500.4 NMAC - Rn, 2 NMAC 80.500.4, 12-28-01]

### **2.80.500.5 EFFECTIVE DATE:**

December 15, 1995 unless a different date is cited at the end of a section.

[10-15-97; 2.80.500.5 NMAC - Rn, 2 NMAC 80.500.5, 12-28-01]

### **2.80.500.6 OBJECTIVE:**

The objective of this rule is to establish procedures and requirements for the remittance of contributions.

[10-15-97; 2.80.500.6 NMAC - Rn, 2 NMAC 80.500.6, 12-28-01]

## **2.80.500.7 DEFINITIONS:**

**[RESERVED]**

[2.80.500.7 NMAC - Rn, 2 NMAC 80.500.7, 12-28-01]

## **2.80.500.8 REMITTANCE OF CONTRIBUTIONS:**

A. In accordance with the Public Employees Retirement Act each state agency or affiliated public employer shall be responsible for deducting the applicable contribution from the salary or wages paid to each member for each payroll period.

B. The employer shall transmit to PERA the member and employer contributions for every member in its employ for each pay period on or before the fifth working day following the payday applicable to the pay period. The contributions shall be accompanied by a transmittal report in a format designated by PERA, which shall clearly set forth the amount of employer and member contributions, and adjustments for prior pay periods if applicable, transmitted.

C. Except as provided in subsection H below, interest will be assessed on any remittance of employee and employer contributions not made by the due date of the remittance. The rate of interest shall be set annually by the board at a July meeting and shall be effective beginning the next succeeding January 1st. Any interest paid on unremitted contributions shall not be posted to the member's account or refunded to the member or the employer.

D. Except as provided in subsection H below, a penalty of fifty dollars (\$50) per day shall be assessed for any employee and employer contribution transmittal report that is untimely. For purposes of this subsection, "untimely" is defined as fifteen (15) days after the end of the month in which the transmittal report was due.

E. In the event the employer fails to make the necessary deductions, the employer shall be responsible to remit to PERA the total amount due for both the member and employer contributions plus interest as provided in subsection C above.

F. Pick-up of member contributions

(1) If an employer has adopted a resolution or executed a collective bargaining agreement pursuant to NMSA 1978, Section 10-11-5 which obligates the employer to pay up to 75% of the members' contributions, the resolution or collective bargaining agreement shall become effective on the first day of the first full pay period of the month following filing of the resolution or collective bargaining agreement with the retirement board. PERA may refuse for filing a resolution containing conditions or contingencies, or not prepared in compliance with requirements for such resolutions approved by the PERA board. "First full pay period" for purposes of adopting a new

coverage plan shall mean the first pay period that ends within the month in which the new coverage plan becomes applicable to a member.

(2) Under the Internal Revenue Code Section 414(h), an employer can pick up 100% of member contributions, but only 75% of the contributions are additional salary.

(3) Member contributions picked-up by the employer under NMSA 1978, Section 10-11-125 are not considered compensation for purposes of Internal Revenue Code Section 415(c).

G. Current employer contributions may not be made by members except as authorized by law.

H. If an employer, for good cause, is unable to timely transmit employee and employer contributions or transmittal report, the employer shall notify PERA in writing at least twenty-four (24) hours prior to the due date, and may request waiver of the interest or penalty that would otherwise be assessed. The executive director may waive interest or penalty for up to thirty-one (31) calendar days. Interest shall thereafter be charged at the rate set in subsection C above.

I. Beginning January 1, 2009, to the extent required by Internal Revenue Code Section 414(u)(2), an individual receiving differential wage payments (as defined under Internal Revenue Code Section 3401(h)(2)) from an affiliated public employer shall be treated as employed by that employer and the differential wage payment shall be treated as compensation for purposes of applying the limits on annual additions under Internal Revenue Code Section 415(c). This provision shall be applied to all similarly situated individuals in a reasonably equivalent manner.

[10-15-97; 11-15-97; 12-15-99; 2.80.500.8 NMAC - Rn & A, 2 NMAC 80.500.8, 12-28-01; A, 12-15-09; A, 12-30-13]

#### **2.80.500.9 REMITTANCE OF CONTRIBUTIONS FOR RE-EMPLOYED RETIRED MEMBERS:**

A. Each affiliated public employer shall be responsible for deducting applicable contributions from the salary or wages paid to each re-employed retired member for each payroll period. The affiliated public employer shall make employer contributions in the amount specified in the Public Employees Retirement Act until the subsequent employment is terminated. Retired member contributions shall be separately tracked, but shall not be posted to the retired member's account or refunded to the retired member or the employer upon termination of employment.

B. The employer shall transmit to PERA applicable employee and employer contributions for every retired member in its employ for each pay period on or before the fifth working day following the payday applicable to the pay period. The contributions

shall be accompanied by a transmittal report in a format designated by PERA, which shall clearly set forth the amount of employer and retired member contributions, and adjustments for prior pay periods if applicable, transmitted.

C. Except as provided in subsection F below, interest will be assessed on any remittance of retired member and employer contributions not made by the due day of the remittance. The rate of interest shall be set annually by the board at a July meeting and shall be effective beginning the next succeeding January 1<sup>st</sup>. Any interest paid on unremitted contributions shall not be posted to the member's account or refunded to the member or the employer.

D. Except as provided in subsection F below, a penalty of fifty dollars (\$50) per day shall be assessed for any employee and employer contribution transmittal report that is untimely. For purposes of this subsection, "untimely" is defined as fifteen (15) days after the end of the month in which the transmittal report was due.

E. In the event the employer fails to make the necessary deductions, the employer shall be responsible to remit to PERA the total amount due for both the retired member and employer contributions plus interest as provided in subsection C above.

F. If an employer, for good cause, is unable to timely transmit retired member employee and employer contributions or transmittal report, the employer shall notify PERA in writing at least twenty-four (24) hours prior to the due date, and may request waiver of the interest or penalty that would otherwise be assessed. The executive director may waive interest or penalty for up to thirty-one (31) calendar days. Interest shall thereafter be charged at the rate set in subsection C above.

G. Notwithstanding the provisions of this section, no retired member employee or employer contributions shall be remitted in the case of the following re-employed retired members:

(1) a retired member employed by the legislature for legislative session work who files an irrevocable exemption from membership within thirty (30) days of employment;

(2) a retired member elected to serve a term as an elected official on or after July 1, 2009 who files an irrevocable exemption from membership with the association within thirty days of taking office; or

(3) a retired member who has not been employed as an employee of an affiliated public employer or retained as an independent contractor by the affiliated public employer from which the retired member retired for at least twelve (12) consecutive months from the date of retirement to the commencement of employment or reemployment with an affiliated public employer.

## **PART 501-599: [RESERVED]**

## **PART 600: SERVICE CREDIT AND PURCHASE OF SERVICE CREDIT**

### **2.80.600.1 ISSUING AGENCY:**

Public Employees Retirement Association, P.O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.80.600.1 NMAC - Rn, 2 NMAC 80.600.1, 8-15-01]

### **2.80.600.2 SCOPE:**

This rule affects the members, former members, public employers, retirement board, and the association under the Public Employees Retirement Act.

[10-15-97; 2.80.600.2 NMAC - Rn, 2 NMAC 80.600.2, 8-15-01]

### **2.80.600.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-11-4, 10-11-6, 10-11-7, and 10-11-130, as amended.

[10-15-97; 2.80.600.3 NMAC - Rn, 2 NMAC 80.600.3, 8-15-01]

### **2.80.600.4 DURATION:**

Permanent.

[10-15-97; 2.80.600.4 NMAC - Rn, 2 NMAC 80.600.4, 8-15-01]

### **2.80.600.5 EFFECTIVE DATE:**

December 15, 1995 unless a different date is cited at the end of a section.

[10-15-97; 2.80.600.5 NMAC - Rn, 2 NMAC 80.600.5, 8-15-01]

### **2.80.600.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for awarding and reinstating service credit.

[10-15-97; 2.80.600.6 NMAC - Rn, 2 NMAC 80.600.6, 8-15-01]

### **2.80.600.7 DEFINITIONS:**

**A.** "Full-time employee" means an employee who normally works eighty (80) hours in an eighty (80) hour pay period or forty (40) hours in a week.

**B.** "Part-time employee" means an employee who works forty (40) or more hours but less than eighty (80) hours in an eighty (80) hour pay period or twenty (20) or more hours but less than forty (40) hours in a week.

[2.80.600.7 NMAC - Rn, 2 NMAC 80.600.7, 8-15-01; A, 12-30-13]

**2.80.600.8-2.80.600.9 [RESERVED]**

**2.80.600.10 GENERAL PROVISIONS:**

**A.** Service shall be credited to the nearest month.

**(1)** Members may receive one month of service credit for any calendar month in which the member becomes a member on or before the sixteenth day of that month, or for any calendar month in which the member leaves office or terminates employment on or after the fifteenth day of the month, provided that all other requirements for awarding service credit are met.

**(2)** A member who is a full-time employee of an affiliated public employer shall acquire one month of service credit for every calendar month in which the member is paid 50% or more of his or her monthly salary as reported by the member's affiliated public employer.

**(3)** If a member who is a full-time employee of an affiliated public employer is paid less than 50% of the member's monthly salary as reported by the member's affiliated public employer, employer and member contributions shall be paid on any salary paid during that month, and the member contributions shall be posted to the member's individual member contribution account, but no service credit shall be acquired for that month, even if unpaid leave was taken pursuant to the Family Medical Leave Act.

**(4)** A member who has the applicable minimum number of years of service credit required for normal retirement on June 30, 2014 and who is a part-time employee of an affiliated public employer shall acquire one month of service credit for every calendar month in which the member works twenty (20) or more hours per week, totaling forty (40) or more hours in an eighty (80) hour pay period as reported by the member's affiliated public employer. This amendment was adopted as an emergency rule to provide additional time for review and consideration of the manner in which service credit is awarded to PERA members who are employed part-time. Immediate adoption of this amendment is necessary for the general welfare of the association.

**(a)** Notwithstanding any other provision of 2.80.600.10 NMAC, part-time employees who normally work at least twenty (20) hours in a week and who were

furloughed pursuant to executive order issued between July 1, 2009 and June 30, 2010 shall acquire one month of service credit for each month affected by a furlough day. This amendment was adopted as an emergency rule to allow part-time employees to acquire service credit they would otherwise be eligible for absent the executive order. Immediate adoption of this amendment is necessary for the general welfare of the association.

**(b)** Notwithstanding any other provision of 2.80.600.10 NMAC, part-time employees who normally work at least twenty (20) hours in a week and who were furloughed in January and February, 2010 as a result of the second judicial district court's furlough plan shall acquire one month of service credit for each month affected by a furlough day.

**(c)** Notwithstanding any other provision of 2.80.600.10 NMAC, part-time employees who normally work at least twenty (20) hours in a week and who were furloughed in May and June, 2010 as a result of the city of Rio Rancho's resolution no. 43 furlough plan shall acquire one month of service credit for each month affected by a furlough day.

**(5)** A member who does not have the applicable minimum number of years of service credit required for normal retirement on June 30, 2014 and who is a part-time employee of an affiliated public employer shall acquire one (1) month of service credit for every calendar month in which the member works thirty (30) or more hours per week, totaling sixty (60) or more hours in an eighty (80) hour pay period as reported by the member's affiliated public employer. This amendment was adopted as an emergency rule to provide additional time for review and consideration of the manner in which service credit is awarded to PERA members who are employed part-time. Immediate adoption of this amendment is necessary for the general welfare of the association.

**(6)** A member who does not have the applicable minimum number of years of service credit required for normal retirement on June 30, 2014 and who is a part-time employee of an affiliated public employer shall acquire one (1) month of service credit for every two (2) consecutive calendar months in which the member works twenty (20) or more, but less than thirty (30) hours per week, totaling forty (40) or more hours, but less than sixty (60) hours, in an eighty (80) hour pay period as reported by the member's affiliated public employer.

**(7)** If a member who is a part-time employee does not qualify for service credit, employer and member contributions shall be paid on any salary paid during that month, and the member contributions shall be posted to the member's individual member contribution account, but no service credit shall be acquired.

**(8)** As used in Subsection A of 2.80.600.10 NMAC, "service credit" means only the service credit earned by the member during periods of employment with an affiliated public employer.

**B.** An employee who works fewer than forty (40) hours in an eighty (80) hour pay period or fewer than twenty (20) hours in a forty (40) hour week shall be exempt from membership by filing a PERA exclusion from membership form pursuant to 2.80.400.40 NMAC.

**C.** If a member has an incomplete contract to purchase service credit at the time of termination of employment, the contract must be paid in full within thirty (30) days of termination or the amount already paid under the contract will be refunded and no corresponding service credit will be granted.

**D.** Overlapping service credit.

**(1)** If a member has service credit for the same period of time for employment by public employers covered under different state systems, service credit may only be acquired under one state system for the period of overlapping service credit. In no case shall a member be credited with more than one month of service credit for all service in any calendar month.

**(2)** If a member accrues service credit under PERA and another state system for an overlapping period, the member shall be granted service credit for this overlapping period in accordance with all applicable statutes and rules that provide for the highest pension factor.

[10-15-97; 11-15-97; 12-15-99; 2.80.600.10 NMAC - Rn, 2 NMAC 80.600.10, 8-15-01; A, 9-30-03; A/E, 5-28-10; A, 9-30-10; A, 12-30-13; A/E, 6-9-14; A/E, 7-1-14]

## **2.80.600.11-19 [RESERVED]**

## **2.80.600.20 SERVICE CREDIT:**

**A.** In order to claim service credit for service rendered prior to August 1, 1947 or for a period prior to the employer becoming an affiliated public employer, a member shall:

**(1)** file a claim for the period of employment showing specific beginning and ending dates of employment;

**(2)** provide certification of employment to the association for the period or periods claimed as prior service;

**(3)** file an affidavit, to be certified and signed by two other persons who know of the employment, together with any additional documentary evidence available which may be required by the board if no records are available for the period of prior service claimed;

(4) provide payroll records, personnel action forms showing hire date(s), term of employment, full-time or part-time, job classification, salary amounts and dates of personnel actions, job description, if any;

(5) contribution history from the federal social security administration for the claimed period of employment, if applicable.

**B.** Forfeited service credit may be reinstated by repayment of withdrawn member contributions, together with interest from the date of withdrawal to the date of repayment at the rate or rates set by the board, under the following conditions:

(1) Service credit may be reinstated in one-year increments, beginning with the most recently forfeited service credit. A one-year increment is 12 consecutive but not necessarily continuous months of service credit. For the purpose of eligibility to retire only, less than one year of service credit may be purchased. After reinstatement of all 12-month "years" as defined herein, any remaining service credit that totals less than 12 months may be reinstated by payment in one lump sum as provided herein.

(2) All forfeited service credit may also be reinstated by repayment of the total amount of all member contributions withdrawn from each period of service together with interest from the date of withdrawal to the date of repayment at the rate set by the board.

(3) A former member who is employed by an employer covered under the Educational Retirement Act must provide evidence of current contributing membership in the educational retirement association; such evidence shall be either certification by the employer, in the form prescribed by the association, or certification by the educational retirement association (ERA).

(4) Payment for reinstated service credit must be received by the association prior to the member's effective date of retirement.

(5) Interest received to reinstate forfeited service credit under this subsection shall not be refunded to the member. The purchase cost received to reinstate forfeited service credit which is determined to be unnecessary to provide the maximum pension applicable to the member and which is purchased in reliance on information provided by PERA shall be refunded to the member.

**C.** "Actual credited service" for purposes of NMSA 1978, Section 10-11-27 and Section 10-11-115.2 means only that service credit earned during periods of employment with the New Mexico state police in the positions of patrolman, sergeant, lieutenant, captain or aircraft division pilot, with the corrections department or its successor agency after July 1, 2004 in the positions of adult correctional officer or adult correctional officer specialist, or as a municipal detention officer member. No permissive service credit which is purchased by state police members, adult correctional officer members, or municipal detention officer members shall be increased by 20% as

provided in NMSA 1978, Section 10-11-27 or Section 10-11-115.2. With respect to service credit acquired for periods of military service, only that service credit which is acquired for intervening military service during a period of employment as a state police member, an adult correctional officer member after July 1, 2004 or as a municipal detention officer member shall be increased by 20%, provided that the member was a retired member or a member on June 30, 2013.

**D.** Military service credit is free in some cases and may be purchased in other cases as provided by statute.

**(1)** Where a member wishes to claim service credit pursuant to NMSA 1978, Section 10-11-6 the association shall, upon the member's request, furnish that member a form of affidavit for completion and certification of such service. The affidavit shall be accompanied by documentary evidence of the member's entry and discharge from service in a uniformed service of the United States.

**(2)** The affiliated public employer by whom the member was employed immediately prior to entering a uniformed service of the United States shall certify in writing the date the member stopped rendering personal service to the employer. This requirement may be waived if PERA records contain sufficient documentation to support the date the member stopped rendering personal service.

**(3)** The affiliated public employer by whom the member was employed immediately after discharge from a uniformed service of the United States shall certify in writing to the association the date the member started rendering personal service to the employer. This requirement may be waived if PERA records contain sufficient documentation of the date of return to employment. Members who are not reemployed by an affiliated public employer within ninety days following termination of the period of intervening service but who nevertheless claim reemployment rights under federal law shall provide to the association written certification from the affiliated public employer that the member is entitled to reemployment rights under the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended.

**(4)** The affidavit, employer certifications, and documentary evidence of uniformed service shall be presented to the association for approval.

**(5)** Service credit for periods of intervening service in the uniformed services following voluntary enlistment, reenlistment or appointment shall be awarded only upon compliance by the member and the affiliated public employer with the provisions of NMSA 1978, Section 10-11-6, as amended, and the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, including but not limited to the payment to the association of contributions required from the member and the employer.

**(6)** PERA members who are also members of the military service reserve components who are activated pursuant to a federal call to duty, deployment or

peacekeeping mission or other declared national emergency may receive free service credit subject to the conditions of this section. The member must provide a form DD 214 or other documentation as required by PERA to support an award of free service credit.

**(7)** Payment for military service credit must be received by the association prior to the member's effective date of retirement.

**E.** A member who claims service credit for one or more periods of employment for which an employer failed to remit the required contributions to the association may receive service credit only after receipt by the association of payment by the employer of the delinquent contributions plus applicable interest and penalties, if any, along with the following documentation:

**(1)** payroll records for the claimed periods of employment, indicating the salary for the claimed employment dates;

**(2)** personnel action forms showing hire date(s), term of employment, job classification, salary amounts and dates of personnel actions;

**(3)** job description;

**(4)** contribution history from the federal social security administration for the claimed period of employment, if applicable;

**(5)** explanation from the employer as to why contributions were not withheld or paid to the association;

**(6)** any other information requested by the association; if original records have been lost or destroyed, affidavits in a form acceptable to the association may be submitted for the purpose of substantiating the employment; the association may accept such affidavits in lieu of original records if it deems them sufficient to establish the required employment information.

**F.** At any time prior to retirement, a member may purchase service credit at its full actuarial present value as determined by the association, under the following conditions:

**(1)** Service credit may be purchased in one-month increments.

**(2)** The amount of service credit purchased under this Subsection F shall not exceed one year.

**(3)** Service credit purchased cannot be used for the purpose of calculating final average salary or eligibility for pension factor of a coverage plan for pension calculation and retirement purposes.

(4) For purposes of calculating the full actuarial present value purchase cost of service credit under Subsection F of this section, the member's final average salary and coverage plan at the time of purchase shall be used.

(5) Payment for service credit under this subsection must be received within sixty (60) days of the date the member is informed in writing of the purchase price of the service credit.

(6) The purchase cost received to purchase service credit under this subsection shall not be refunded to the member.

[10-15-97; 11-15-97; 1-15-99; 12-15-99; 2.80.600.20 NMAC - Rn & A, 2 NMAC 80.600.20, 8-15-01; A, 12-28-01; A, 9-30-03; A, 8-31-04; A, 6-30-05; A, 12-15-09; A, 7-16-12; A, 12-30-13]

#### **2.80.600.21-29 [RESERVED]**

#### **2.80.600.30 PAYMENT FOR PURCHASE OF SERVICE CREDIT:**

A. No installment payment contracts may be used for the purchase of any service credit.

B. The rate or rates of interest for the purchase or reinstatement of service credit shall be set annually by the board at a July meeting and shall be effective beginning the next succeeding January 1st.

C. A vested member may purchase a total of five (5) years of permissive service credit as allowed under the Public Employees Retirement Act in one lump-sum or as provided by statute.

D. A member may rollover funds from an Internal Revenue Code Section 457, 403(b), 401(k), IRA or another 401(a) qualified account to pay for forfeited or permissive service credit allowed by the Public Employees Retirement Act. The rollover of funds must be made by a trustee-to-trustee transfer and the account from which the funds come must be in the name of the member requesting the transfer.

[10-15-97; 2.80.600.30 NMAC - Rn, 2 NMAC 80.600.30, 8-15-01; A, 12-28-01; A, 9-30-03; A, 12-15-09]

#### **PART 601-699: [RESERVED]**

#### **PART 700: NORMAL RETIREMENT**

##### **2.80.700.1 ISSUING AGENCY:**

Public Employees Retirement Association, 33 Plaza La Prensa, Santa Fe, NM, 87507.

[2.80.700.1 NMAC – Rp, 2.80.700.1, 10/10/2023]

**2.80.700.2 SCOPE:**

This rule affects the members, retirees, beneficiaries, affiliated public employers, and the association under the Public Employees Retirement Act.

[2.80.700.2 NMAC – Rp, 2.80.700.2, 10/10/2023]

**2.80.700.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-11-8, 10-11-116, 10-11-130, 10-11-136 NMSA 1978, as amended.

[2.80.700.3 NMAC – Rp, 2.80.700.3, 10/10/2023]

**2.80.700.4 DURATION:**

Permanent.

[2.80.700.4 NMAC – Rp, 2.80.700.4, 10/10/2023]

**2.80.700.5 EFFECTIVE DATE:**

October 10, 2023, unless a different date is cited at the end of a section.

[2.80.700.5 NMAC – Rp, 2.80.700.5, 10/10/2023]

**2.80.700.6 OBJECTIVE:**

The objective of this rule is to establish procedures for normal retirement.

[2.80.700.6 NMAC – Rp, 2.80.700.6, 10/10/2023]

**2.80.700.7 DEFINITIONS:**

**[RESERVED]**

[2.80.700.7 NMAC – Rp, 2.80.700.7, 10/10/2023]

**2.80.700.8-9 [RESERVED]**

**2.80.700.10 PROCEDURE FOR RETIREMENT:**

A. The following procedure governs the process for retirement:

(1) The member shall request an application for retirement from PERA. To ensure that the member may retire on the date the member has chosen, the completed application should be returned to PERA, with the required documents described in Subsection B below, at least 60 days prior to the selected date of retirement. The completed application and all supporting documentation must be filed with PERA no later than the close of business on the last working day of the month prior to the selected date of retirement. Any changes to an application for retirement that has already been submitted to PERA, including, but not limited to, retirement date, designation of survivor beneficiary or form of payment option, must be in writing and filed with PERA no later than the close of business on the last working day of the month prior to the selected date of retirement.

(2) PERA shall furnish the member an estimate of retirement pension payable under form of payment A within a reasonable time of receipt of the properly completed application and required documents. If the member also desires an estimate of retirement pension payable under forms of payment B, C and D, the member shall request an estimate in writing.

(3) When the application is filed, PERA shall furnish the member's last affiliated public employer with an employer's certification of earnings form to be completed and returned to PERA. The final calculation of pension cannot be processed until PERA receives the properly completed employer's certification form.

(4) PERA will furnish the member a final calculation of retirement pension based on the information provided by the affiliated public employer.

(5) The completed application form must either include or be accompanied by a signed notarized statement of consent by the member's spouse to the form of payment and beneficiary elected by the member or an affidavit that the member is not married. An affidavit naming all former spouses must also accompany the final application form. If a married member does not provide spousal consent, the member shall execute an affidavit that:

(a) states why the member has been unable to obtain spousal consent;

(b) provides the most recent contact information for the member's spouse;  
and

(c) acknowledges that the member understands that because he or she is married and has not provided spousal consent, the PERA Act provides that the member will be retired under form of payment C with his or her spouse named as survivor beneficiary.

(6) The application shall be considered to be "filed" when PERA receives the completed application as evidenced by a writing on the application indicating the date of receipt by PERA.

(7) Retirement will be effective on the first day of the month following: a) the filing with PERA of the completed, signed application with all required documentation; b) the member's qualifying for retirement based on service and age; and c) the member's termination of covered employment with all employers covered by any state system or the educational retirement system.

(8) The retirement of the member shall be submitted to the board for ratification at the next regular meeting following the effective date of retirement.

**B. The retiring member shall furnish the following documents to PERA:**

(1) Proof of age of the member and any designated beneficiary or beneficiaries or the proof of age for a beneficiary to a supplemental needs trust. Acceptable documents are a birth certificate, a baptismal certificate, a religious record of birth established before age 5 years, a current passport, a current New Mexico driver's license or a current New Mexico motor vehicle division issued identification card, or any two of the following documents showing the date of birth of the member or designated beneficiary or beneficiaries:

- (a) copy of a life or automobile insurance policy;
- (b) current voter registration or voter identification record;
- (c) tribal census record;
- (d) childhood immunization record made prior to age 18 years;
- (e) military record, including a valid United States active-duty, retiree or reservist military identification card;
- (f) birth certificate of child showing age of parent;
- (g) physician's or midwife's record of birth;
- (h) immigration record;
- (i) naturalization record;
- (j) social security records.

(2) For any designated beneficiary to be identified as a spouse, a copy of a marriage certificate, other proof of marital status acceptable in a court of law or any two of the following documents showing marital status:

- (a) financial institution or bank records;

(b) joint real estate deeds or mortgages;

(c) insurance policies.

(3) For any designated beneficiary to be identified as a supplemental needs trust, a copy of the documents related to the formation of the trust and an affidavit from the trustee that the trust is formed as a supplemental needs trust as authorized by the Federal Social Security Act. Additional information may be required by the association to ascertain the purpose and function of the trust to ensure compliance with the PERA Act.

(4) Complete endorsed copies of all court documents necessary to ascertain the current marital status of the member and whether any ex-spouse of the member is entitled to any portion of the member's benefits. Such documents shall include the final decrees and marital property settlements for all marriages during the member's employment with an affiliated public employer. If the member's only divorce was prior to becoming a PERA member, then the final divorce decree is required, but no marital property settlement is required. If the member was divorced more than once before becoming a PERA member, then only the most recent final decree is required. The requirement for providing a copy of a final decree may be waived, in PERA's discretion, when PERA can establish through online court records that a divorce decree was entered on a specific date and no further documentation is deemed necessary to administer benefits.

(5) Any member with an effective retirement date on or after January 1, 2014 shall provide authorization to the association for the electronic transfer of pension payments to the retiree's banking institution. Such authorization shall be executed, in writing, in the form prescribed by the association.

**C.** No adjustments to the pension based on failure to claim free service credit may be made after the first pension payment.

**D.** The pension of a member who has earned service credit under more than one coverage plan with different pension factors shall be calculated pursuant to Subsection I of Section 10-11-8, NMSA 1978. If a member has earned service credit under one coverage plan on or before July 1, 2013 and under one or more coverage plans after July 1, 2013 with different pension factors, each pension factor shall be used to calculate the member's pension. The coverage plan from which the member was last employed shall govern the age and service requirements for retirement. Permissive service credit purchased pursuant to Subsection H of Section 10-11-7, NMSA 1978 cannot be used to determine final average salary, pension factor or pension maximum for pension calculation purposes.

**E.** Upon meeting the membership requirements in 2.80.400 NMAC, a member shall combine concurrent salaries received from two affiliated public employers. In the case of concurrent full-time and part-time employment or full-time and elected official service,

service credit shall be earned only for the full-time employment. In the case of two part-time employments, service credit shall be earned only for the employment which has the lowest pension factor and pension maximum. In the case of concurrent employment, termination from all affiliated public employers is required before retirement. No combining of concurrent salary may occur for employees who are on extended annual or sick leave until retirement.

**F.** In addition to any other vesting provided by state law, a member's normal retirement benefit is non-forfeitable when the member reaches normal retirement age, which is:

(1) age 65, with five or more years of credited service, whichever is later, for individuals who were members on June 30, 2013;

(2) age 65, with eight or more years of credited service, whichever is later, for individuals who became general plan members on or after July 1, 2013; and

(3) age 60, with six or more years of credited service, whichever is later, for individuals who became public safety plan members on or after July 1, 2013.

**G.** In addition to any other vesting provided by state law, a member is also vested in his or her accrued benefits when the member reaches such lesser age and specified years of credited service as provided under the plan in which he or she is a member at the time of retirement or was last a member. If there is a termination of the PERA retirement system, or if employer contributions to the PERA fund are completely discontinued, the rights of each affected member to the benefits accrued at the date of termination or discontinuance, to the extent then funded, are non-forfeitable.

[2.80.700.10 NMAC – Rp, 2.80.700.10, 10/10/2023]

## **2.80.700.11-19 [RESERVED]**

## **2.80.700.20 BENEFIT PAYMENT:**

The maximum annual benefit limits contained in Internal Revenue Code Section 415(b), as amended and adjusted, are incorporated herein by reference. Notwithstanding any other provision of the PERA Act and regulations, all benefits paid from the PERA trust fund shall be distributed in accordance with the requirements of Internal Revenue Code Section 401(a)(9) and the regulations under that section. In order to meet these requirements, the trust fund must be administered in accordance with the following provisions:

**A.** The entire interest of the member shall:

(1) be completely distributed to the member not later than the required beginning date; or

(2) shall be distributed, beginning not later than the required beginning date, in accordance with internal revenue service regulations, over a period not extending beyond the life expectancy of the member or the life expectancy of the member and a designated beneficiary.

**B.** For the purposes of this section, "required beginning date" shall be defined in the same manner as the term "required beginning date" is defined in the Internal Revenue Code Section 401 (a)(9) and the regulations under that section.

**C.** The life expectancy of the member or the member's beneficiary may not be recalculated after the benefits commence.

**D.** If a member dies before the distribution of the member's benefits has begun, distribution to beneficiaries must begin no later than December 31 of the calendar year immediately following the calendar year in which the member died.

**E.** The amounts payable to a member's beneficiary may not exceed the maximum determined under the incidental death benefit requirements of the Internal Revenue Code Section 401(a)(9)(G) and regulations thereunder. PERA shall adjust the percentage of the member's pension payable to a non-spouse survivor beneficiary who is more than 10 years younger than the member at the time of the member's retirement as required by 26 C.F.R. Section 1.401(a)(9)-6.

[2.80.700.20 NMAC – Rp, 2.80.700.20, 10/10/2023]

## **2.80.700.21-29 [RESERVED]**

### **2.80.700.30 ANNUAL COMPENSATION:**

Notwithstanding any provision of the PERA Act and regulations, the annual compensation of each member that is taken into account under the plan, including for benefit calculation purposes, for any year does not exceed the limit specified in Internal Revenue Code Section 401(a)(17).

[2.80.700.30 NMAC – Rp, 2.80.700.30, 10/10/2023]

## **PART 701-799: [RESERVED]**

## **PART 800: CORRECTION OF ERRORS AND OMISSIONS**

### **2.80.800.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.80.800.1 NMAC - Rn, 2 NMAC 80.800.1, 12-28-01]

#### **2.80.800.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, public employers, retirement board, and the association under the Public Employees Retirement Act.

[10-15-97; 2.80.800.2 NMAC - Rn, 2 NMAC 80.800.2, 12-28-01]

#### **2.80.800.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-11-4.2, 10-11-130, as amended.

[10-15-97; 2.80.800.3 NMAC - Rn, 2 NMAC 80.800.3, 12-28-01]

#### **2.80.800.4 DURATION:**

Permanent.

[10-15-97; 2.80.800.4 NMAC - Rn, 2 NMAC 80.800.4, 12-28-01]

#### **2.80.800.5 EFFECTIVE DATE:**

December 15, 1995 unless a different date is cited at the end of a section.

[10-15-97; 2.80.800.5 NMAC - Rn, 2 NMAC 80.800.5, 12-28-01]

#### **2.80.800.6 OBJECTIVE:**

The objective of this rule is to establish procedures for collecting pensions overpayments.

[10-15-97; 2.80.800.6 NMAC - Rn, 2 NMAC 80.800.6, 12-28-01]

#### **2.80.800.7 DEFINITIONS:**

**[RESERVED]**

[2.80.800.7 NMAC - Rn, 2 NMAC 80.800.7, 12-28-01]

#### **2.80.800.8 CORRECTION OF ERRORS AND OMISSIONS:**

The board directs the executive director to make all reasonable efforts to collect any pension overpayment made for any reason.

[10-15-97; 11-15-97; 2.80.800.8 NMAC - Rn, 2 NMAC 80.800.8, 12-28-01]

## **PART 801-899: [RESERVED]**

## **PART 900: PRE-RETIREMENT SURVIVOR PENSIONS**

### **2.80.900.1 ISSUING AGENCY:**

Public Employees Retirement Association, 33 Plaza La Prensa, Santa Fe, NM, 87507.

[2.80.900.1 NMAC – Rp, 2.80.900.1, 10/10/2023]

### **2.80.900.2 SCOPE:**

This rule affects beneficiaries of deceased PERA members, the retirement board and the association under the Public Employees Retirement Act.

[2.80.900.2 NMAC – Rp, 2.80.900.2, 10/10/2023]

### **2.80.900.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-11-14.5, 10-11-130 NMSA 1978, as amended.

[2.80.900.3 NMAC – Rp, 2.80.900.3, 10/10/2023]

### **2.80.900.4 DURATION:**

Permanent.

[2.80.900.4 NMAC – Rp, 2.80.900.4, 10/10/2023]

### **2.80.900.5 EFFECTIVE DATE:**

October 10, 2023, unless a different date is cited at the end of a section.

[2.80.900.5 NMAC – Rp, 2.80.900.5, 10/10/2023]

### **2.80.900.6 OBJECTIVE:**

The objective of this rule is to establish procedures for payment of pre-retirement survivor pensions.

[2.80.900.6 NMAC – Rp, 2.80.900.6, 10/10/2023]

### **2.80.900.7 DEFINITIONS:**

**[RESERVED]**

### **2.80.900.8 PRE-RETIREMENT SURVIVOR PENSIONS:**

The procedure for payment of a pre-retirement survivor pension is:

**A.** Applicants for pre-retirement survivor pensions shall notify PERA of the death of the member and complete an application for benefits.

**B.** The completed application shall be returned to PERA with the following documents:

(1) A certified copy of the death certificate or other proof of death acceptable in a court of law.

(2) Copy of marriage license or other proof of marital status acceptable in a court of law if the application is for a surviving spouse.

(3) Affidavit of surviving spouse that he or she and the deceased member were married at the time of death and stating whether there are any surviving minor children of the deceased member.

(4) Proof of age of the surviving spouse, surviving minor children or other designated beneficiary or the proof of age for a beneficiary to a supplemental needs trust. Acceptable documents for proof of age shall be a birth certificate, a baptismal certificate, a copy of a life insurance policy, a certified copy of a voter registration issued over 10 years prior, or proof of age meeting a standard at least equivalent to that applied by the social security administration.

(5) Documents required under the Probate Code for payments to a minor if the application is on behalf of eligible surviving children.

(6) Affidavit that the applicant or beneficiary of a special needs trust is unmarried if the applicant is a child of the deceased member or a supplemental needs trust formed for the benefit of a child of the deceased member.

(7) Copies of social security cards for all prospective payees.

(8) If the member has been divorced, the applicant shall provide PERA with complete endorsed copies of all court documents the association deems necessary to ascertain the marital status of the member at the time of death and whether any ex-spouse of the member is entitled to any portion of any benefits payable. Such documents shall include the final decrees and marital property settlements for all marriages during the member's employment with an affiliated public employer. If the member's only divorce was prior to becoming a PERA member, then the final divorce decree is required, but no marital property settlement is required. If the member was divorced more than once before becoming a PERA member, then only the most recent final decree is required.

(9) a copy of the documents related to the formation of the supplemental needs trust, an affidavit from the trustee that the trust is formed as a supplemental needs trust as authorized by the federal Social Security Act and any additional information requested by the association if the application is on behalf of a supplemental needs trust.

**C.** When the application and accompanying documentation as required in Subsection B of 2.80.900.8 NMAC above are filed, PERA will determine whether a pension is payable. The application shall be considered to be "filed" when PERA receives the completed application as evidenced by a writing on the application indicating the date of receipt by PERA. PERA will calculate the pension payable and begin paying the pension effective the first day of the month following the date of the member's death. The amount of survivor pension shall be submitted to the board for ratification at the next regular meeting following the date of the first payment of survivor pension to the applicant.

**D. Duty death.**

(1) If the application is for a survivor pension resulting from duty death, the application shall be accompanied by documentation supporting the claim, in addition to the documentation required in Subsection B of 2.80.900.8 NMAC above. Documentation may include but is not limited to the following:

(a) a certified copy of the death certificate or other proof of death acceptable in a court of law;

(b) employer's report of accident;

(c) determination of duty death by another agency such as workers compensation administration or social security administration although such a determination does not necessarily prove the death was a duty death for PERA purposes;

(d) autopsy report;

(e) attending physician's narrative report containing the conclusion of duty death and stating the basis therefor;

(f) any other information requested by the association.

(2) The burden of proof of duty death is on the applicant.

(a) "Solely and exclusively" means the member's work is so substantial a factor of the death that the death would not have occurred at the time without it.

(b) "Course of the member's performance of duty" means place or activity for which the employer's business required the presence of the employee, but shall not include travel or time on the way to assume the duties of employment or travel or time leaving such duties, except when the employee is temporarily assigned to a destination other than his or her normal work station or is within the "special errand" rule in which case such time will be considered in the course of employment.

(3) The board hereby authorizes the director of member services to determine whether the death was the natural and proximate result of causes arising solely and exclusively out of and in the course of the member's performance of duty with an affiliated public employer. Such determination shall be presented to the board for ratification at the next regular meeting of the board. The board may remove the matter from the consent calendar and substitute its own determination for that of the director of member services, or it may assign the matter to an administrative hearing officer for determination.

**E. Military death.** Effective with respect to deaths occurring on or after January 1, 2007, while a member is performing qualified military service, as defined in Chapter 43 of Title 38, United States Code, to the extent required by Internal Revenue Code Section 401(a)(37), survivors of such member are entitled to any additional benefits that the plan would provide if the member had resumed employment and then died, such as accelerated vesting or survivor benefits that are contingent on the member's death while employed. In any event, a deceased member's period of qualified military service must be counted for vesting purposes.

[2.80.900.8 NMAC – Rp, 2.80.900.8, 10/10/2023]

## **PART 901-999: [RESERVED]**

## **PART 1000: DISABILITY RETIREMENT BENEFITS**

### **2.80.1000.1 ISSUING AGENCY:**

Public Employees Retirement Association, 33 Plaza La Prensa, Santa Fe, New Mexico 87507.

[2.80.1000.1 NMAC – Rp, 2.80.1000.1, 10/10/2023]

### **2.80.1000.2 SCOPE:**

This rule affects the members, disability retirees, beneficiaries, affiliated public employers, the retirement board and the association under the Public Employees Retirement Act.

[2.80.1000.2 NMAC – Rp, 2.80.1000.2, 10/10/2023]

### **2.80.1000.3 STATUTORY AUTHORITY:**

Sections 10-11-10.1 and 10-11-130 NMSA 1978.

[2.80.1000.3 NMAC – Rp, 2.80.1000.3, 10/10/2023]

### **2.80.1000.4 DURATION:**

Permanent.

[2.80.1000.4 NMAC – Rp, 2.80.1000.4, 10/10/2023]

### **2.80.1000.5 EFFECTIVE DATE:**

October 10, 2023, unless a different date is cited at the end of a section.

[2.80.1000.5 NMAC – Rp, 2.80.1000.5, 10/10/2023]

### **2.80.1000.6 OBJECTIVE:**

The objectives of this rule are to define terms used in the disability retirement provision of the PERA Act; to set forth with particularity the membership of the committee; to clarify the compensation applicable to various members of the committee; to set forth procedures for initial disability retirement applications and for reevaluation of retirees' continued eligibility for disability payments; to provide a procedure for trial employment; and to provide for notice to retirees of pension reclassifications. The intent of the board in promulgating these rules is to encourage continued employment of members while providing protection in cases of disability. Vocational rehabilitation is strongly recommended in every case possible.

[2.80.1000.6 NMAC – Rp, 2.80.1000.6, 10/10/2023]

### **2.80.1000.7 DEFINITIONS:**

For purposes of disability retirement the following definitions shall apply:

A. **"Commensurate"** employment means that the applicant is able to engage in some profitable employment or enterprise in the state of New Mexico, which approximates to a substantial degree the applicant's pre-injury compensation but is not necessarily equal to the applicant's pre-injury employment.

B. **"Course of the member's performance of duty"** means place or activity for which the employer's business requires the presence of the employee, but shall not include travel or time on the way to assume the duties of employment or travel or time leaving such duties, except when the employee is temporarily assigned to a destination other than his or her normal work station or is within the "special errand" rule, in which

case such time will be considered to be in the course of employment. Mere presence on the employer's premises while coming to or going from the job shall not establish this element unless the member has also assumed or is performing job duties.

C. **"Currently employed, contributing employee of an affiliated public employer,"** in the case of an applicant for duty disability benefits, means the employment and contribution status on the date the disability was incurred.

D. **"Likely to be permanent"** means that the weight of the medical evidence presented indicates that the applicant has either reached maximum medical improvement and the disability will probably last at least until the applicant reaches the age at which he or she will become eligible for normal retirement or that the medical information supports a determination of permanent disability, even though maximum medical improvement has not been reached.

E. **"Solely and exclusively"** means the member's work is so substantial a factor of the disability that the disability would not have occurred at the time without it and a pre-existing condition is not a significant contributing factor material to the disability.

F. **"Totally incapacitated"** means inability, as a result of either sudden injury or illness or the cumulative long-term effects of injury or illness, to work the member's regular work week.

[2.80.1000.7 NMAC – Rp, 2.80.1000.7, 10/10/2023]

## **2.80.1000.8-19 [RESERVED]**

## **2.80.1000.20 DISABILITY REVIEW COMMITTEE:**

A. The disability review committee shall consist of at least one physician licensed in New Mexico and at least three, but not more than five members of the board; the physician need not be either a board member or association member, but may be either or both. The committee may also engage a psychologist (Ph.D.) or a psychiatrist (M.D.) licensed in New Mexico to serve on an as-needed basis to evaluate and advise the committee regarding applications for disability retirement based in whole or in part on mental incapacity.

B. The executive director or designated representative shall act as secretary for the committee.

C. Compensation: Members of the committee shall receive no compensation other than that authorized by the Per Diem and Mileage Act, except that physicians, psychiatrists or psychologists who are not board or association members and are engaged by the board to serve on the committee may be compensated at the rate established by the board.

**2.80.1000.21-29 [RESERVED]**

**2.80.1000.30 INITIAL APPLICATION PROCEDURE:**

**A. Application.** The association shall provide application forms for members to use in complying with these provisions. No member shall be deemed an applicant for disability retirement until the member or his or her representative or employer has completed and filed the disability application package, including all the forms required in order to process the application. The following forms shall be required in order to process the application:

(1) Employer's report of disability (not applicable to members who are not currently employed contributing members). If the employer refuses to provide the report, the committee may take whatever steps it deems necessary to obtain the required information.

(2) Member's examining physician's statement for disability retirement benefits. If the application is for disability retirement based on physical incapacity, the examining physician must be a medical doctor (M.D.), doctor of osteopathic medicine (D.O.), certified nurse practitioner (CNP), or a physician's assistant (PA). An M.D., D.O., or CNP must be licensed in the state in which he or she practices. If the application is for disability retirement based on mental incapacity, the examining physician must be either a psychologist (Ph.D.) certified in the state in which he or she practices, [or] a psychiatrist (M.D.), or certified nurse practitioner (CNP) licensed in the state in which he or she practices. If the application is for disability retirement based on both physical and mental incapacity, reports must be made for each kind of incapacity. The examining physician's statements shall be based on an examination of the member not more than 3 months prior to the date of submitting the application.

(3) Employer's first report of injury, if any.

(4) A list of all health care practitioners consulted who have examined or treated the member regarding the disability and all records, reports, narratives, evaluations, diagnoses, prognoses or notes discussing, establishing, evaluating or measuring the disability. Such records shall include, but not be limited to, one or more reports, evaluations, analyses or narratives made within 90 days of application.

(5) Copies of any and all vocational rehabilitation reports and work performance evaluation reports made since the disability was incurred.

(6) Release of medical information to PERA on a form signed by the applicant or his or her legal representative.

(7) Any other information requested by members of the committee.

**B.** If information requested by members of the committee is not provided by the disability applicant within 120 days of the written request, the application, if otherwise complete, will be considered by the committee in the absence of the requested information and the applicant's failure to provide the requested information may be considered by the committee in its consideration of the application.

**C.** Notification: The applicant shall be given notice of every meeting at which his or her application is to be considered. Such notice shall be in writing and mailed not less than five days prior to such disability review committee meeting, unless the applicant waives, in writing, the notification requirement in order to expedite any action on his or her application.

**D.** Meetings: The committee shall hold its regular meetings at designated times at the PERA building, Santa Fe, New Mexico. A majority of the committee members, at least one of whom must be a physician, shall constitute a quorum. No action may be taken by the committee in the absence of a quorum.

(1) Confidentiality: Meetings of the committee shall not be open to the public in order to preserve the confidentiality of medical records pursuant to Section 14-2-1 NMSA 1978. The applicant and the applicant's guest(s) or representative may be present to hear discussion and to address the committee during consideration of his or her application.

(2) Testimony and oral statements or arguments made by an applicant or his or her representative shall be tape recorded.

**E.** Release of medical reports: Copies of medical reports may be given to the applicant or his or her representative, provided a release of information form is signed by the applicant or his or her legal representative.

**F.** Examination: Upon receipt and consideration of the completed disability retirement forms required in Subsection A of Section 30 above, the committee may notify the applicant in writing if further examination is necessary, and if so, the type of examination and information necessary to document the disability application. If, after the applicant has been notified in writing, the applicant fails without good cause to report to an examining physician within 90 days, his or her application for disability retirement benefits shall become void.

**G.** The committee shall determine whether the applicant meets the requirements for disability retirement, and approve or deny the application. The applicant shall be notified by letter of the committee's action within 10 working days of its meeting. If the application is approved, the type (duty or non-duty) of the retirement pension and the effective date shall be submitted to the board for ratification at the next regular meeting following the effective date of retirement.

**H.** If the application for disability retirement is approved, the member, unless excluded from coverage by the federal social security administration, shall apply for federal disability benefits within 30 calendar days of approval of the application for disability retirement. A copy of the federal social security administration application shall be submitted to PERA.

**I.** If an application for disability retirement benefits is approved and the member does not terminate employment within 45 calendar days, a new application must be filed and approved by the committee before a disability retirement pension can be paid.

**J.** If an application for disability retirement benefits is denied, and the applicant either fails to appeal or appeals and the denial is upheld on appeal, the applicant may re-apply and present new medical evidence in support of a new application for disability retirement benefits based on the same disorder one year after the date of the initial denial. The applicant may not re-apply for disability benefits for the same medical condition without new medical evidence made within 90 days of the re-application.

[2.80.1000.30 NMAC – Rp, 2.80.1000.30, 10/10/2023]

#### **2.80.1000.31-39 [RESERVED]**

#### **2.80.1000.40 APPEAL:**

If the committee denies disability retirement benefits, the applicant may appeal the action. Any appeals under this section shall be conducted according to Section 10-11-120 NMSA 1978 and 2.80.1500 NMAC. An applicant's withdrawal or refund of contributions at any time before or during the pendency of an appeal causes the forfeiture of service credit and shall result in the automatic dismissal of the appeal and the issuance of a notice of dismissal.

[2.80.1000.40 NMAC – Rp, 2.80.1000.40, 10/10/2023]

#### **2.80.1000.41-49 [RESERVED]**

#### **2.80.1000.50 CONTINUATION PROCEDURE:**

**A.** At the end of the first year that a disability retirement pension is paid, the disability retired member's condition shall be reevaluated to determine eligibility for continuation of payment of a disability retirement pension.

**B.** The disability retired member must submit a copy of the application for benefits with the federal social security administration and written evidence of payment of federal disability benefits in the following form: 1) a copy of a warrant for federal disability benefits; or 2) a letter from the federal social security administration confirming that the disability retired member is receiving federal disability benefits.

**C.** If the disability retired member has not applied for federal disability benefits, has applied and has not received a written final determination, or has received federal social security disability for a different condition than presented in the application for PERA disability, the committee shall determine the disability retired member's eligibility for continuation of payment of a state disability retirement pension. The following forms and information are required for re-evaluation for continuation of disability retirement benefits:

(1) Examining physician's statement for continuation of disability retirement pension. If disability retirement was granted based on mental incapacity, the examining physician must be either a psychologist (Ph.D.) certified in the state in which he or she practices, a psychiatrist (M.D.), or a certified nurse practitioner (CNP) licensed in the state in which he or she practices. If the disability retirement was granted based on both physical and mental incapacity, reports must be made for each kind of incapacity by the appropriate health care professionals. The examining physician's statements shall be based on an examination of the disability retired member not more than three months prior to the date of consideration of the re-evaluation;

(2) Disability retired member's statement for continuation of disability retirement pension;

(3) A list of all health care practitioners consulted who have examined or treated the disability retired member regarding the disability;

(4) Copies of any and all vocational rehabilitation reports and work performance evaluation reports made since the disability was incurred. At re-evaluation for continuation of disability retirement benefits, at least one vocational rehabilitation report by a vocational rehabilitation evaluator approved by PERA must be submitted to the committee. In addition to any other vocational rehabilitation reports, if the disability retired member was referred by PERA to the division of vocational rehabilitation ("DVR") at the time of initial approval of disability retirement benefits, a report from DVR must be submitted at re-evaluation.

(5) Any other information requested by the committee.

**D.** Disability retired members whose examination reports are under consideration by the committee have the right to be heard by and to present any pertinent evidence which they may have to the committee. They may also review any and all evidence that the committee may have which pertains to their case.

**E.** Appeals of denial of continuation of disability retirement pensions by members who are not covered by or who are not eligible to apply for federal disability benefits shall be conducted according to Section 10-11-120 NMSA 1978, and 2.80.1500 NMAC.

**F.** If the disability retired member fails to appeal as provided herein the committee's decision becomes final.

**G.** If continuation of disability retirement benefits is denied, and the applicant either fails to appeal or appeals and the denial is upheld on appeal, the applicant may not re-apply for disability retirement benefits based on the same condition(s) for at least one year after the initial denial of continuation of disability retirement benefits.

[2.80.1000.50 NMAC – Rp, 2.80.1000.50, 10/10/2023]

**2.80.1000.51-59 [RESERVED]**

**2.80.1000.60 TRIAL EMPLOYMENT:**

**A.** A disability retired member who desires to return to employment for a trial period of not more than 120 calendar days shall first request, in writing, approval from the association not less than 30 days before the first day of work. The request for approval shall contain the following information:

- (1) name, address, and telephone number of the proposed employer;
- (2) job title;
- (3) salary;
- (4) trial employment start date.

**B.** If the disability retired member successfully completes a trial period of employment with an affiliated public employer, the disability retired member shall be reinstated as a PERA member and resume contributions to PERA.

[2.80.1000.60 NMAC – Rp, 2.80.1000.60, 10/10/2023]

**2.80.1000.61-69 [RESERVED]**

**2.80.1000.70 EARNINGS FROM EMPLOYMENT:**

**A.** Except for trial employment, a disability retired member who desires to return to employment by an employer covered by any state system shall comply with the applicable rule regarding post-retirement employment, Subsection G of 2.80.700.10 NMAC for PERA retirees, 2.84.1100.20 NMAC for magistrate retirees or 2.83.1100.20 NMAC for judicial retirees.

**B.** If the amount earned from any employment, except for trial employment, is \$15,000 or more, disability benefits shall be suspended immediately and any amounts paid after that limit is reached must be reimbursed by the retiree to PERA.

**C.** PERA shall require all disability retired members to provide a statement of earnings from any employment during the preceding calendar year. Such statement of

earnings shall include the internal revenue service tax return or other proof of earnings, acceptable to PERA, if an IRS tax return does not exist.

[2.80.1000.70 NMAC – Rp, 2.80.1000.70, 10/10/2023]

## **2.80.1000.71-79 [RESERVED]**

### **2.80.1000.80 PENSION RECLASSIFICATION:**

When a disability retired member reaches the combined age and years of service that qualifies a member for normal retirement benefits under the coverage plan under which the disability retired member was last employed before receiving disability retirement benefits, PERA shall reclassify that person's pension from disability to normal retirement. The disability retired member shall be notified in writing by PERA of this action within 30 days of reclassification.

[2.80.1000.80 NMAC – Rp, 2.80.1000.80, 10/10/2023]

## **PART 1001-1099: [RESERVED]**

## **PART 1100: RETIRED MEMBERS**

### **2.80.1100.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.80.1100.1 NMAC - Rn, 2 NMAC 80.1100.1, 12-28-00]

### **2.80.1100.2 SCOPE:**

This rule affects retirees, beneficiaries, affiliated public employers and the association under the Public Employees Retirement Act.

[10-15-97; 2.80.1100.2 NMAC - Rn, 2 NMAC 80.1100.2, 12-28-00]

### **2.80.1100.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-11-8, 10-11-118, 10-11-118.1, 10-11-119, and 10-11-130, as amended.

[10-15-97; 2.80.1100.3 NMAC - Rn, 2 NMAC 80.1100.3, 12-28-00]

### **2.80.1100.4 DURATION:**

Permanent.

[10-15-97; 2.80.1100.4 NMAC - Rn, 2 NMAC 80.1100.4, 12-28-00]

**2.80.1100.5 EFFECTIVE DATE:**

December 15, 1995 unless a different date is cited at the end of a section.

[10-15-97; 2.80.1100.5 NMAC - Rn & A, 2 NMAC 80.1100.5, 12-28-00]

**2.80.1100.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for the payment, suspension and reinstatement of pensions of retired members; to establish notification and reporting requirements for post-retirement employment; and to establish conditions for retired members who work for affiliated public employers as independent contractors.

[10-15-97; 2.80.1100.6 NMAC - Rn, 2 NMAC 80.1100.6, 12-28-00; A, 9-30-03; A, 8-31-04]

**2.80.1100.7 DEFINITIONS:**

**[RESERVED]**

[2.80.1100.7 NMAC - Rn, 2 NMAC 80.1100.7, 12-28-00]

**2.80.1100.8-2.80.1100.9 [RESERVED]**

**2.80.1100.10 PAYMENT OF PENSION:**

Pension payments will be processed or mailed monthly, not later than the last day of the month for which they are paid.

A. A retired member may have the pension warrant mailed directly to any location specified in writing by the retired member; provided, however, that after December 31, 1998, the provisions of 2.80.700.10.B(5) NMAC shall apply. Arrangements providing for electronic transfer of pension payments to the retiree's banking institution are permitted so long as the retired member's right to receipt of the funds is not altered except as ordered by a court of competent jurisdiction.

B. In the event a retired member is incapacitated or unable to sign his or her pension warrant, proof that a guardian has been appointed for the retired member, or proof of appointment of a conservator for the estate, or a copy of a durable power of attorney for a third party shall be filed with PERA.

[10-15-97; 11-15-97; 2.80.1100.10 NMAC - Rn & A, 2 NMAC 80.1100.10, 12-28-00]

## **2.80.1100.11 POST-RETIREMENT SELECTION OF NEW BENEFICIARY OR CHANGE TO FORM OF PAYMENT A:**

A. To exercise his or her one-time irrevocable option to change the beneficiary designated at retirement to another survivor beneficiary under the same form of payment or to have future payments made under form of payment A pursuant to NMSA 1978, Section 10-11-116 (D), the retired member shall submit the request in writing to PERA, including a statement that the beneficiary designated at retirement is still living.

B. If the retired member requests a beneficiary change, he or she shall provide a copy of the new beneficiary's certificate of birth with the written request.

C. If the retired member was married at the time of retirement and is still married to the same person at the time of the request, he or she shall provide a new signed notarized statement of consent by the member's spouse to the new beneficiary or to the election of form of payment A.

D. If the retired member has been divorced, he or she shall provide PERA with complete endorsed copies of all court documents necessary to ascertain the current marital status of the member and whether any ex-spouse of the member is entitled to any portion of the member's benefits. Such documents shall include the final decrees and marital property settlements for all marriages during the member's employment with an affiliated public employer. If the member's only divorce was prior to becoming a PERA member, then the final divorce decree is required, but no marital property settlement is required. If the member was divorced more than once before becoming a PERA member, then only the most recent final decree is required. The requirement for providing a copy of a final decree may be waived, in PERA's discretion, when PERA can establish through online court records that a divorce decree was entered on a specific date and no further documentation is deemed necessary to administer benefits.

E. A retired member who was divorced prior to retirement and named his or her former spouse as survivor beneficiary may exercise his one-time irrevocable option to deselect his or her former spouse as survivor beneficiary in accordance with NMSA 1978, Section 10-11-116 (E) provided that there is no court order requiring the election of a specific form of payment or designation of a specific survivor pension beneficiary.

F. PERA shall provide the retired member with a new benefit estimate and an agreement for selection of new beneficiary or change to form of payment A after retirement in the form required by PERA within a reasonable time of receipt of the written request and required information and documents.

G. If the signed notarized agreement is received at PERA by the ninth day of the month, the requested change shall be effective for the pension payment for that month. Agreements received after the ninth day of the month shall be effective for the following month's pension payment.

[2.80.1100.11 NMAC - N, 9-30-10; A, 12-30-13; A, 12-30-13]

**2.80.1100.12-19 [RESERVED]**

**2.80.1100.20 POST-RETIREMENT EMPLOYMENT:**

A. When a retired member is subsequently employed by an affiliated public employer, the retired member shall notify PERA immediately on the form prescribed by the association of the hire date, position and salary of the subsequently employed retired member.

B. If a retired member returns to work and his or her pension is suspended pursuant to NMSA 1978, Section 10-11-8, the retired member will be required to repay PERA any pension amounts erroneously paid after commencement of employment or reemployment, plus interest at the rate set by the board for collecting overpayments. If erroneously paid pension payments have not been repaid when the subsequent employment is terminated and the retired member has applied for reinstatement of the pension, the erroneously paid amount must be repaid in full before the pension may be reinstated, or the subsequently employed retired member must make arrangements acceptable to PERA for the erroneously paid amount to be withheld from the reinstated pension until fully repaid.

[10-15-97; 11-15-97; 2.80.1100.20 NMAC - Rn & A, 2 NMAC 80.1100.20, 12-28-00; A, 12-28-01; A, 9-30-03; A, 8-31-04; A, 12-15-09; A, 9-30-10]

**2.80.1100.21-29 [RESERVED]**

**2.80.1100.30 SUSPENSION OF PENSION:**

A. A previously retired member who is subsequently employed by an affiliated public employer and whose pension is suspended pursuant to NMSA 1978, Section 10-11-8 (C) shall not become a member. The previously retired member will be eligible to reinstate his or her pension upon termination of the subsequent employment under the following conditions:

(1) the member files an application for reinstatement of pension in the form required by PERA; and

(2) the member's pension, under form of payment A, shall not be less than the amount of the previous pension under form of payment A; and

(3) reinstatement of the pension does not constitute the member's latest retirement for purposes of cost-of-living adjustment eligibility pursuant to NMSA 1978, Section 10-11-118 (C).

B. A previously retired member who is subsequently employed by an affiliated public employer and whose pension is suspended upon one of the following grounds shall become a member:

(1) he or she has been employed as an employee of an affiliated public employer or retained as an independent contractor by the affiliated public employer from which the retired member retired within twelve consecutive months from the date of retirement to the commencement of employment or reemployment with an affiliated public employer; or

(2) he or she makes an election pursuant to NMSA 1978, Section 10-11-8 (F).

C. A previously retired member who has subsequently become a member will be eligible re-retire at the termination of the subsequent employment period under the following conditions:

(1) The member files an application for retirement in accordance with the provisions of 2.80.700.10 NMAC.

(2) The recalculated pension, under form of payment A, shall not be less than the amount of the suspended pension under form of payment A.

(3) If the re-retiring member acquires three or more years of service credit during the subsequent employment with an affiliated public employer, the following provisions apply:

(a) the re-retiring member may re-retire under the coverage plan applicable at the time of re-retirement;

(b) the pension payment shall be made employing the form of payment selected by the re-retiring member upon the member's application for re-retirement; and

(c) the re-retiring member may designate any person as survivor beneficiary, subject to the provisions of NMSA 1978, Section 10-11-116.

[10-15-97; 2.80.1100.30 NMAC - Rn, 2 NMAC 80.1100.30, 12-28-00; A, 9-30-03; A, 8-31-04; A, 9-30-10; A, 12-30-13]

## **2.80.1100.31-39 [RESERVED]**

## **2.80.1100.40 INDEPENDENT CONTRACTORS:**

A retired member who intends to render services to an affiliated public employer as an independent contractor shall submit the contract to the association at least fifteen (15) working days prior to the effective date of the contract. If a retired member contracts to perform work for any affiliated public employer, the following conditions shall apply:

A. PERA shall evaluate the contract to determine whether, under the terms of the contract, the retired member is an "employee" or an "independent contractor". To make this determination, PERA shall refer to the common-law control test guidelines as expressed in the Social Security Handbook published by the U.S. department of health and human services, as revised and amended. If PERA determines that the retired member is actually an "employee" rather than an "independent contractor" under the terms of the contract, the provisions of NMSA 1978, Section 10-11-8 and 2.80.1100.20 NMAC, will be applicable to the retired member. If the retired member disagrees with PERA's determination, the retired member may appeal PERA's decision pursuant to 2.80.1500 NMAC.

B. Renewals, amendments or modifications of a previously approved post-retirement contract shall also be submitted to PERA for evaluation fifteen (15) working days prior to their effective date. The provisions of this section will apply to such renewals, amendments or modifications.

[10-15-97; 11-15-97; 2.80.1100.40 NMAC - Rn & A, 2 NMAC 80.1100.40, 12-28-00; A, 9-30-03]

#### **2.80.1100.41-49 [RESERVED]**

#### **2.80.1100.50 [RESERVED]**

[2.80.1100.50 NMAC - N, 8-31-04; Repealed, 9-30-10]

### **PART 1101-1199: [RESERVED]**

## **PART 1200: LEGISLATIVE RETIREMENT**

### **2.80.1200.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[6-15-96; 2.80.1200.1 NMAC - Rn, 2 NMAC 80.1200.1, 12-28-00]

### **2.80.1200.2 SCOPE:**

All persons who are eligible and desire to claim service credit or receive benefits under the legislative retirement provisions of the Public Employees Retirement Act.

[6-15-96; 2.80.1200.2 NMAC - Rn, 2 NMAC 80.1200.2, 12-28-00]

### **2.80.1200.3 STATUTORY AUTHORITY:**

Sections 10-11-39 through 43 NMSA 1978 create state legislator member coverage plan 1. Sections 10-11-43.1 through 10-11-43.5 NMSA 1978 create state legislator member coverage plan 2. Section 10-11-129.1 creates the legislative retirement fund. Section 10-11-130, NMSA 1978, authorizes the public employees retirement board to make and adopt such reasonable rules and regulations as may be necessary or convenient to carry out the duties of the retirement board and activities of the association.

[6-15-96; 2.80.1200.3 NMAC - Rn, 2 NMAC 80.1200.3, 12-28-00; A, 9-30-03]

#### **2.80.1200.4 DURATION:**

Permanent.

[6-15-96; 2.80.1200.4 NMAC - Rn, 2 NMAC 80.1200.4, 12-28-00]

#### **2.80.1200.5 EFFECTIVE DATE:**

June 15, 1996 unless a later date is cited at the end of a section.

[6-15-96; 2.80.1200.5 NMAC - Rn, 2 NMAC 80.1200.5, 12-28-00; A, 8-31-04]

#### **2.80.1200.6 OBJECTIVE:**

The objective of Part 1200 is to establish the procedures for acquiring benefits under the legislative retirement provisions of the Public Employees Retirement Act. Included are procedures which address persons whose membership or benefits under state legislator member coverage plan 1 were affected by court orders enjoining the association from administering the plan during the course of litigation concerning the constitutionality of the plan. See State v. Public Employees Retirement Board et al., N.M. Sup. Ct. Case No. 22, 279.

[6-15-96; 2.80.1200.6 NMAC - Rn, 2 NMAC 80.1200.6, 12-28-00]

#### **2.80.1200.7 DEFINITIONS:**

Definitions of terms used in this rule are found in 2.80.100.7 NMAC, Definitions, and Section 10-11-2, NMSA 1978.

[6-15-96; 2.80.1200.7 NMAC - Rn, 2 NMAC 80.1200.7, 12-28-00]

#### **2.80.1200.8 AMENDMENT AND REPEAL:**

Section 30 of 2.80.1200 NMAC is hereby amended and moved to subsection 10.C of this rule. This rule repeals in their entirety sections 1200.10 and 1200.20 of PERA Rule 1200, Legislative Retirement, filed July 1, 1987. Note: The July 1, 1987 version of

Rule 1200 superseded the original version of PERA Rule 1200, which was filed 11-19-81.

[6-15-96; 2.80.1200.8 NMAC - Rn, 2 NMAC 80.1200.8, 12-28-00]

#### **2.80.1200.9 ENROLLMENT:**

A. Participation in state legislator member coverage plan 1 is voluntary for legislators and lieutenant governors whose terms of office ended on or before December 21, 2002. Legislators and lieutenant governors may enroll in state legislator member coverage plan 1 by completing and filing a written application with PERA and paying member contributions on or before December 31, 2003 for one year or more of service credit earned by them after December 31, 1959. No survivor, estate, heir, personal representative or beneficiary of a deceased legislator or lieutenant governor may enroll in the plan. State legislative member coverage plan 1 closes to new members on December 31, 2003.

B. The board, the attorney general and certain retirees and members under state legislator member coverage plan 1 entered into stipulated partial final judgments in the matter of State v. Public Employees Retirement Board et al., First Judicial District Court, Case No. SF 87-2682(C). Unless otherwise provided by law, the association is bound by the provisions of the judgments so long as the judgments remain valid and effective.

C. Participation in state legislator member coverage plan 2 is voluntary for legislators and lieutenant governors whose terms of office ended after December 31, 2002. Legislators and lieutenant governors may enroll in state legislator member coverage plan 2 by completing and filing a written application with PERA on or before the later of one hundred eighty (180) days from July 1, 2003 or one hundred eighty (180) days after first taking office, and paying member contributions for one or more years of service credit earned after December 31, 2002. No survivor, estate, heir, personal representative or beneficiary of a deceased legislator or lieutenant governor may enroll in the plan.

[6-15-96; 2.80.1200.9 NMAC- Rn, 2 NMAC 80.1200.9, 12-28-00; A, 9-30-03]

#### **2.80.1200.10 SERVICE CREDIT:**

A. Service under state legislator member coverage plan 1 or state legislator member coverage plan 2 shall be credited by the calendar year.

B. One year of service credit may be earned for each calendar year during which the member fulfilled the obligations of the position of legislator or lieutenant governor for more than six months of the calendar year, including the legislative session. No service credit may be posted to a member's file until member contributions plus interest, if any, have been paid to PERA and the legislative council service has verified legislative service for the years claimed.

C. If a legislative member has service credit under PERA, other than as a legislative member, the legislative service credit and the regular PERA service credit may be combined for retirement purposes, provided that:

(1) the legislative member has at least five years of service credit under a coverage plan other than state legislator member coverage plan 1 or state legislator member coverage plan 2; and

(2) the legislative member meets the age requirement for normal retirement in the other coverage plan; in computing the benefits for the combined service, the pension shall be the sum of the benefits under state legislator member coverage plan 1 or state legislator member coverage plan 2 for the service as a legislator and the benefits for the remaining service under the applicable coverage plan.

D. In accordance with NMSA 1978, Section 10-11-7(E), the purchase cost for each year of credited military service under a state legislator coverage plan is equal to three times the normal member contribution per year under the state legislator coverage plan applicable to the member.

E. In order to post or adjust service credit for increased retirement benefits available to members under state legislator member coverage plan 1 for one or more calendar years after December 31, 1959 and prior to January 1, 2004, PERA must receive the required member contributions totaling two hundred dollars (\$200.00) per year on or before December 31, 2003.

F. In order to post or adjust service credit for increased retirement benefits available to members under state legislator member coverage plan 2 for one or more calendar years after December 31, 1959 and prior to January 1, 2003, PERA must receive the required member contributions totaling five hundred dollars (\$500.00) per year on or before December 31, 2004. No survivor, estate, heir, personal representative or beneficiary of a deceased legislator or lieutenant governor may post or adjust service credit under the plan.

[11-19-81; 8-1-87; 6-15-96; 2.80.1200.10 NMAC - Rn & A, 2 NMAC 80.1200.10, 12-28-00; A, 9-30-03; A, 8-31-04]

## **2.80.1200.11 MEMBER CONTRIBUTIONS:**

Member contributions for the current calendar year are due within the calendar year, and no interest shall be charged by PERA on contributions timely paid. Interest will be assessed on unremitted member contributions for calendar years preceding the current calendar year at a rate set by the board, and will accrue from the first day of the year after the service year for which credit is claimed until the date of payment, except that no interest shall accrue for the period from January 1, 1989 through December 31, 1996. The board shall set the rate of interest annually by resolution at a July meeting,

to be effective on the following January 1st for that calendar year. The rate of interest for unremitted member contributions paid in 1996 shall be as follows:

A. For calendar years prior to January 1, 1984, interest shall be calculated at the rate of 5.25% compounded annually from December 31 of the applicable year through December 31, 1983, and at the rate of 10% compounded annually thereafter up to the date of payment.

B. For calendar years after December 31, 1983, interest shall be calculated at the rate of 10% compounded annually from December 31 of the applicable year to the date of payment.

[6-15-96; 2.80.1200.11 NMAC- Rn, 2 NMAC 80.1200.11, 12-28-00]

### **2.80.1200.12 BENEFITS SUSPENDED BECAUSE OF LITIGATION:**

The administration of state legislator member coverage plan 1 was suspended from December 29, 1988 through November 2, 1993 and July 12, 1994 through the thirtieth day after the effective date of this rule. Retirees or their beneficiaries who were receiving benefits or who had filed applications for benefits prior to one or both of these periods of suspension may receive benefits for the period(s). In order to pay such benefits, PERA must receive updated information concerning the affected persons on PERA forms. In making benefit payments for these periods, PERA is entitled to rely upon the information furnished to PERA. PERA is not obligated to pay benefits for these periods until the thirty-first day after the effective date of this rule, or sixty days from PERA's receipt of the updated information, whichever comes later. No interest will be paid by PERA on benefits accumulated for periods during which administration of the plan was suspended; however, applicable cost of living adjustments will be included.

[6-15-96; 2.80.1200.12 NMAC - Rn, 2 NMAC 80.1200.12, 12-28-00; A, 9-30-03]

### **2.80.1200.13 APPLICATIONS FOR BENEFITS:**

Persons who are eligible for but are not yet receiving benefits under the plan may apply for benefits pursuant to the procedures set forth in the PERA Act and PERA rules. The effective date of the pension shall be no earlier than the first day of the month following the month in which the application for a benefit was filed. No interest shall be paid by PERA on benefits which accrue from the effective date of the benefit to the date of the first pension check.

[6-15-96; 2.80.1200.13 NMAC - Rn, 2 NMAC 80.1200.13, 12-28-00]

## **PART 1201-1399: [RESERVED]**

## **PART 1400: RECIPROCITY**

#### **2.80.1400.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.80.1400.1 NMAC - Rn, 2 NMAC 80.1400.1, 12-28-01]

#### **2.80.1400.2 SCOPE:**

This rule affects the members, former members, normal retirees (as distinguished from disability retirees), beneficiaries, public employers, retirement board, and the association under the Public Employees Retirement Act.

[10-15-97; 2.80.1400.2 NMAC - Rn, 2 NMAC 80.1400.2, 12-28-01]

#### **2.80.1400.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-13A-2, 10-13A-3, 10-13A-4, and 10-11-130 as amended.

[10-15-97; 2.80.1400.3 NMAC - Rn, 2 NMAC 80.1400.3, 12-28-01]

#### **2.80.1400.4 DURATION:**

Permanent.

[10-15-97; 2.80.1400.4 NMAC - Rn, 2 NMAC 80.1400.4, 12-28-01]

#### **2.80.1400.5 EFFECTIVE DATE:**

December 15, 1995 unless a different date is cited at the end of a section.

[10-15-97; 2.80.1400.5 NMAC - Rn, 2 NMAC 80.1400.5, 12-28-01]

#### **2.80.1400.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for reciprocity retirement, for eligible reciprocal service credit, and for overlapping service credit.

[10-15-97; 2.80.1400.6 NMAC - Rn, 2 NMAC 80.1400.6, 12-28-01]

#### **2.80.1400.7 DEFINITIONS:**

**[RESERVED]**

[2.80.1400.7 NMAC - Rn, 2 NMAC 80.1400.7, 12-28-01]

## **2.80.1400.8-2.80.1400.9 [RESERVED]**

### **2.80.1400.10 GENERAL PROVISIONS:**

A. "Salary" is defined by each state system for that state system. Each system shall certify the member's salary as defined by that system to the payor system, and the payor system shall accept that salary for pension calculation purposes where applicable.

B. The Public Employees Retirement Reciprocity Act applies to normal retirement only, and does not apply to disability retirement or pre-retirement survivor pensions.

C. PERA retiree: If a retired member whose service credit at retirement was acquired only under PERA is:

- (1) subsequently employed by an employer covered under another state system, and
- (2) the retired member becomes a contributing member of that system, and
- (3) the retired member's PERA pension is suspended for the period of membership under that system, and
- (4) the retired member acquires service credit under that system, then the subsequently acquired service credit is eligible reciprocal service credit; when the member terminates the subsequent employment and retires again, the subsequent retirement shall be governed by the provisions of the Public Employees Retirement Reciprocity Act.

D. Retiree under another state system: If a retired member whose service credit at retirement was acquired only under another state system is:

- (1) subsequently employed by an employer covered under PERA, and
- (2) the retired member becomes a contributing member of PERA, and
- (3) the retired member's pension is suspended for the period of membership under PERA, and
- (4) the retired member acquires service credit under PERA, then the subsequently acquired service credit is eligible reciprocal service credit; when the member terminates the subsequent employment and retires again, the subsequent retirement shall be governed by the provisions of the Public Employees Retirement Reciprocity Act.

E. Overlapping service credit.

(1) If a member has service credit for the same period of time for employment by public employers covered under different state systems, service credit may only be acquired under one state system for the period of overlapping service credit.

(2) If a member retires with service credit under more than one state system for an overlapping period, the member shall be granted service credit for this overlapping period as follows:

(a) PERA, JRA or MRA shall grant service credit earned for the months the member was employed by an employer covered under one or more of these systems in accordance with all applicable statutes and rules.

(b) ERA shall grant service credit for the quarters of ERA service credited to the member in accordance with all applicable ERA statutes and rules less the amount of service credit granted by PERA, JRA or MRA in subparagraph 2(a) above. In no case shall a member be credited with more than one month of service credit for all service in any calendar month.

F. Free or purchased military service credit under any state system may only be considered eligible reciprocal service credit under one state system for reciprocity retirement purposes.

G. When a member retires according to the provisions of the Public Employees Retirement Reciprocity Act or requests a service credit verification or benefits estimate, each state system under which the member has acquired eligible reciprocal service credit shall furnish the payor system with a certified statement of the member's service credit, and other pertinent data necessary to compute the member's pension.

H. A member retired according to the provisions of the Public Employees Retirement Reciprocity Act shall receive the same cost of living adjustments provided by each state system under which the retired member acquired eligible reciprocal service credit. Each state system shall pay the cost of living adjustment due under the provisions of that state system for the portion of the total pension attributable to service credit acquired under that state system.

I. A member retiring according to the provisions of the Public Employees Retirement Reciprocity Act shall only elect a form of payment option with the payor system. Each state system shall calculate benefits according to the same form of payment, except in the case of a member who retires under PERA and elects form of payment D, in which case the ERA component of the pension shall be calculated according to form of payment A.

J. Amendments to this rule shall be effective only if adopted by the educational retirement board and the public employees retirement board.

[10-15-97; 11-15-97; 2.80.1400.10 NMAC - Rn, 2 NMAC 80.1400.10, 12-28-01; A, 9-30-03; A, 8-31-04; A, 6-30-05]

## **PART 1401-1499: [RESERVED]**

## **PART 1500: APPEAL OF DENIAL OF CLAIM OF BENEFITS**

### **2.80.1500.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.80.1500.1 NMAC - Rn, 2 NMAC 80.1500.1, 12-28-01]

### **2.80.1500.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, public employers, retirement board, and the association under the Public Employees Retirement Act, Judicial Retirement Act, Magistrate Retirement Act and Volunteer Firefighters Retirement Act.

[10-15-97; 12-15-99; 2.80.1500.2 NMAC - Rn, 2 NMAC 80.1500.2, 12-28-01]

### **2.80.1500.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Section 10-11-120, 10-11-130, 10-12B-3, 10-12C-3, and 10-11A-4, as amended.

[10-15-97; 12-15-99; 2.80.1500.3 NMAC -Rn, 2 NMAC 80.1500.3, 12-28-01]

### **2.80.1500.4 DURATION:**

Permanent.

[10-15-97; 2.80.1500.4 NMAC - Rn, 2 NMAC 80.1500.4, 12-28-01]

### **2.80.1500.5 EFFECTIVE DATE:**

July 1, 1993 unless a different date is cited at the end of a section.

[10-15-97; 2.80.1500.5 NMAC - Rn, 2 NMAC 80.1500.5, 12-28-01]

### **2.80.1500.6 OBJECTIVE:**

The objective of this rule is to establish procedures and requirements for appealing denials of claims for benefits.

[10-15-97; 2.80.1500.6 NMAC - Rn, 2 NMAC 80.1500.6, 12-28-01]

## **2.80.1500.7 DEFINITIONS:**

**[RESERVED]**

## **2.80.1500.8-2.80.1500.9 [RESERVED]**

## **2.80.1500.10 GENERAL PROVISIONS:**

A. The denial of any claim for retirement benefits may be appealed by a claimant. A refund or withdrawal of a member's contributions causes the forfeiture of service credit and shall result in the automatic dismissal of an appeal and the issuance of notice of dismissal. The appeal shall be initiated by receipt by PERA of a notice of appeal within ninety (90) days of the date of the letter in which the written notification to the claimant of the denial. The notice of appeal must state the reasons for claiming the denial is improper. If the claimant fails to submit a notice of appeal as provided herein, the initial denial of any claim shall constitute the final order of the board.

B. The appeal shall be heard by a hearing officer designated to represent the board unless otherwise provided by the board or board rules.

C. Procedure.

(1) PERA's office of general counsel will establish internal procedures for processing appeals, within the parameters set by this rule.

(2) Discovery and evidence.

(a) Following the filing of an appeal, the parties must submit to the hearing officer, with a copy to the other parties, including PERA, at least fifteen (15) days prior to the scheduled hearing, any documentary evidence he or she may wish to present for consideration at the de novo hearing. The hearing officer may grant a request for extension of time to submit documentary evidence for good cause, if such extension is not prejudicial to another party. This documentary evidence shall include all documents that will be introduced as exhibits at the hearing. Failure to comply with the requirements of this paragraph may result in the consideration of the appeal without the documentary evidence.

(b) At the same time documentary evidence is due to be submitted, PERA may, but is not required to file a written response to claimant's notice of appeal.

(c) Upon written request of any party, the parties shall provide to the other parties the names and addresses of persons that may be called as witnesses at the hearing.

(d) Pre-hearing discovery permitted by the rules of civil procedure for the district courts in New Mexico shall be allowed as authorized by the hearing officer. Upon the request of any party in writing, the hearing officer may authorize depositions.

(e) Upon request, the claimant shall provide to the attorney for the association authorizations for the release of records regarding the claimant's health care and employment (whether self-employed or as an employee or an independent contractor).

(f) The rules of evidence do not apply, but the hearing officer may admit all relevant evidence, which in the opinion of the hearing officer, is the best evidence most reasonably obtainable, having due regard to its necessity, competence, availability and trustworthiness. Such evidence shall be given the weight the hearing officer deems appropriate.

(g) The hearing officer may, upon good cause shown, remand the matter back to the disability review committee or the association for reconsideration.

(3) Hearing.

(a) A hearing shall be held within sixty (60) days of receipt of the notice of appeal unless the parties mutually agree to an extension of time and the extension is approved in writing by the hearing officer. The parties shall be given at least thirty (30) days written notice of the scheduled hearing.

(b) The board's authority to issue subpoenas is delegated to the hearing officer for the purpose of obtaining evidence or testimony not otherwise available.

(c) The board's authority to administer oaths is delegated to the hearing officer for the purpose of conducting the hearing.

(d) The parties have the right to present argument and evidence orally, to present or cross-examine witnesses, and to be accompanied by counsel.

(e) Failure of the claimant or his or her representative to appear at the hearing, without prior approval from the hearing officer, shall result in automatic final denial of any claims previously asserted.

(f) If the claimant or his or her representative requests rescheduling of a hearing so late that additional costs are incurred, any additional costs incurred shall be assessed against the claimant.

(4) Burden of persuasion. Unless otherwise established by law, the claimant has the burden of proving by a preponderance of the evidence the facts relied upon to show he or she is entitled to the benefit denied.

(5) Record. The hearing shall be recorded by a certified court reporter, and copies of all evidence offered shall be maintained by the association for a period of not less than five (5) years. Any party desiring a copy of the transcript of the proceedings shall be responsible for paying the cost, if any, of preparing such copy. The appellant shall make arrangements with the association for the preparation of transcripts for appeal to the district court.

(6) Recommended decision.

(a) The hearing officer's recommended decision shall be based upon the evidence adduced at the hearing and shall be issued by the hearing officer within sixty (60) days following the close of the record.

(b) The hearing officer shall propose findings of fact and conclusions of law as part of the recommended decision to the board.

(7) Exceptions to recommended decision.

(a) The parties to a proceeding may file with the board exceptions to the hearing officer's recommended decision within fifteen (15) days of the date of issuance of the recommended decision. Upon the written request of a party, and for good cause shown, the hearing officer may extend the time to file exceptions.

(b) Copies of such exceptions and any briefs shall be served on all parties and the hearing officer, and a statement of such service shall be filed with the exceptions.

(c) Exceptions to a hearing officer's recommended decision shall cite the precise substantive or procedural issue to which exceptions are taken and shall be based only on the evidence and arguments presented at the hearing.

(d) Any exception not specifically made shall be considered waived. Any exception that fails to comply with the foregoing requirements may be disregarded.

(e) The hearing officer may file with the board a response to any exceptions filed within fifteen (15) days of the date of filing of the exceptions and shall serve copies on all parties.

D. Final action by the board.

(1) The board shall consider the hearing officer's recommended decision, exceptions and any supporting briefs to the recommended decision, and the hearing officer's response to the exceptions, if any. The board may review all of the record made before the hearing officer.

(2) The board shall not consider any additional oral argument, evidence or affidavits not in the record before the hearing officer, or pleadings not filed in accordance with these rules.

(3) The board may request that the hearing officer be present at the time the board reviews a recommended decision issued by a hearing officer and may discuss the recommended decision with the hearing officer. The board members may also discuss the recommended decision among themselves and with legal counsel to the board.

(4) The board's final action shall be rendered no later than 180 days from the date of the hearing officer's recommended decision. Board members who need additional time to review the record before taking final action may request of the board chair that additional time for review be given. If additional time is requested, the deadline for the board's final action shall be extended for one month.

(5) Ex parte communication with board members or hearing officers concerning a decision that is on appeal is prohibited.

(6) The board may remand a recommended decision to the hearing officer for additional findings, conclusions, clarification or the taking of additional evidence. Such a remand shall restart the time frames contained in this rule.

(7) The board shall approve, disapprove or modify the recommended decision, and shall enter a final order concerning the matter being appealed. The board may modify the proposed conclusions of law based on the proposed findings of fact. If the board wishes to modify the proposed findings of fact, it may do so only after review of the record before the hearing officer. The board shall provide a reasoned basis for changing the hearing officer's recommendation.

[10-15-97; 11-15-97; 12-15-99; 2.80.1500.10 NMAC - Rn, 2 NMAC 80.1500.10, 12-28-01; A, 9-30-03; A, 8-31-04; A, 9-30-10]

## **PART 1501-1599: [RESERVED]**

## **PART 1600: DETERMINATION OF COMMUNITY INTEREST AND DIVISION OF RETIREMENT PENSIONS/CONTRIBUTIONS AT DIVORCE**

### **2.80.1600.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.80.1600.1 NMAC - Rn, 2 NMAC 80.1600.1, 12-28-01]

### **2.80.1600.2 SCOPE:**

This rule affects members, former members, retirees, beneficiaries, and the association under the Public Employees Retirement Act. This rule also affects the spouses and ex-spouses of members, former members and retirees under the act.

[10-15-97; 2.80.1600.2 NMAC - Rn, 2 NMAC 80.1600.2, 12-28-01]

#### **2.80.1600.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-11-136, 10-11-130, and 10-11-116, as amended.

[10-15-97; 2.80.1600.3 NMAC - Rn, 2 NMAC 80.1600.3, 12-28-01]

#### **2.80.1600.4 DURATION:**

Permanent.

[10-15-97; 2.80.1600.4 NMAC - Rn, 2 NMAC 80.1600.4, 12-28-01]

#### **2.80.1600.5 EFFECTIVE DATE:**

December 15, 1995 unless a different date is cited at the end of a section.

[10-15-97; 2.80.1600.5 NMAC - Rn, 2 NMAC 80.1600.5, 12-28-01]

#### **2.80.1600.6 OBJECTIVE:**

The objective of this rule is to establish procedures for dividing the community interest in retirement pensions or contributions.

[10-15-97; 2.80.1600.6 NMAC - Rn, 2 NMAC 80.1600.6, 12-28-01]

#### **2.80.1600.7 DEFINITIONS:**

[RESERVED]

#### **2.80.1600.8-2.80.1600.9 [RESERVED]**

#### **2.80.1600.10 DIVORCE DECREE OR ORDER:**

A. The following information must be contained in a court order which divides the community interest in PERA retirement pensions or contributions:

(1) specific information identifying the parties, i.e., full names, addresses, social security numbers, retirement numbers if any;

(2) a declaration that there is a community interest in a member's pension or member contributions;

(3) the percentage or dollar amount of each party's interest in the gross pension as calculated at the time of retirement;

(4) the percentage or dollar amount of each party's interest in member contributions;

(5) a direct order to PERA restraining refund of member contributions except according to the provisions of the decree or order, if such a restraint is desired;

(6) liability for and payment of federal and state income taxes;

(7) a direct order to PERA to issue separate warrants to each party.

B. A separate account may not be created for a member's former spouse who has a court-determined interest in a member's account.

C. A model order containing provisions for the determination and division of the community interest in a PERA member's account shall be available on request from PERA's office of general counsel.

D. Payments made pursuant to such orders shall only be made when member contributions are refunded or a pension is payable in accordance with the provisions of the Public Employees Retirement Act. PERA shall not be obligated to administer pension benefits in accordance with such orders until the first of the month following written approval by the office of general counsel.

[10-15-97; 11-15-97; 2.80.1600.10 NMAC - Rn, 2 NMAC 80.1600.10, 12-28-01]

#### **2.80.1600.11-19 [RESERVED]**

#### **2.80.1600.20 CHANGE OF NAME OR ADDRESS:**

Member files must contain current names and addresses for persons having a court-determined interest in member retirement accounts. Any person with such an interest must provide PERA with a written statement of change of name or address. If a warrant is returned as undeliverable because of incorrect name or address, the money due the person will accumulate in the fund until PERA is furnished with the correct information. No interest shall be paid on any monies so accumulated.

[10-15-97; 2.80.1600.20 NMAC - Rn, 2 NMAC 80.1600.20, 12-28-01]

#### **2.80.1600.21-29 [RESERVED]**

### **2.80.1600.30 FORM OF PAYMENT:**

A. When a retired member who has chosen either form of payment B or C with the retired member's spouse as the named survivor beneficiary is divorced, the retired member may either: 1) make no change in the form of payment and beneficiary; or 2) change the form of payment to form of payment A, which does not provide for a survivor beneficiary, if an appropriate court order so provides.

B. If the retired member elects to change from form of payment B or C to A, permission to make such an election must be included in a court order. PERA shall not be obligated to administer a change in form of payment in accordance with such an order until the first of the month following written approval by the office of general counsel.

C. A court order requiring an election of a particular form of payment at retirement shall be addressed to the non-retired member, and the member shall be responsible for executing the proper PERA forms and providing the documentation necessary to effectuate the election. A member who violates such an order may be in contempt of court.

[10-15-97; 11-15-97; 2.80.1600.30 NMAC - Rn, 2 NMAC 80.1600.30, 12-28-01; A, 9-30-03; A, 6-30-05]

### **2.80.1600.31-39 [RESERVED]**

### **2.80.1600.40 TAXES:**

A. Each party must submit a completed W-4 form to PERA when applying for a retirement pension.

B. The member must submit a completed PERA termination notice/request for refund when applying for a refund of contributions.

[10-15-97; 2.80.1600.40 NMAC - Rn, 2 NMAC 80.1600.40, 12-28-01; A, 9-30-03]

### **2.80.1600.41-49 [RESERVED]**

### **2.80.1600.50 BENEFICIARY DESIGNATIONS:**

An order requiring one or more beneficiary designations shall be addressed to the member, and the member shall be responsible for executing the proper PERA forms and providing the documentation necessary to effectuate the designation(s). A member who violates such a court order may be in contempt of court.

[11-15-97; 2.80.1600.50 NMAC - Rn, 2 NMAC 80.1600.50, 12-28-01]

## **PART 1601-1699: [RESERVED]**

## **PART 1700: MUNICIPAL ELECTION FOR CHANGE IN COVERAGE PLAN**

### **2.80.1700.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.80.1700.1 NMAC - Rn, 2 NMAC 80.1700.1, 12-28-01]

### **2.80.1700.2 SCOPE:**

This rule affects the affiliated public employers and their employees, the retirement board and the association under the Public Employees Retirement Act.

[10-15-97; 12-15-99; 2.80.1700.2 NMAC - Rn, 2 NMAC 80.1700.2, 12-28-01]

### **2.80.1700.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-11-130, 10-11-50, 10-11-55.1, 10-11-74, 10-11-80, 10-11-104, 10-11-110, as amended.

[10-15-97; 2.80.1700.3 NMAC - Rn, 2 NMAC 80.1700.3, 12-28-01]

### **2.80.1700.4 DURATION:**

Permanent.

[10-15-97; 2.80.1700.4 NMAC - Rn, 2 NMAC 80.1700.4, 12-28-01]

### **2.80.1700.5 EFFECTIVE DATE:**

November 1, 1994 unless a different date is cited at the end of a section.

[10-15-97; 2.80.1700.5 NMAC - Rn, 2 NMAC 80.1700.5, 12-28-01]

### **2.80.1700.6 OBJECTIVE:**

The objective of this rule is to establish procedures for affiliated public employers to conduct elections to adopt a new coverage plan or to change coverage plans for their employees.

[10-15-97; 12-15-99; 2.80.1700.6 NMAC - Rn, 2 NMAC 80.1700.6, 12-28-01]

### **2.80.1700.7 DEFINITIONS:**

**[RESERVED]**

**2.80.1700.8 GENERAL PROVISIONS:**

A. An affiliated public employer desiring to conduct an election to adopt a new coverage plan or for a change in coverage plan shall adopt and file with the board a resolution so stating. In addition to the resolution, the affiliated public employer shall also file for board approval, a sample ballot and a list of employee election committee members.

B. The resolution shall specify the date of the election, which election shall be held not fewer than thirty (30) nor more than sixty (60) days after the approval by the board of the resolution, except as provided in subsection E below.

C. The affiliated public employer shall give notice of the election to its members in the form prescribed by the association. Actual notice to each member is not required, but the manner in which notice is given shall be reasonably calculated to inform all affected members of the election.

D. Ballots shall be prepared by the affiliated public employer in sufficient quantity for all eligible members to vote and in the form prescribed by the association. Ballots for an election for a new coverage plan or a change in coverage plan shall be separate from the ballots for any other question being voted on by the members.

E. The association may postpone an election for coverage if it determines the affiliated public employer has not substantially complied with the procedures required by this rule and may require that remedial measures be taken, including, but not limited to, requiring that a new notice be given to members, preparing a new ballot or register, and rescheduling the election. The board may rescind an election if it determines the affiliated public employer did not substantially comply with the procedures required by this rule.

F. A register shall be prepared by the affiliated public employer containing names of members entitled to vote in the election. Names shall be manually added to the printed register to include the names of those members desiring to vote who become eligible to vote after printing of the register, provided verification is made by the affiliated public employer of the member's eligibility to vote in the election. An affiliated public employer may cease manually adding names to the printed register twenty-four (24) hours prior to the commencement of voting on election day. Members shall sign their names to the register when issued a ballot. If a member who has voted absentee subsequently ceases to be eligible prior to the date of election, that vote shall be valid.

G. Before issuing a ballot to a member, identification may be required of the member.

H. Voting shall be permitted by absentee ballot. Absentee ballots may be voted by the member and thereafter delivered to the person designated by the affiliated public employer to receive absentee ballots. Absentee ballots shall be made available not later than 5 days prior to the election day. No absentee ballots may be counted unless received at or before 5:00 p.m. on the day prior to the election day. Absentee ballots shall not be opened until voting has ceased on the election day.

I. Voting shall be conducted at a minimum of one voting location continuously throughout a minimum 9 hour period including the hours between 8:00 a.m. and 5:00 p.m., but if all eligible members have voted prior to the posted closing time, the voting shall end at the earlier time.

J. The affiliated public employer shall appoint a committee of employees of the employer to be approved by the board. The committee shall be present at the voting places during the election day and during the process of counting the votes. The chair of the committee shall sign his or her name to the final tally indicating that the tally is, to the best of his or her information, a correctly computed tally. A representative of the affiliated public employer shall be designated by the affiliated public employer as responsible for the election, and he or she shall also so indicate on the tally by signing his or her name.

K. The final tally of votes shall be filed with the association within 72 hours after closing of the election, unless the offices of the association are closed due to weekends or holidays for a period of three consecutive days after the election day, in which case the tally shall be filed on the next business day following the election day.

L. Elections for changes in coverage plan may be conducted for designated employee groups of an affiliated public employer. A designated group may be all members employed by the affiliated public employer, an organizational group whose compensation is established by negotiated contract or all members employed by the affiliated public employer whose compensation is not established by negotiated contract. The resolution required in subsection A shall state the designated employee group.

M. Insignificant departures from the requirements set forth in these regulations pertaining to the conduct of elections shall not invalidate the election provided the results of the election would not have been affected.

N. "First full pay period" for the purpose of adopting a new coverage plan shall mean the first pay period that ends within the month in which the new coverage plan becomes applicable to a member.

O. An election adopting a coverage plan is irrevocable for the purpose of subsequently adopting a coverage plan that would decrease employee or employer contributions with respect to all current and future members of that affiliated employer.

[10-15-97; 11-15-97; 12-15-99; 2.80.1700.8 NMAC - Rn, 2 NMAC 80.1700.8, 12-28-01; A, 9-30-03]

## **PART 1701-1799: [RESERVED]**

## **PART 1800: EXECUTIVE DIRECTOR**

### **2.80.1800.1 ISSUING AGENCY:**

Public Employees Retirement Association, 33 Plaza La Prensa, Santa Fe, New Mexico 87507.

[10/15/1997; 2.80.1800.1 NMAC - Rn, 2 NMAC 80.1800.1, 12/28/2001; A, 12/28/2021]

### **2.80.1800.2 SCOPE:**

This rule applies to the retirement board and the executive director under the Public Employees Retirement Act. This rule affects the members, former members, retirees, beneficiaries, public employers and the association under the Public Employees Retirement Act.

[10-15-97; 11-15-97; 2.80.1800.2 NMAC - Rn, 2 NMAC 80.1800.2, 12-28-01]

### **2.80.1800.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Section 10-11-130, 10-11-131, as amended.

[10-15-97; 2.80.1800.3 NMAC - Rn, 2 NMAC 80.1800.3, 12-28-01]

### **2.80.1800.4 DURATION:**

Permanent.

[10-15-97; 2.80.1800.4 NMAC - Rn, 2 NMAC 80.1800.4, 12-28-01]

### **2.80.1800.5 EFFECTIVE DATE:**

July 1, 1993 unless a different date is cited at the end of a section.

[10-15-97; 2.80.1800.5 NMAC - Rn, 2 NMAC 80.1800.5, 12-28-01]

### **2.80.1800.6 OBJECTIVE:**

The objective of this rule is to clarify the authority of the executive director, and to provide for an annual evaluation of the executive director by the retirement board.

[10-15-97; 11-15-97; 2.80.1800.6 NMAC - Rn, 2 NMAC 80.1800.6, 12-28-01]

## **2.80.1800.7 DEFINITIONS:**

**[RESERVED]**

## **2.80.1800.8 GENERAL PROVISIONS:**

**A.** The board, at a regular meeting, shall employ an executive director who shall serve at the pleasure of the board and at a salary set by the board. The executive director shall be the chief administrative officer of the board and of the association and serve as a fiduciary to the retirement fund. The executive director shall attest to official actions of the board when required.

**B.** The executive director is authorized to approve duly executed applications for affiliation by public employers, and applications for normal, disability and survivor pensions in order to insure timely processing of retirement pensions. In cases of disability retirement applications, approval by the disability review committee is necessary prior to approval by the executive director. All approvals by the executive director for pensions must be submitted for ratification by the board at its next regular meeting.

**C.** The executive director is authorized to perform any acts required of the board pursuant to a proper delegation of authority and rules and policies and procedures adopted by the board.

**D.** The board shall conduct an annual written evaluation of the executive director by the anniversary date of the appointment of the executive director.

**E.** The executive director shall adhere to the standards set forth in and be subject to the enforcement provisions of the New Mexico Governmental Conduct Act.

[10/15/1997; 11/15/1997; 2.80.1800.8 NMAC - Rn, 2 NMAC 80.1800.8, 12/28/2001; A, 12/28/2021]

## **2.80.1800.9 CONDUCT OF BUSINESS:**

**A.** The business affairs of the board shall be conducted by the executive director within the authority outlined by the public employees retirement act and rules and policies and procedures adopted by the board.

**B.** On behalf of the board, the executive director is authorized to execute vouchers, delegate others to execute vouchers, buy and sell, or assign, or otherwise acquire or dispose of stocks, bonds, notes, or other securities held by the board, and execute such other documents as may be necessary to the administration of the public employees retirement act.

**C.** The executive director shall obtain the board's approval before requesting a formal opinion interpreting the law from the attorney general. The director may, however, obtain advice, either oral or written, from the attorney general as the need may arise.

**D.** The executive director is authorized to decide whether the association will seek lead plaintiff status in securities class action lawsuits in order to ensure a timely decision is made in accordance with applicable deadlines set out by the court. The executive director shall promptly apprise the board chair of such decisions. All such decisions shall be presented at the next board meeting and the board may ratify or reject the executive director's decision. If the board rejects the executive director's decision, the association shall seek to remove itself from lead plaintiff status.

**E.** The executive director may recommend and propose repeal, replacement, amendments, or new rules for action by the board. Any such recommendation shall be provided to each board member with the agenda for the meeting at which the recommendation will be considered, within a reasonable time, prior to being considered by the board.

[2.80.1800.9 NMAC – N, 12/28/2021]

#### **2.80.1800.10 ADMINISTRATIVE BUDGETS:**

**A.** The executive director shall prepare budgets and requests for appropriations, which shall be considered and approved by the board prior to submission to the department of finance and administration or legislature.

**B.** The executive director shall annually prepare an organizational chart coincident with the adoption of the budget. This chart shall include a description of all positions required for the operation of the association, and the executive director shall be responsible for staffing these positions. This responsibility shall include the authority for the employment, promotion, demotion and dismissal of all employees.

[2.80.1800.10 NMAC – N, 12/28/2021]

#### **2.80.1800.11 ACTUARY:**

The executive director shall contract with an actuarial firm to be engaged for the purpose of performing routine actuarial services and annual actuarial valuations to be provided for in a contract to be approved by the board, subject to compliance with the procurement code rules and procedures.

[2.80.1800.11 NMAC – N, 12/28/2021]

#### **PART 1801-1899: [RESERVED]**

## **PART 1900: PUBLIC EMPLOYERS**

### **2.80.1900.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.80.1900.1 NMAC - Rn, 2 NMAC 80.1900.1, 12-28-01]

### **2.80.1900.2 SCOPE:**

This rule affects municipal employers, employees of affiliated public employers, and the association under the Public Employees Retirement Act.

[10-15-97; 2.80.1900.2 NMAC - Rn, 2 NMAC 80.1900.2, 12-28-01]

### **2.80.1900.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-11-122 and 10-11-130, as amended.

[10-15-97; 2.80.1900.3 NMAC - Rn, 2 NMAC 80.1900.3, 12-28-01]

### **2.80.1900.4 DURATION:**

Permanent.

[10-15-97; 2.80.1900.4 NMAC - Rn, 2 NMAC 80.1900.4, 12-28-01]

### **2.80.1900.5 EFFECTIVE DATE:**

October 21, 1988, unless a different date is cited at the end of a section.

[10-15-97; 2.80.1900.5 NMAC - Rn, 2 NMAC 80.1900.5, 12-28-01]

### **2.80.1900.6 OBJECTIVE:**

The objective of this rule is to set forth the information that is required by the association from public employers seeking affiliation with PERA.

[10-15-97; 2.80.1900.6 NMAC - Rn, 2 NMAC 80.1900.6, 12-28-01]

### **2.80.1900.7 DEFINITIONS:**

**[RESERVED]**

## **2.80.1900.8 GENERAL PROVISIONS:**

A. Any public employer that seeks to become an affiliated public employer shall provide the association with the following information for review:

(1) a certified copy of the resolution or ordinance adopted by the public employer pursuant to NMSA 1978, Section 10-11-122(B); and

(2) if the public employer is a local public body subject to the jurisdiction of the local government division of the New Mexico department of finance and administration, written certification by the local government division that the public employer has the approved budget sufficient to pay the contributions required upon affiliation with PERA; and

(3) such written information as the association may request to establish that the employer seeking to affiliate qualifies as one of the entities specifically listed in the definition of "public employer" contained in NMSA 1978, Section 10-11-2(P); and

(4) such information as is required by the association to make a good faith determination that the public employer meets the definition of a "governmental plan" as that term is used in Section 414(d) of the Internal Revenue Code of 1986, as amended, including but not limited to the following:

(a) a fully completed affiliated public employer questionnaire, in a form prescribed by the association, containing information pertinent to determining the employer's qualified plan status; and

(b) any supplementary information requested by the association to clarify, supplement, explain, or correct the information contained in the completed questionnaire;

(5) in the event that the association determines that the information provided by the employer in the questionnaire, or in any supplementary submission, is in any way unclear or insufficient to permit the association to make a good faith determination that the employer meets the governmental plan definition, the association may request that the employer seek a ruling from the internal revenue service to confirm that the employer meets such definition.

B. The employer shall not be deemed to have satisfied the information requirements of this part until so notified in writing by the association.

C. The association shall notify the public employer in writing whether the employer has met the requirements for affiliation and the effective date of affiliation. No later than thirty days after the effective date of affiliation, the public employer shall file the following information with the association:

(1) a list of all employees on its payroll and an indication whether each employee on the list is a member of the association or intends to be exempt from membership; and

(2) a written application for exemption, in a form prescribed by the association, for each elected official and employee who intends to be exempt from membership in the association pursuant to NMSA 1978, Section 10-11-3(B); and

(3) a written application for membership, in a form prescribed by the association, for each employee who is required to be a member of the association pursuant to NMSA 1978, Section 10-11-3(A).

[10-15-97; 11-15-97; 2.80.1900.8 NMAC - Rn, 2 NMAC 80.1900.8, 12-28-01]

## **PART 1901-1999: [RESERVED]**

## **PART 2000: WITHHOLDING OF RETIREMENT PENSIONS/CONTRIBUTIONS PURSUANT TO A CHILD SUPPORT OBLIGATION ENFORCEMENT ORDER**

### **2.80.2000.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.80.2000.1 NMAC - Rn, 2 NMAC 80.2000.1, 12-28-01]

### **2.80.2000.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, and the association under the Public Employees Retirement Act.

[10-15-97; 2.80.2000.2 NMAC - Rn, 2 NMAC 80.2000.2, 12-28-01]

### **2.80.2000.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-11-130, and 10-11-136.1, as amended.

[10-15-97; 2.80.2000.3 NMAC - Rn, 2 NMAC 80.2000.3, 12-28-01]

### **2.80.2000.4 DURATION:**

Permanent.

[10-15-97; 2.80.2000.4 NMAC - Rn, 2 NMAC 80.2000.4, 12-28-01]

#### **2.80.2000.5 EFFECTIVE DATE:**

December 15, 1995 unless a different date is cited at the end of a section.

[10-15-97; 2.80.2000.5 NMAC - Rn, 2 NMAC 80.2000.5, 12-28-01]

#### **2.80.2000.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for withholding from retirement pensions/contributions the amounts due pursuant to a child support enforcement order.

[10-15-97; 2.80.2000.6 NMAC - Rn, 2 NMAC 80.2000.6, 12-28-01]

#### **2.80.2000.7 DEFINITIONS:**

[RESERVED]

#### **2.80.2000.8-2.80.2000.9 [RESERVED]**

#### **2.80.2000.10 CHILD SUPPORT OBLIGATION ENFORCEMENT ORDER:**

A. PERA requires that the following information be contained in a court order to withhold amounts due in satisfaction of current or delinquent child support obligations.

- (1) specific information identifying the member or retired member, i.e., full name, address, social security number, retirement number, if any;
- (2) specific information identifying the third party payee, i.e., full name, address, Social Security number, if any, or account code for child support enforcement bureau;
- (3) dollar amount to be withheld from the pension payment or refund of member contributions;
- (4) the period of time pension payments or refunds of member contributions will be affected by the order;
- (5) a direct order to PERA to issue separate warrants to each party.

B. A model order containing provisions for all the required information for the withholding of retirement pensions and/or contributions pursuant to a child support obligation enforcement order shall be available on request from PERA's office of general counsel.

C. Payments made pursuant to such orders shall only be made when member contributions are refunded or a pension is payable in accordance with the provisions of the Public Employees Retirement Act. PERA shall not be obligated to administer pension benefits in accordance with such orders until the first of the month following written approval by the office of general counsel.

[10-15-97; 11-15-97; 2.80.2000.10 NMAC - Rn, 2 NMAC 80.2000.10, 12-28-01]

## **2.80.2000.11-19 [RESERVED]**

### **2.80.2000.20 CHANGE OF NAME OR ADDRESS:**

Member files must contain current names and addresses for persons having a court-determined interest in member retirement accounts. Any person who has such an interest must provide PERA with a written statement of change of name or address. If a warrant is returned as undeliverable because of incorrect name or address, the money due the person will accumulate in the fund until PERA is furnished with the correct information. No interest shall be paid on any monies so accumulated.

[10-15-97; 2.80.2000.20 NMAC - Rn, 2 NMAC 80.2000.20, 12-28-01]

## **PART 2001-2099: [RESERVED]**

## **PART 2100: MEMBER CONTRIBUTIONS**

### **2.80.2100.1 ISSUING AGENCY:**

Public Employees Retirement Association (PERA), 33 Plaza La Prensa, Santa Fe, New Mexico 87507.

[2.80.2100.1 NMAC - Rp, 2.80.2100.1 NMAC, 12/30/15]

### **2.80.2100.2 SCOPE:**

This rule affects the members, public employers, retirement board and the association under the Public Employees Retirement Act.

[2.80.2100.2 NMAC - Rp, 2.80.2100.2 NMAC, 12/30/15]

### **2.80.2100.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-11-124, 10-11-129 and 10-11-130 NMSA 1978, as amended.

[2.80.2100.3 NMAC - Rp, 2.80.2100.3 NMAC, 12/30/15]

#### **2.80.2100.4 DURATION:**

Permanent.

[2.80.2100.4 NMAC - Rp, 2.80.2100.4 NMAC, 12/30/15]

#### **2.80.2100.5 EFFECTIVE DATE:**

December 30, 2015, unless a different date is cited at the end of a section.

[2.80.2100.5 NMAC - Rp, 2.80.2100.5 NMAC, 12/30/15]

#### **2.80.2100.6 OBJECTIVE:**

The objectives of this rule are to establish standards and procedures for refunding member contributions and to identify federal obligations which may be satisfied out of benefits payable.

[2.80.2100.6 NMAC - Rp, 2.80.2100.6 NMAC, 12/30/15]

#### **2.80.2100.7 DEFINITIONS:**

**A.** "Another qualified plan" for the purposes of the direct rollover provisions in Section 10-11-124 (C) NMSA 1978, means an eligible retirement plan, including:

(1) an individual retirement account described in Internal Revenue Code Section 408(a);

(2) an individual retirement annuity described in Internal Revenue Code Section 408(b);

(3) a qualified trust described in Internal Revenue Code Section 401(a) that accepts the distributee's eligible rollover distribution;

(4) an annuity plan described in Internal Revenue Code Section 403(a);

(5) effective January 1, 2002, an annuity contract described in Internal Revenue Code Section 403(b);

(6) effective January 1, 2002, a plan eligible under Internal Revenue Code Section 457(b) that is maintained by a state, political subdivision of a state or any agency or instrumentality of a state or political subdivision of a state that agrees to separately account for amounts transferred into the plan; or

(7) effective January 1, 2008, a Roth IRA described in Internal Revenue Code Section 408A.

**B.** "Direct rollover" means a payment by the retirement system to the eligible retirement plan specified by the distributee.

**C.** "Distributee" means:

- (1) an employee or a former employee;
- (2) an employee's or former employee's surviving spouse;
- (3) an employee's or former employee's spouse or former spouse who is the alternate payee under a qualified domestic relations order, as defined in Internal Revenue Code Section 414(p);
- (4) effective January 1, 2007, a non-spouse beneficiary who is a designated beneficiary as defined by Internal Revenue Code Section 401(a)(9)(E); or
- (5) effective January 1, 2002, a surviving spouse, as defined by federal law, or a spouse or former spouse who is an alternate payee under a domestic relations order dividing PERA benefits, as defined in Internal Revenue Code Section 414(p).

**D.** "Eligible rollover distribution" means:

- (1) any distribution of all or any portion of the balance to the credit of the distributee, except that an eligible rollover distribution does not include: any distribution that is one of a series of substantially equal periodic payments, not less frequently than annually, made for the life, or the life expectancy, of the distributee or the joint lives, or joint life expectancies, of the distributee and the distributee's designated beneficiary, or for a specified period of 10 years or more;
- (2) any distribution to the extent such distribution is required under Internal Revenue Code Section 401(a)(9);
- (3) the portion of any distribution that is not includible in gross income; or
- (4) any other distribution that is reasonably expected to total less than two hundred dollars (\$200) during the year.

[2.80.2100.7 NMAC - Rp, 2.80.2100.7 NMAC, 12/30/15]

## **2.80.2100.8 GENERAL PROVISIONS:**

**A.** No partial refund of a member's contributions is permitted.

**B.** A member shall not receive a refund of contributions if the member terminates employment with one affiliated public employer and is thereafter employed by the same or another affiliated public employer within thirty (30) days of termination. The

application for a refund of member contributions, if desired, must be filed prior to any subsequent employment. If the application for refund is not filed within this period of time, no refund shall be permitted until termination of all affiliated public employment.

**C.** Requests for refunds of member contributions shall be made on forms provided by the association.

**(1)** The member or the member's legal representative, or the member's designated refund beneficiary or the beneficiary's legal representative, if the member is deceased, must complete and sign the request for refund.

**(2)** If the member is deceased, the applicant for refund must provide PERA with a copy of the member's death certificate. If the deceased member has no living beneficiary, then the personal representative of the estate must provide PERA with a copy of the letters of administration or order of appointment of personal representative, signed and filed in court; or must comply with NMSA 1978, Section 45-3-1201.

**(3)** If the member has been divorced, the member shall provide PERA with complete endorsed copies of all court documents necessary to ascertain the current marital status of the member and whether any ex-spouse of the member is entitled to any portion of the member's contributions. Such documents shall include the final decrees and marital property settlements for all marriages during the member's employment with an affiliated public employer. If the member's only divorce was prior to becoming a PERA member, then the final divorce decree is required, but no marital property settlement is required. If the member was divorced more than once before becoming a PERA member, then only the most recent final decree is required. The requirement for providing a copy of a final decree may be waived, in PERA's discretion, when PERA can establish through online court records that a divorce decree was entered on a specific date and no further documentation is deemed necessary to administer benefits. If the member's former spouse is entitled to a portion of a refund of member contributions pursuant to a court order entered under NMSA 1978, Section 10-11-136, the member's former spouse may request, on a form prescribed by the association, that his or her share of a refund of member contributions be transferred directly to another qualified plan as allowed by the Internal Revenue Code, as specified under Subsection L of 2.80.2100.8 NMAC.

**(4)** The member's last affiliated public employer must certify to the termination of employment of the member before a refund may be made.

**(5)** No refund shall be permitted unless a membership application is on file with PERA. The requirement for a membership application may be waived, in PERA's discretion, when PERA can establish membership for the applicable time period through other documentation.

**(6)** After tax employee contributions that are not includible in gross income may be directly refunded to the member.

**D.** Interest on member contributions shall be posted annually effective June 30 of each year at the rate of 2.0%.

**E.** A refund of member contributions includes interest on those contributions calculated through the last working day of the month prior to the date of refund.

**F.** A refund of member contributions shall not include the purchase cost received to buy permissive service credit pursuant to Section 10-11-7(H) NMSA 1978.

**G.** If a court order issued pursuant to Section 10-11-136 NMSA 1978 or Section 10-11-136.1 NMSA 1978 restraining, withholding or dividing a refund of member contributions is received by PERA after a request for refund of contributions has been received but has not been paid, PERA will comply with the order.

**H.** Pursuant to Section 10-11-135, NMSA 1978, PERA retirement accounts are not subject to legal process under other state laws, except for division of a community interest in such accounts as provided in Section 10-11-136 NMSA 1978 or in enforcement of child support obligations as provided in Section 10-11-136.1 NMSA 1978. In the following instances, however, federal laws pre-empt the provisions of the Public Employees Retirement Act and PERA will honor the federal action if the account is in pay status, i.e. if the member has terminated employment and requested a refund of contributions or if a pension is payable. If the federal action is applied against a refund of member contributions, non-tax deferred contributions shall be paid before tax-deferred contributions.

**(1)** IRS notices of levy for unpaid taxes.

**(2)** Orders by a United States bankruptcy court.

**(3)** Orders of garnishment for fines or restitution by a federal court in a criminal case.

**I.** Members may designate only one refund beneficiary. Such designation shall be in writing in the form prescribed by PERA. If the refund beneficiary is other than a natural person, the member shall provide documentation as required by the association. The member shall be responsible for updating the beneficiary designation form with current information, including but not limited to, the beneficiary's name and address. If a warrant for a refund to the most recent beneficiary on file with the association is returned as undeliverable because of incorrect name or address, the money will remain with the association until it is furnished with the correct information.

**J.** Forfeitures arising from severance of employment, death or any other reason, must not be applied to increase the benefits any member would otherwise receive under the plan. PERA shall make all reasonable efforts to refund contributions or to pay pensions as required by the plan.

**K.** The maximum annual contribution limits contained in Internal Revenue Code Section 415(c), as amended and adjusted, are incorporated herein by reference.

**L.** For distributions made on or after January 1, 1993, notwithstanding any contrary provision or retirement law that would otherwise limit a distributee's election under this rule, a distributee may elect, at the time and in the manner prescribed by the PERA, to have any portion of an eligible rollover distribution paid directly to an eligible retirement plan specified by the distributee in a direct rollover.

**(1)** A non-spouse beneficiary may only rollover the distribution to an individual retirement account or individual retirement annuity established for the purpose of receiving the distribution and the account or annuity will be treated as an inherited individual retirement account or annuity.

**(2)** Effective January 1, 2002, a portion of a distribution will not fail to be an eligible rollover distribution merely because the portion consists of after-tax employee contributions that are not includible in gross income. However, such portion may be transferred only to an individual retirement account or annuity described in Internal Revenue Code Section 408(a) or (b), or to a qualified defined contribution plan described in Internal Revenue Code Section 401(a), or on or after January 1, 2007, to a qualified defined benefit plan described in Internal Revenue Code Section 401(a) or to an annuity contract described in Internal Revenue Code Section 403(b), that agrees to separately account for amounts so transferred, and earnings thereon, including separately accounting for the portion of the distribution that is includible in gross income and the portion of the distribution that is not so includible.

[2.80.2100.8 NMAC - Rp, 2.80.2100.8 NMAC, 12/30/15]

## **2.80.2100.9 UNCLAIMED CONTRIBUTIONS:**

**A.** A member's accumulated member contributions, plus interest, shall constitute unclaimed member contributions pursuant to Section 10-11-128 NMSA 1978 if the following conditions are met:

**(1)** the member has applied for and received a refund of member contributions;

**(2)** a balance of five hundred dollars (\$500) or less remains on the member's account;

**(3)** PERA has sent a letter to the member's last known address on file with the association notifying the member that the funds are available for disbursement and received no response within 60 days of the mailing.

**B.** A deceased member's accumulated member contributions, plus interest, shall constitute unclaimed member contributions, pursuant to Section 10-11-128 NMSA 1978, if the following conditions are met:

(1) PERA has received notification of the member's death through an authorized death notification provider or a certified copy of the member's death certificate;

(2) a survivor pension benefit is not payable;

(3) a balance of member contributions, plus interest, remains in the deceased member's account;

(4) PERA has sent an initial letter to the deceased member's last known address on file with the association and to the address of the member's refund beneficiary or estate, if known, notifying the deceased member's refund beneficiary or estate that the funds are available for disbursement and if no response is received within 60 days of mailing the initial letter, PERA has sent a final letter the following year to the deceased member's last known address on file with the association and to the address of the member's refund beneficiary or estate, if known, notifying the deceased member's refund beneficiary or estate that the funds are available for disbursement.

(5) PERA has received no response within two years of the date of the member's death.

**C.** Unclaimed member contributions, plus interest, shall be credited to the income fund, and the member's account shall be closed.

**D.** PERA shall perpetually maintain a list of members and the value of the accounts which were closed in accordance with this provision.

**E.** No interest shall accrue on unclaimed member contributions which have been credited to the income fund.

**F.** A member, beneficiary or estate of a member may at any time apply to receive a refund of unclaimed member contributions and interest accrued before the account was closed in accordance with the provisions of this rule.

**G.** For the limited purpose of receiving a form 1099 to file taxes for a deceased member, PERA will accept a notarized affidavit from the member's surviving representative. The affidavit shall include the deceased member's social security number, an identification of the relationship between the deceased member and surviving representative, and an affirmation that the request for the form 1099 is for the purpose of settling the affairs or filing taxes for the deceased member.

**H.** If a member whose account has been closed is subsequently employed by an affiliated public employer, the member's account shall be reopened effective the date of reemployment, and the account balance, accrued interest and service credit shall be restored to the amounts in effect at the time the account was closed.

[2.80.2100.9 NMAC - Rp, 2.80.2100.9 NMAC, 12/30/2015; A, 12/28/2021]

## **PART 2101-2199: [RESERVED]**

## **PART 2200: MUNICIPAL FIRE MEMBER COVERAGE PLANS**

### **2.80.2200.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[4-1-96; 2.80.2200.1 NMAC - Rn, 2 NMAC 80.2200.1, 12-28-01]

### **2.80.2200.2 SCOPE:**

This rule affects the affiliated public employers and employees under the municipal fire member coverage plans of the Public Employees Retirement Act during the fiscal year 1997.

[4-1-96; 2.80.2200.2 NMAC - Rn, 2 NMAC 80.2200.2, 12-28-01]

### **2.80.2200.3 STATUTORY AUTHORITY:**

This rule is authorized by Section 2, Chapter 8 of the New Mexico Laws of 1996 and Section 10-11-130, NMSA 1978.

[4-1-96; 2.80.2200.3 NMAC - Rn, 2 NMAC 80.2200.3, 12-28-01]

### **2.80.2200.4 DURATION:**

Permanent.

[4-1-96; 2.80.2200.4 NMAC - Rn, 2 NMAC 80.2200.4, 12-28-01]

### **2.80.2200.5 EFFECTIVE DATE:**

April 1, 1996. This rule was originally adopted as an emergency rule. See notice of adoption of emergency rule and notice of PERA rulemaking, March 28, 1996, published in the New Mexico register on April 15, 1996. The rule was adopted by the PERA board as a permanent rule on May 30, 1996. The effective date of the permanent rule relates back to the effective date of the emergency rule.

[4-1-96; 6-15-96; 2.80.2200.5 NMAC - Rn, 2 NMAC 80.2200.5, 12-28-01]

#### **2.80.2200.6 OBJECTIVE:**

On March 4, 1996, legislation was signed by Governor Gary Johnson which appropriated \$300,000 from the general fund to the employers accumulation fund for the fiscal year 1997 for the purpose of funding municipal fire member coverage plans. The legislation called for the following: "The amount of the appropriation shall be matched by employers or employees, or both, of participants in the municipal fire member plans by a contribution of an amount equal to one percent of the municipal fire member plan's monthly payroll for fiscal year 1997." House Appropriations and Finance Committee Substitute for House Bills 667 and 693, Section 2. The objective of this rule is to establish administrative procedures to implement this "match" in time for fiscal year 1997. Because of the limited period of time between the end of the 1996 legislative session and the effective date of the legislation, this rule was originally adopted as an emergency rule to give municipalities adequate time to take official action with respect to the allocation of the match between the employers and employees. Immediate adoption of this rule was also necessary for the preservation of the soundness of the fund and the general welfare of the association.

[4-1-96; 6-15-96; 2.80.2200.6 NMAC - Rn, 2 NMAC 80.2200.6, 12-28-01]

#### **2.80.2200.7 DEFINITIONS:**

Definitions of terms used in this rule are found in 2.80.100.7 NMAC Definitions, and Section 10-11-2, NMSA 1978.

[4-1-96; 2.80.2200.7 NMAC - Rn, 2 NMAC 80.2200.7, 12-28-01]

#### **2.80.2200.8 REPORTING REQUIREMENT:**

On or before July 1, 1996, each affiliated public employer with a municipal fire member coverage plan shall file with the association a certified copy of a duly enacted resolution or ordinance of its governing body. The resolution or ordinance shall specify what percentage of the mandatory contribution equal to 1% of the municipal fire member plan monthly payroll for fiscal year 1997 will be contributed by the employer, if any, and what percentage by the employee, if any. If no such resolution or ordinance is filed with PERA by July 1, 1996, the entire 1% contribution shall be allocated to the employer and deposited into the employers accumulation fund.

[4-1-96; 2.80.2200.8 NMAC - Rn, 2 NMAC 80.2200.8, 12-28-01]

### **PART 2201-2299: [RESERVED]**

### **PART 2300: LEAVE WITHOUT PAY**

#### **2.80.2300.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[11-15-97; 2.80.2300.1 NMAC - Rn, 2 NMAC 80.2300.1, 12-28-01]

#### **2.80.2300.2 SCOPE:**

This rule affects the members, former members, beneficiaries, public employers, retirement board and the association under the Public Employees Retirement Act.

[11-15-97; 2.80.2300.2 NMAC - Rn, 2 NMAC 80.2300.2, 12-28-01]

#### **2.80.2300.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-11-130 and 10-11-8, as amended.

[11-15-97; 2.80.2300.3 NMAC - Rn, 2 NMAC 80.2300.3, 12-28-01]

#### **2.80.2300.4 DURATION:**

Permanent.

[11-15-97; 2.80.2300.4 NMAC - Rn, 2 NMAC 80.2300.4, 12-28-01]

#### **2.80.2300.5 EFFECTIVE DATE:**

November 15, 1997 unless a different date is cited at the end of a section.

[11-15-97; 2.80.2300.5 NMAC - Rn, 2 NMAC 80.2300.5, 12-28-01]

#### **2.80.2300.6 OBJECTIVE:**

The objective of this rule is to clarify how leave without pay status affects members of the association.

[11-15-97; 2.80.2300.6 NMAC - Rn, 2 NMAC 80.2300.6, 12-28-01]

#### **2.80.2300.7 DEFINITIONS:**

[RESERVED]

**2.80.2300.8-9** [RESERVED]

#### **2.80.2300.10 BREAK IN SERVICE:**

A. Except as provided in Subsection B below, leave without pay for a period that exceeds twelve (12) weeks shall be deemed a break in service. A member on leave without pay for a period exceeding twelve (12) weeks is no longer continuously employed for the purpose of NMSA 1978, Section 10-11-8(G), as amended.

B. A member who leaves the employ of an affiliated public employer to enter a uniformed service of the United States and is reemployed under the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, shall be treated as not having incurred a break in service.

[11-15-97; 2.80.2300.10 NMAC - Rn, 2 NMAC 80.2300.10, 12-28-01]

## **CHAPTER 81: RETIREE HEALTH CARE FUNDS**

### **PART 1: GENERAL PROVISIONS**

#### **2.81.1.1 ISSUING AGENCY:**

NM Retiree Health Care Authority.

[6-15-98; 2.81.1.1 NMAC - Rn, 2 NMAC 81.1.1, 12-30-02]

#### **2.81.1.2 SCOPE:**

Applies to the board of the retiree health care authority and to all employers, employees and eligible retirees, spouses and dependents participating in the coverages under the Act.

[6-15-98; 2.81.1.2 NMAC - Rn, 2 NMAC 81.1.2, 12-30-02]

#### **2.81.1.3 STATUTORY AUTHORITY:**

This Rule is promulgated pursuant to the Retiree Health Care Act, the New Mexico Retiree Health Care Act (the "Act"), Sections 10-7C-1 et seq. NMSA 1978.

[6-15-98; 2.81.1.3 NMAC - Rn, 2 NMAC 81.1.3, 12-30-02]

#### **2.81.1.4 DURATION:**

Permanent.

[6-15-98; 2.81.1.4 NMAC - Rn, 2 NMAC 81.1.4, 12-30-02]

#### **2.81.1.5 EFFECTIVE DATE:**

June 15, 1998 unless a later date is cited at the end of a section.

[6-15-98; 2.81.1.5 NMAC - Rn &A, 2 NMAC 81.1.5, 12-30-02]

#### **2.81.1.6 OBJECTIVE:**

The objective of this Rule is to establish procedures governing the board of the retiree health care authority ("the board").

[6-15-98; 2.81.1.6 NMAC - Rn, 2 NMAC 81.1.6, 12-30-02]

#### **2.81.1.7 DEFINITIONS:**

**[RESERVED]**

[6-15-98; 2.81.1.7 NMAC - Rn, 2 NMAC 81.1.7, 12-30-02]

#### **2.81.1.8 MEMBERSHIP OF THE BOARD:**

The board shall be composed of those persons or their designees as set out in Section 6 the Act.

[6-15-98; 2.81.1.8 NMAC - Rn, 2 NMAC 81.1.8, 12-30-02]

#### **2.81.1.9 BOARD OFFICERS/TERMS OF OFFICE:**

Officers of the board shall consist of a president, vice president and a secretary who shall be elected from the board membership. The president shall preside over all board meetings and in his/her absence the vice-president shall preside and in the absence of both the president and the vice-president then the secretary shall preside. The terms of officers shall be for one year and they shall be elected at the annual meeting of the board. An officer may be reelected to the same position or elected to fill another position as an officer of the board. Any officer of the board shall serve in the capacity to which the officer was elected until written notification of the replacement is filed with the board pursuant to Section 10 [now 2.81.1.10 NMAC] of this Rule or until the member resigns their position as an officer of the board, or until authorized written notification of a change of a board member is filed with the NMRHCA by the proper person or entity.

[6-15-98; 2.81.1.9 NMAC - Rn, 2 NMAC 81.1.9, 12-30-02]

#### **2.81.1.10 NOTIFICATION OF APPOINTMENT AND REMOVAL OF BOARD MEMBERS AND ALTERNATES:**

Employment as the education retirement director, executive secretary of the public employees retirement association, or the swearing in of the state treasurer shall automatically constitute positions or offices. They may select designees who shall serve at the pleasure of the person holding the position or office. Other members of the board shall not be authorized to appoint alternates/designees to the board. The remaining board members shall serve at the pleasure of the person or entity authorized to select

the board member. The board member shall assume office at the time the selecting person or entity files written notification of the appointment of the board member or designee at the offices of the NMRHCA. The written notice shall contain the name, title, business address and business and home telephone number of the board member or designee. Ex officio board members and their designees shall only serve as board members during the ex officio board member's period of employment or election in the capacity employed or elected. Each remaining board member or designee shall only serve until authorized written notification of a change is filed with the NMRHCA.

[6-15-98; 2.81.1.10 NMAC - Rn, 2 NMAC 81.1.10, 12-30-02]

#### **2.81.1.11 ABSENCES FROM MEETINGS:**

Since the board may meet less often than monthly and continuity of board attendance is important, this Rule will be enforced. Any member of the board missing more than two board meetings in any calendar year shall be requested to explain his or her absence to the board. If the board determines that the excessive absences are due to the board member's or designee board member's neglect, the selecting entity or ex officio officer may be requested by the board to select or designate another person. Presence of a designee of an ex officio board member shall be counted as presence of the board member.

[6-15-98; 2.81.1.11 NMAC - Rn, 2 NMAC 81.1.11, 12-30-02]

#### **2.81.1.12 ANNUAL MEETING OF THE BOARD:**

The board shall hold an annual meeting at such time as the board determines.

[6-15-98; 2.81.1.12 NMAC - Rn, 2 NMAC 81.1.12, 12-30-02]

#### **2.81.1.13 VACANCY IN OFFICE:**

If one of the officers vacates their position as an officer of the board, the next lower officer shall automatically assume the duties of the higher officer. For example, if the presidency becomes vacant, the vice-president shall automatically assume the title and duties of president and the secretary shall automatically assume the title and duties of vice-president. After due notice, a new secretary will be elected by the board. Each of the officers shall serve until election of officers at the next annual meeting.

[6-15-98; 2.81.1.13 NMAC - Rn, 2 NMAC 81.1.13, 12-30-02]

#### **2.81.1.14 REGULAR MEETING OF THE BOARD:**

The regular meetings of the board shall be held on those dates and times and in such places to be determined from time to time by the board. The date of any regular meeting may be changed by a majority vote of a quorum of the board. The president or vice-

president may cancel a regularly scheduled meeting of the board by giving notice of the cancellation in advance of any regularly scheduled meeting.

[6-15-98; 2.81.1.14 NMAC - Rn, 2 NMAC 81.1.14, 12-30-02]

#### **2.81.1.15 ADOPTION OF ROBERT'S RULES OF ORDER FOR THE CONDUCT OF BOARD BUSINESS:**

Robert's rules of order are adopted by the board and shall be used for the conduct of all meetings to be held by the NMRHCA. Robert's rules of order shall be binding in all cases where they are not inconsistent with New Mexico statutes and rules and regulations adopted by the NMRHCA.

[6-15-98; 2.81.1.15 NMAC - Rn, 2 NMAC 81.1.15, 12-30-02]

#### **2.81.1.16 CALL FOR MEETINGS OF THE BOARD:**

A call for meetings of the board shall be as follows:

**A. Special Meetings:** A special meeting of the board is a meeting other than a regular or emergency meeting and may be called by the president, vice-president or any three board members for the specific purposes specified in the call.

**B. Emergency Meeting:** An emergency meeting of the board is a meeting other than a regular or special meeting and may be called by the president, vice-president, or any two members of the board to consider a sudden or unexpected set of circumstances affecting the NMRHCA which require the immediate attention of the board.

[6-15-98; 2.81.1.16 NMAC - Rn, 2 NMAC 81.1.16, 12-30-02]

#### **2.81.1.17 OPEN MEETINGS:**

The board shall conduct its meetings pursuant to the Open Meetings Act (Section 10-15-1 et seq. NMSA 1978) so as to assure reasonable citizen access to all board meetings. At least once a year, the board shall determine in a public meeting what notice for a public meeting is reasonable when applied to the board. At a minimum, that notice shall include broadcast stations licensed by the federal communications commission and newspapers of general circulation that have provided a written request for such notice (see: Open Meetings Act 10-15-1(D) NMSA 1978). That notice shall also include an agenda containing a list of specific items of business to be discussed or transacted at the meeting or information on how the public may obtain a copy of such an agenda (see Open Meetings Act Section 10-15-1(F) NMSA 1978).

[6-15-98; 2.81.1.17 NMAC - Rn, 2 NMAC 81.1.17, 12-30-02]

#### **2.81.1.18 QUORUM:**

A majority of all of the board members shall constitute a quorum for conducting the affairs of the NMRHCA. In the event a position on the board is vacant due to resignation, removal or failure to appoint, a quorum shall be a majority of those persons holding office. The president of the board is a voting member of the board, shall be entitled to debate any issue and vote on any issue in the same manner as other members of the board and shall be considered when present as a member of the board for purposes of a quorum.

[6-15-98; 2.81.1.18 NMAC - Rn, 2 NMAC 81.1.18, 12-30-02]

#### **2.81.1.19 PROCEDURES FOR ADDRESSING THE BOARD:**

The procedures for addressing the board shall be as follows:

**A. Individual and Subject Matter.** An individual may speak on any item that appears on the adopted agenda, before a final vote is taken, by notifying and subsequently being recognized by the president or then presiding officer. The president or then presiding officer may, in his discretion, limit the time any individual or entity is allotted to make a presentation and the president or then presiding officer may in his discretion, limit the time allotted for any subject.

**B. Advance Notice of Matter to be Presented.** A person with a matter to present to the board shall submit the request in writing with appropriate supporting materials four days in advance of a regularly scheduled meeting, twenty-four hours in advance of a special meeting and three hours in advance of an emergency meeting.

[6-15-98; 2.81.1.19 NMAC - Rn, 2 NMAC 81.1.19, 12-30-02]

#### **2.81.1.20 DUTIES AND POWERS OF THE BOARD:**

**A. Board's Authority Vested by the Constitution of the State:** The board retains and reserves unto itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the Constitution of the state of New Mexico and statutes, including those prescribed by Sections 10-7C-1 et seq. NMSA 1978 and such other power and authority as may be conferred upon the board from time to time.

**B. Board Hearing Authority Delegable:** In any instance in which the board is authorized to conduct an adjudicatory hearing pursuant to the New Mexico Retiree Health Care Act, or pursuant to these regulations, the board may delegate the authority to conduct such an adjudication to a hearing authority, designation of which shall be in the sole and exclusive authority of the board, pursuant to procedures to be adopted by the hearing authority in consultation with the board's general counsel. Upon completion of the hearing, the hearing authority shall issue a disposition to the board, and, upon the application of either party to the adjudication, the board shall determine by majority vote whether to adopt the hearing authority's disposition as its own or to consider the matter further itself. In the event the board votes to consider the matter further, it shall also

determine whether such consideration will include the parties' written submissions only, such written submissions plus oral argument before the board, or rehearing of all or part of the matter before the board.

**C. Authority of the Board to be Liberally Construed:** The authority of the board shall be liberally construed in all doubtful cases to be inclusive of the actions taken by the board.

[6-15-98; 2.81.1.20 NMAC - Rn & A, 2 NMAC 81.1.20, 12-30-02]

#### **2.81.1.21 PAYMENT OF PER DIEM AND MILEAGE:**

The NMRHCA shall pay per diem and mileage consistent with the Per Diem and Mileage Act, Section 10-8-1 et seq. NMSA 1978 and consistent with the per diem and mileage reimbursement requirements of the department of finance and administration as amended and as authorized from time to time by the board acting in a board meeting.

**A. Payment to NMRHCA Employees:** The NMRHCA employees are entitled to receive per diem and mileage for travel incurred in the normal course and scope of their employment. No employee shall be entitled to receive per diem and mileage for travel outside of the state without obtaining the board's prior approval for the travel or without obtaining the prior approval of an officer of the board if the board has delegated to such officer the authority to grant such approval.

**B. Payment to NMRHCA Board Members:** An NMRHCA board member is entitled to receive per diem and mileage for travel incurred for attending all regular, special and emergency board meetings called pursuant to the Open Meetings Act and the NMRHCA's open meetings resolution. In addition, the NMRHCA board members named to serve on the NMRHCA board agenda committee is entitled to receive per diem and mileage for travel incurred for attending all agenda committee meetings. NMRHCA board members shall not be entitled to receive per diem and mileage for any other travel, inside or outside of the state, without obtaining prior approval of an officer of the board or the executive director if the board has delegated to such officer or executive director the authority to grant such approval.

**C. Payment to NMRHCA Alternate Board Members or to Designees of Ex Officio Board Members:** An NMRHCA alternate board member or board member by designation of an ex officio board member is entitled to receive per diem and mileage for travel incurred for attending regular, special and emergency board meetings called pursuant to the Open Meetings Act and the NMRHCA's open meetings resolution only when the NMRHCA board member or ex officio board member is not present at the board meeting and the alternate or designee attends in the place of the board member or ex officio board member. The NMRHCA shall not pay per diem and mileage to the alternate board member or designee and to the board member or ex officio board member for attendance at the same meeting on the same day. NMRHCA alternate

board members shall not be entitled to receive per diem and mileage for any other travel, inside or outside of the state, without obtaining prior approval of the board.

**D. Payment to NMRHCA Advisory Committee Members:** An NMRHCA advisory committee member named by the board to serve on an advisory committee is entitled to receive per diem and mileage for travel incurred for attending an NMRHCA advisory committee meeting which has been scheduled in writing by the board or by the executive director. NMRHCA advisory committee members shall not be entitled to receive per diem and mileage for any other travel, inside or outside of the state, without obtaining prior approval of the board.

[6-15-98; 2.81.1.21 NMAC - Rn, 2 NMAC 81.1.21, 12-30-02]

## **PART 2: COMMUNITY RELATIONS**

### **2.81.2.1 ISSUING AGENCY:**

NM Retiree Health Care Authority ("NMRHCA").

[6/15/98; Recompiled 10/01/01]

### **2.81.2.2 SCOPE:**

This rule applies to all citizens interested in the NMRHCA program of providing retiree, spouse and dependent health care coverages and other benefits to eligible retired employees, eligible spouses and eligible dependents.

[6/15/98; Recompiled 10/01/01]

### **2.81.2.3 STATUTORY AUTHORITY:**

This rule is promulgated pursuant to the New Mexico Retiree Health Care Act (the "Act"), Sections 10-7C-1 et seq. NMSA 1978.

[6/15/98; Recompiled 10/01/01]

### **2.81.2.4 DURATION:**

Permanent.

[6/15/98; Recompiled 10/01/01]

### **2.81.2.5 EFFECTIVE DATE:**

June 15, 1998 [unless a later date is cited at the end of a section].

[6/15/98; Recompiled 10/01/01]

#### **2.81.2.6 OBJECTIVE:**

The objective of this rule is to establish guidelines to encourage interaction with state agencies, school districts, educational entities, independent public employers, municipalities, counties, institutions of higher education and other public entities and residents of New Mexico to better inform them of the operations of the NMRHCA and to learn of their needs and concerns.

[6/15/98; Recompiled 10/01/01]

#### **2.81.2.7 DEFINITIONS:**

**[RESERVED]**

[6/15/98; Recompiled 10/01/01]

#### **2.81.2.8 RESPONSIBILITY TO THE PUBLIC:**

The board recognizes its responsibility to the public to provide information concerning its actions, its policies, and details of its educational and business operations. in recognition of this responsibility the board shall endeavor to:

**A. Meetings open to public:** Open all regular, special and emergency meetings of the board of directors of the NMRHCA to the public with notice publicly made in advance consistent with the New Mexico Open Meetings Act and the NMRHCA's open meetings resolution then in effect and adopted by the board for governing open meetings.

**B. Hold annual budget hearing:** Hold an annual budget hearing each spring, open to the public and publicly announced in advance, for the purpose of adopting the budget for the forthcoming fiscal year.

**C. Submission of third party administrators annual report:** Require that the third party administrators submit an annual report of financial and operational activities to the board. Such report shall be circulated to NMRHCA participating employers as defined in the act for retention as a public record by those employers and for use by them in providing the information to the public, their employees and retirees.

**D. Informing the public:** Inform the public of NMRHCA matters through appropriate public news media and authority publications.

[6/15/98; Recompiled 10/01/01]

#### **2.81.2.9 PARTICIPATION BY THE PUBLIC:**

The board recognizes that constructive study, discussion, and active participation by citizens are necessary to promote the best possible programs of insurance in the community. To encourage this participation, the board shall endeavor to:

**A. Invite participating entities to assist:** Invite participating entities to assist individually or in groups in matters of concern to the NMRHCA.

**B. Encourage participation by others:** Encourage participation by employees and retirees of participating entities.

**C. Coordination with state agencies.** The board shall endeavor to communicate with the risk management division of the general services department, the department of insurance of the state and the municipal league and county associations insurance programs.

[6/15/98; Recompiled 10/01/01]

## **PART 3: CODE OF ETHICS**

### **2.81.3.1 ISSUING AGENCY:**

NM Retiree Health Care Authority ("NMRHCA").

[6/15/98; Recompiled 10/01/01]

### **2.81.3.2 SCOPE:**

This rule applies to all board members, employees, actuaries, consultants, attorneys and members of ad. hoc. or standing committees of the NMRHCA.

[6/15/98; Recompiled 10/01/01]

### **2.81.3.3 STATUTORY AUTHORITY:**

This rule is promulgated pursuant to the New Mexico Retiree Health Care Act (the "Act"), Sections 10-7C-1 et seq. NMSA 1978.

[6/15/98; Recompiled 10/01/01]

### **2.81.3.4 DURATION:**

Permanent.

[6/15/98; Recompiled 10/01/01]

### **2.81.3.5 EFFECTIVE DATE:**

June 15, 1998 [unless a later date is cited at the end of a section].

[6/15/98; Recompiled 10/01/01]

#### **2.81.3.6 OBJECTIVE:**

**A.** The objective of this rule is to establish procedures governing a code of ethics that must be adhered to by those persons covered and provide penalties for failure to comply. The proper operation of a democratic government requires that public representatives and those attorneys, consultants, agents and employees on who they rely for advice and opinions be independent, impartial, and responsible to the people.

**B.** NMRHCA decisions and policy should be made through proper channels of the NMRHCA structure and public office, employment or contracts should not be used for personal gain. A conflict of interest exists when a public representative's, public employee's or public contractor's private or personal interests conflict with his/her public duties or when a public representative, public employee, agent, consultant or attorney for the public entity uses insider knowledge, official position, power or influence to further his/her private interests.

**C.** When a sound code of ethics is promulgated and enforced, the public has confidence in the integrity of its government. The objective of the code of ethics rule is to advance openness in government by requiring disclosure of private interests that may affect public acts, to set standards of ethical conduct, to minimize pressures on public representatives and to establish a process for reviewing and settling alleged violations.

[6/15/98; Recompiled 10/01/01]

#### **2.81.3.7 DEFINITIONS:**

As used in the code of ethics rule:

**A. "business"** means a corporation, partnership, sole proprietorship, firm, organization, or individual carrying on a business or owning real property other than a personal residence;

**B. "insider information" or "confidential information"** means information which is confidential under law or practice or which is not generally available outside the circle of those who regularly serve the NMRHCA as a board member, public representative, official, employee, agent, consultant or attorney;

**C. "financial interest"** means:

**(1)** an interest of ten percent or more in a business or an interest exceeding ten thousand dollars (\$10,000.00) in a business; for a board member, official, employee,

agent, consultant attorney or other public representative this means an interest held by the individual or his or her spouse, siblings, parents, or children;

(2) an ownership interest held by the individual or his/her spouse, siblings, parents or children in business; or

(3) any employment or prospective employment (for which negotiations have already begun) of the individual or his/her spouse, siblings, parents or children;

**D. "public representative"** means a person serving the NMRHCA as board member, official, employee, agent, consultant or attorney or as a member of an ad.hoc. or standing NMRHCA advisory committee;

**E. "controlling interest"** means an interest which is greater than twenty percent;

**F. "official act"** means an official decision, recommendation, approval, disapproval or other action which involves the use of discretionary authority, except the term does not mean an act of the legislative or an act of general applicability.

[6/15/98; Recompiled 10/01/01]

### **2.81.3.8 PUBLIC REPRESENTATIVE/REGISTRATION/DISCLOSURE:**

**A.** Upon becoming a public representative, the public representative shall provide registration information to the NMRHCA office as listed below. This information shall be updated at the end of every fiscal year and shall be available to the public at all times:

(1) name;

(2) address and telephone number;

(3) professional, occupational or business licenses;

(4) membership on boards of directors of corporations, public or private associations or organizations; and

(5) the nature, but not the extent or amount, of any financial interests and controlling interests as defined in the code of ethics rule within one month of becoming a public representative.

**B.** A public representative who has a financial interest which may be affected by an official act of the NMRHCA, ad. hoc. or advisory committee shall declare such interest prior to discussion, voting, advising or taking any other action and that declaration shall be entered in the official minutes of the NMRHCA. A public representative shall abstain from voting, advising or taking any other action including discussion on that issue if the

decision, in the public representative's opinion, may affect his/her financial interest in a manner different from its effect on the general public.

[6/15/98; Recompiled 10/01/01]

**2.81.3.9 PROHIBITIONS/PRIVATE BENEFITS OR GIFTS/PERSONAL REPRESENTATION/ USE OF NMRHCA SERVICES/ACQUIRING FINANCIAL INTEREST:**

**A.** No public representative nor a member of his/her family shall request or receive and accept a gift or loan for his/her personal use or for another, if:

(1) it tends to influence the public representative in the discharge of his/her official acts; or

(2) the public representative, within two years, has been involved in any official act directly affecting the donor or lender or knows that he/she will be involved in any official act directly affecting the donor or lender.

**B.** No public representative shall request or receive a gift or loan for personal use or for the use of others from any person or business involved in a business transaction with the NMRHCA with the following exceptions:

(1) an occasional nonpecuniary gift of insignificant value;

(2) an award publicly presented in recognition of public service;

(3) a commercially reasonable loan made in the ordinary course of business by an institution authorized by the laws of the state to engage in the business of making loans; or

(4) a political campaign contribution, provided that such gift or loan is properly reported and actually used in a political campaign.

**C.** No public representative shall personally represent private interests before the board of the NMRHCA or any ad. hoc. or standing committee, which the public representative is a member, or directly or indirectly receive compensation for that representation.

**D.** No public representative shall personally represent private interests before the NMRHCA board, ad. hoc., standing committees or directly or indirectly receive compensation for that representation.

**E.** No public representative shall use or disclose insider information for his or others private purposes.

**F.** No public representative shall use NMRHCA services, personnel or equipment for personal benefit, convenience or profit, except when such use is generally available to the public and when in accordance with policies of the NMRHCA board.

**G.** No public representative shall acquire or negotiate to acquire a financial interest at a time when the official believes or has reason to believe that it will be substantially or directly affected by his official acts.

**H.** No public representative shall enter into a contract or transaction with the NMRHCA or its public representatives, unless the contract or transaction is made public by filing notice with the NMRHCA board.

**I.** A public representative shall disqualify himself from participating in any official act directly affecting a business in which he has a financial interest.

**J.** No public representative shall use confidential information acquired by virtue of his employment, office or status for his or another's private gain.

**K.** The NMRHCA shall not enter into any contract with an employee of the state or with a business in which the employee has a controlling interest, involving services or property of a value in excess of one thousand dollars (\$1,000), when the employee has disclosed his controlling interest unless the contract is made after public notice and competitive bidding; provided that this section does not apply to a contract of official employment with the NMRHCA.

**L.** The NMRHCA shall not enter into a contract with, nor take any action favorable affecting, any person or business which is:

**(1)** represented personally in the matter by a person who has been an employee of the state within the preceding year if the value of the contract or action is in excess of one thousand dollars (\$1,000) and the contract is a direct result of an official act by the employee; or

**(2)** assisted in the transaction by a former employee of the state whose official act, while in state employment, directly resulted in the NMRHCA's making that contract or taking that action.

**M.** The NMRHCA shall not enter into any contract of purchase with a legislator or with a business in which such legislator has controlling interest, involving services or property in excess of one thousand dollars (\$1,000) where the legislator has disclosed his controlling interest, unless the contract is made after public notice and competitive bidding. As used in Section 9.13 [now Subsection M of 2.81.3.9 NMAC], contract shall not mean a "lease."

#### **2.81.3.10 ENFORCEMENT/COMPLAINT/HEARING OFFICER/PENALTY FOR VIOLATION/ FRIVOLOUS COMPLAINTS:**

**A.** Any contract approval, sale or purchase entered into or official action taken by a public official in violation of this rule may be voided by action of the NMRHCA board.

**B.** Any person may make a sworn, written complaint to the NMRHCA board of a violation by a public official of any provisions of the code of ethics rule. Such complaint shall be filed with the NMRHCA executive director or if it is a complaint against him, with a member of the NMRHCA board, who shall maintain the confidentiality thereof and instruct the complainant of the confidentiality provisions of the code of ethics rule, and shall refer said complaint to the NMRHCA board at its next regularly scheduled meeting in executive session. The complaint shall state the specific provision of the code of ethics rule which has allegedly been violated and the facts which the plaintiff believes support the complaint.

**C.** Within fifteen days of receiving the complaint, the NMRHCA board in executive session shall appoint a hearing officer to review the complaint for probable cause. Within fifteen days of undertaking the inquiry to determine probable cause, the hearing officer shall report his findings to the NMRHCA board. Upon find of probable cause, within 30 days, the hearing officer shall conduct an open hearing in accordance with due process of law. Fifteen days notice in advance of the hearing shall be provided to the person subject to the complaint. Within a time specified by the NMRHCA board, the hearing officer shall report his findings and recommendations to the NMRHCA board for appropriate action based on those findings and recommendations.

**D.** If the complaint is found to be frivolous, the NMRHCA board may assess the complainant the costs of the hearing officer's fees.

**E.** Except for the hearing, the proceedings shall be kept confidential by all parties concerned, unless the accused public official requests that the process be open at any stage. Persons complained against shall have the opportunity to submit documents to the hearing officer for his review in determining probable cause.

**F.** Any violation of the law shall be referred to the appropriate law enforcement agency for prosecution.

[6/15/98; Recompiled 10/01/01]

#### **2.81.3.11 CODE OF ETHICS HEARING OFFICER/APPOINTMENT/QUALIFICATIONS/DUTIES:**

**A.** A hearing officer shall be appointed by the NMRHCA board for each complaint. The hearing officer may be an authority board member, agent or employee of the NMRHCA or another person. The complainant and the person complained against have the right to one disqualification of a designated hearing officer.

**B. The hearing officer shall:**

(1) receive written complaints regarding violations of the code of ethics rule, notify the person complained against of the charge, and reject complaints not supported by probable cause; in the event the hearing officer rejects a complaint as lacking in probable cause, he shall provide a written statement of reasons for his rejection to the NMRHCA board and the complainant;

(2) conduct hearings of all complaints received; and

(3) report the findings of the hearings and make recommendations on resolving the complaint to the NMRHCA board.

**C. The decision of the board shall be final and not subject to appeal.**

[6/15/98; Recompiled 10/01/01]

**2.81.3.12 VIOLATION:**

It is a violation of this rule for any public official knowingly, willfully or intentionally to conceal or fails to disclose any financial interest called for by the code or violate any of the provisions hereof.

[6/15/98; Recompiled 10/01/01]

**2.81.3.13 PENALTIES:**

Upon recommendation of the hearing officer the NMRHCA board may:

**A.** issue a public reprimand to the public official;

**B.** remove or suspend from his office, employment or contract the public official; and

**C.** refer complaints against public officials to the appropriate law enforcement agency for investigation and prosecution.

[6/15/98; Recompiled 10/01/01]

**PART 4: CONTRACTS**

**2.81.4.1 ISSUING AGENCY:**

NM Retiree Health Care Authority ("NMRHCA").

[6/15/98; 2.81.4.1 NMAC - Rn, 2 NMAC 81.4.1, 1-1-2010]

#### **2.81.4.2 SCOPE:**

This rule applies to all vendors or potential vendors of professional services or insurance services, the NMRHCA, its board, staff and consultants.

[6/15/98; 2.81.4.2 NMAC - Rn, 2 NMAC 81.4.2, 1-1-2010]

#### **2.81.4.3 STATUTORY AUTHORITY:**

This rule is promulgated pursuant to the Retiree Health Care Act, the New Mexico Retiree Health Care Act (the "Act"), Sections 10-7C-1 et seq. NMSA 1978.

[6/15/98; 2.81.4.3 NMAC - Rn, 2 NMAC 81.4.3, 1-1-2010]

#### **2.81.4.4 DURATION:**

Permanent.

[6/15/98; 2.81.4.4 NMAC - Rn, 2 NMAC 81.4.4, 1-1-2010]

#### **2.81.4.5 EFFECTIVE DATE:**

June 15, 1998 unless a later date is cited at the end of a section.

[6/15/98; 2.81.4.5 NMAC - Rn & A, 2 NMAC 81.4.5, 1-1-2010]

#### **2.81.4.6 OBJECTIVE:**

The objective of this rule is to establish requirements for procurement of professional services, consulting and insurance services, and tangible personal property for the authority. The objective is to set out policies whereby maximum competition is stimulated for provision of these services to the NMRHCA.

[6/15/98; 2.81.4.6 NMAC - Rn & A, 2 NMAC 81.4.6, 1-1-2010]

#### **2.81.4.7 DEFINITIONS:**

**A. "Retiree health care authority"** or "NMRHCA" means the retiree health care authority established by Chapter 6 Laws of New Mexico, 1990 (Sections 10-7C-1 et seq. NMSA 1978).

**B. "Board"** means, the board of directors of the NMRHCA.

**C. "Group health insurance"** means coverage which includes but is not limited to: life insurance, accidental death and dismemberment, medical care and treatment,

dental care, eye care and other coverages as determined to be necessary by the NMRHCA.

**D. "Professional services"** means the services of third party administrators, insurance consultants, banks, underwriters, brokers, agents, architects, archaeologists, artists, entertainers, auditors, engineers, clergymen, land surveyors, landscape architects, medical arts practitioners, scientists, managements and systems analysts, certified public accountants, registered public accountants, lawyers, psychologists, planners, photographers, pilots, researchers, teachers, writers, interpreters and persons or businesses providing similar services.

**E. "Contract"** means any agreement for the procurement of professional services entered into by the NMRHCA.

**F. "Sole source"** means that there is only one source for a required professional service which is the object of a contract or amendment.

**G. "Best source"** means that a source for a required professional service is for a reason or combination of reasons significantly less costly, or better qualified, or more capable, or more advantageously situated or otherwise more suitable than any other source to provide the professional service which is the object of an amendment to a contract.

**H. "Emergency"** is when there exists a threat to public health, welfare, safety or property requiring procurement under emergency conditions. An emergency condition is a situation which creates a threat to public health, welfare or safety such as may arise by reason of floods, epidemics, riots, equipment failures or similar events. Any emergency procurement shall be made with competition as is practicable under the circumstances. The existence of the emergency condition creates an immediate and serious need for services, construction, or items of tangible personal property that cannot be met through normal procurement methods and the lack of which would seriously threaten:

- (1) the functioning of government;
- (2) the preservation or protection of property; or
- (3) the health or safety of any person.

**I. "Services"** means the furnishing of labor, time or effort by a contractor not involving the delivery of a specific end product other than reports and other materials which are merely incidental to the required performance. "Services" includes the furnishing of insurance but does not include construction or the services of employees of a state agency or a local public body.

**J. "Tangible personal property"** means tangible property other than real property having a physical existence, including but not limited to supplies, equipment, materials and printed materials.

[6/15/98; 2.81.4.7 NMAC - Rn & A, 2 NMAC 81.4.7, 1-1-2010]

**2.81.4.8 [RESERVED]**

[6/15/98; 2.81.4.8 NMAC - Rn & Repealed, 2 NMAC 81.4.8, 1-1-2010]

**2.81.4.9 APPLICABILITY OF RULE:**

**A.** Every contract shall be approved by the board only after its general legal counsel has reviewed for and affirmed as in compliance with appropriate provisions of the procurement code and these rules.

**B.** All amendments to contracts shall be subject to review and approval as to form only by the board's general legal counsel as provided in these rules.

[6/15/98; 2.81.4.9 NMAC - Rn, 2 NMAC 81.4.9, 1-1-2010]

**2.81.4.10 CONTRACTS - FORM:**

**A.** Contracts shall be in a form and contain such provisions as may be required by the board.

**B.** Each contract shall comply with the Conflict of Interest Act, particularly Sections 10-16-7, 10-16-8, 10-16-9 and 10-16-12 NMSA 1978 and when the disclosure required by Section 10-16-12 NMSA 1978 is necessary, that disclosure shall be filed with the secretary of state.

[6/15/98; 2.81.4.10 NMAC - Rn, 2 NMAC 81.4.10, 1-1-2010]

**2.81.4.11 CONTRACTS - PROCEDURES:**

**A.** All prospective contractors shall submit to the board a signed completed original of a contract reviewed and approved by the board general legal counsel. The contract form shall be submitted to and approved by the board prior to initiating any action with prospective contractors for contractual services and prior to beginning performance of any services pursuant to the contract.

**B.** There shall be no liability whatsoever by the NMRHCA, and there shall be no services rendered unless those services have commenced after approval of a contract for services by the board.

**C.** Proposals shall be evaluated based on the requirements set forth in the invitation for proposals, which requirements shall include criteria for evaluating proposals such as experience, both quantitative and qualitative, prior provision of similar services, client references, price and any other considerations the NMRHCA deems relevant. No criteria may be used in proposal evaluations that are not set forth in the invitation for proposals. With regard to professional services contracts the NMRHCA may provide that price is a factor but that a contract need not be awarded to the vendor proposing the lowest price. The award shall be made to the responsible offeror or offerors whose proposal is most advantageous to the NMRHCA, taking into consideration the evaluation factors set forth in the request for proposals.

**D.** Contracts for professional services shall be solicited, negotiated and awarded through a competitive sealed proposal process in accordance with Sections 13-1-111 to 13-1-117 NMSA 1978, of the Procurement Code. Sole source purchases may be solicited, negotiated and awarded in accordance with Sections 13-1-126 NMSA 1978, of the Procurement Code. Sole source purchases may be solicited, negotiated and awarded in accordance with Section 13-1-126 NMSA 1978, of the Procurement Code, and 2.81.4.13 NMAC. Emergency purchases may be solicited, negotiated in accordance with Section 13-1-127 and 13-1-128 NMSA 1978, of the Procurement Code, and 2.81.4.16 NMAC.

[6/15/98; 2.81.4.11 NMAC - Rn, 2 NMAC 81.4.11, 1-1-2010]

#### **2.81.4.12 [RESERVED]**

[6/15/98; 2.81.4.12 NMAC - Rn & Repealed, 2 NMAC 81.4.12, 1-1-2010]

#### **2.81.4.13 SOLE SOURCE PROCUREMENT:**

**A.** Subject to the limitations of Subsections B and C of this section, a contract may be awarded without competitive sealed proposals regardless of the estimated cost when the board makes a written determination, after conducting a good-faith review of available sources, that there is only one source for the required professional service, in accordance with Section 13-1-126 NMSA 1978, of the Procurement Code. The written determination shall include a detailed, sufficient explanation of the reasons why the qualifications or unique capabilities of the proposed vendor require a sole source contract with the vendor.

**B.** A copy of the written determination shall be kept on file pursuant to 2.81.4.16 NMAC.

**C.** The board or its designee shall conduct negotiations as to price and terms in order to obtain the price most advantageous to the NMRHCA.

[6/15/98; 2.81.4.13 NMAC - Rn & A, 2 NMAC 81.4.13, 1-1-2010]

#### **2.81.4.14 MULTI-TERM CONTRACTS; SPECIFIED PERIOD:**

**A.** A multi-term contract for services (including the furnishing of insurance) except for professional services, in an amount under twenty-five thousand dollars \$25,000.00, or more if authorized under Section 13-1-150 NMSA 1978, may be entered into for any period of time deemed to be in the best interests of the NMRHCA, not to exceed four years; provided that the term of the contract and conditions of renewal or extension, if any, are included in the specifications and funds are available for the first fiscal period at the time of contracting.

**B.** If the amount of the contract is twenty-five thousand dollars (\$25,000.00) or more, a multi-term contract for services (including the furnishing of insurance) shall not exceed eight years including all extensions and renewals. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.

**C.** A contract for professional services (not including the furnishing of insurance) may not exceed a term of four years including all extensions and renewals, except that a multi-term contract for the services of trustees, escrow agents, registrars, paying agents, letter of credit issuers and other forms of credit enhancement, and other similar services (excluding bond attorneys, underwriters and financial advisors with regard to the issuance, sale and delivery of public securities) may be for the life of the securities or as long as the securities remain outstanding.

[6/15/98; 2.81.4.14 NMAC - Rn & A, 2 NMAC 81.4.14, 1-1-2010]

#### **2.81.4.15 AMENDMENTS TO CONTRACTS:**

**A.** Amendments to contracts originally entered into pursuant to this rule, may be made pursuant to rules adopted by the secretary of DFA.

**B.** For amendments to contracts originally entered into as sole source procurement pursuant to 2.81.4.13 NMAC.

**(1)** A written determination which includes a detailed, sufficient explanation of the reason, qualifications or unique capabilities that make the vendor a sole source shall be required for all amendments which:

**(a)** significantly change the scope of work in the original contract; or

**(b)** when aggregated with any prior amendments, more than double the amount of the original contract.

**(2)** All other amendments, may be made pursuant to rules adopted by the secretary of DFA.

**(3)** Amendments which only extend the term of the original contract shall not require the determination provided for in Paragraphs (1) or (2) of Subsection B of this section.

**C.** For amendments to contracts originally entered into pursuant to a competitive proposal process, as provided for in Sections 13-1-111 through 13-1-117 of the Procurement Code, a written determination that includes a reasonable explanation of the reasons, qualifications or capabilities that make the vendor the best source for the contract services shall be required for all amendments, except for amendments which only extend the term of the contract.

**D.** For multi-term contracts, renewals shall be made pursuant to the terms of the contract, and amendments involving a change in the scope of services shall be made pursuant to the provisions of Subsections A, B or C of this section as appropriate.

**E.** No amendment to a professional services contract shall be approved which would renew or extend the term of a contract, including the original contract, beyond four years, except as allowed under Subsection C of 2.81.4.14 NMAC.

**F.** Contract amendments containing term periods with retroactive dates, or back-date contract amendments under which work has already begun, will not be approved by the board, except for good cause or in extraordinary cases such as the imminent loss of available contractual funds. Requests for retroactive contract approval must be explained in detail in writing and be approved in writing by the executive director of the NMRHCA.

[6/15/98; 2.81.4.15 NMAC - Rn & A, 2 NMAC 81.4.15, 1-1-2010]

#### **2.81.4.16 EMERGENCY AND SOLE SOURCE PROCUREMENT; CONTENT AND RETENTION OF RECORD:**

Notwithstanding other provisions of this rule, an emergency purchase or sole source purchase of professional services may be made. A copy of records of any emergency procurement or sole source purchase of professional services, including the written determination of the basis for the emergency or sole source procurement which meets the requirements of Sections 13-1-128 NMSA 1978, and which cites the language in Sections 13-1-126 and 13-1-127 NMSA 1978, which is being relied on by the board as justification for the emergency or sole source purchase, shall be retained for a minimum of three years.

[6/15/98; 2.81.4.16 NMAC - Rn, 2 NMAC 81.4.16, 1-1-2010]

#### **2.81.4.17 RIGHT TO PROTEST:**

Any offeror who is aggrieved in connection with a solicitation or award of a contract may protest to the executive director of the NMRHCA. The protest shall be submitted in

writing within fifteen calendar days after knowledge of the facts or occurrence giving rise to the protest.

[6/15/98; 2.81.4.17 NMAC - Rn, 2 NMAC 81.4.17, 1-1-2010]

#### **2.81.4.18 FILING OF PROTEST:**

**A.** Protests must be in writing and addressed to the executive director of the NMRHCA.

**B.** The protest shall:

- (1)** include the name and address of the protestant;
- (2)** include the solicitation number;
- (3)** contain a statement of the grounds for protest;
- (4)** include supporting exhibits, evidence or documents to substantiate any claim unless not available within the filing time in which case the expected availability date shall be indicated; and
- (5)** specify the ruling requested from the NMRHCA.

**C.** No formal pleading is required to initiate a protest, but protests should be concise, logically arranged, and direct.

**D.** Protests shall be submitted within fifteen (15) days after knowledge of the facts or occurrences giving rise to the protest. Any person or business that has been sent written notice of any fact or occurrence is presume to have knowledge or the fact or occurrence.

[6/15/98; 2.81.4.18 NMAC - Rn, 2 NMAC 81.4.18, 1-1-2010]

#### **2.81.4.19 PROCUREMENT AFTER PROTEST:**

**A.** In the event of a timely protest, as defined in 2.81.4.17 NMAC and 2.81.4.18 NMAC, the executive director shall not proceed further with the procurement unless the executive director makes a written determination that the award of the contract is necessary to protect substantial interest of the authority. Such written determination should set forth the basis for the determination.

**B.** As used herein the point in time in which a contract is awarded is that point at which a legally enforceable contract is created, unless the context clearly requires a different meaning.

**C.** In no circumstance will a procurement be halted after a contract has been awarded merely because a protest has been filed.

[6/15/98; 2.81.4.19 NMAC - Rn, 2 NMAC 81.4.19, 1-1-2010]

#### **2.81.4.20 PROCEDURE:**

**A.** Upon the filing of a timely protest, the executive director shall give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders and offerors who appear to have a substantial and reasonable prospect of receiving an award if the protest is denied.

**B.** The protestant and every business that receives notice pursuant to Subsection A of this section will automatically be parties to any further proceedings before the executive director or the board. In addition, any other person or business may move to intervene at any time during the course of the proceedings. Intervention will be granted upon a showing of a substantial interest in the outcome of the proceedings. Intervenor shall accept the status of the proceeding at the time of their intervention; in particular, they must abide by all prior rulings and accept all previously established time schedules.

**C.** The executive director and all employees and the general legal counsel of the NMRHCA are not parties to the proceedings.

[6/15/98; 2.81.4.20 NMAC - Rn & A, 2 NMAC 81.4.20, 1-1-2010]

#### **2.81.4.21 AUTHORITY TO RESOLVE PROTEST:**

The executive director may take any action reasonably necessary to resolve a protest. Such actions include, but are not limited to, the following:

- A.** issue a final written determination summarily dismissing the protest;
- B.** obtain information from the staff of the state purchasing agent or state central purchasing office and from the NMRHCA staff;
- C.** require parties to produce for examination information or witnesses under their control;
- D.** require parties to express their positions on any issue in the proceeding;
- E.** require parties to submit legal briefs on any issues in the proceeding;
- F.** establish procedural schedules;
- G.** regulate the course of the proceedings and the conduct of any participants;

H. receive, rule one, exclude or limit evidence;

I. take official notice of any fact that is among the traditional matters of official or administrative notice;

J. conduct hearings; and

K. take any action reasonably necessary to compel discovery or control the conduct of parties or witnesses.

[6/15/98; 2.81.4.21 NMAC - Rn, 2 NMAC 81.4.21, 1-1-2010]

#### **2.81.4.22 DISCOVERY:**

Upon written request of any party, or upon its own motion, the executive director or board may require parties to comply with discovery requests.

[6/15/98; 2.81.4.22 NMAC - Rn, 2 NMAC 81.4.22, 1-1-2010]

#### **2.81.4.23 HEARINGS:**

A. Hearings are disfavored and will be held only when the executive director or board determine that substantial material factual issues are present that cannot be resolved satisfactorily through an examination or written document in the record. Any party may request a hearing, but such requests shall be deemed denied unless specifically granted.

B. Hearings, when held, should be as informal as practicable under the circumstances, but the executive director or board has absolute discretion in establishing the degree of formality for any particular hearing. In no event is the executive director or board required to adhere to formal rules of evidence or procedure.

[6/15/98; 2.81.4.23 NMAC - Rn, 2 NMAC 81.4.23, 1-1-2010]

#### **2.81.4.24 RESOLUTION:**

A. The executive director shall promptly (the goal is thirty (30) days after receipt of all information or the date of any hearing, whichever is later) issue a written determination relating to the protest. The determination shall:

(1) state the reasons for the action taken; and

(2) inform the protestant of the right to judicial review of the determination pursuant to Section 13-1-183 NMSA 1978.

**B.** A copy of the written determination shall be sent immediately by certified mail, return receipt requested to each of the parties.

[6/15/98; 2.81.4.24 NMAC - Rn, 2 NMAC 81.4.24, 1-1-2010]

#### **2.81.4.25 RELIEF:**

**A.** If, prior to award, the executive director makes a determination that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be cancelled.

**B.** If, after an award, the executive director makes a determination that a solicitation or award of a contract is in violation of law and that the business awarded the contract has not acted fraudulently or in bad faith:

**(1)** the contract may be ratified, affirmed and revised to comply with law, provided that a determination is made that doing so is in the best interest of the NMRHCA; or

**(2)** the contract may be terminated, and the business awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract plus a reasonable profit prior to termination.

**C.** If, after an award, the executive director or the board make a determination that a solicitation or award of a contract is in violation of law and that the business awarded the contract has acted fraudulently or in bad faith, the contract shall be cancelled.

**D.** Except as provided in Paragraph (2) of Subsection B of this section, the executive director of the board shall not award money damages or attorneys' fees.

[6/15/98; 2.81.4.25 NMAC - Rn & A, 2 NMAC 81.4.25, 1-1-2010]

#### **2.81.4.26 MOTION FOR RECONSIDERATION:**

**A.** A motion for reconsideration of a written determination issued pursuant to 2.81.4.24 NMAC may be filed by any party involved in the procurement. The motion for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification of the determination is deemed warranted, specifying any errors of law made, or information not previously considered.

**B. When to file:** A motion for reconsideration shall be filed not later than ten (10) days after receipt of the written determination.

**C. Response to motion:** The executive director or the board shall promptly (the goal is ten (10) days after receipt of the motion) issue a written response to the motion

for reconsideration. A copy of the written response shall be sent immediately by certified mail, return receipt requested, to each of the parties.

[6/15/98; 2.81.4.26 NMAC - Rn, 2 NMAC 81.4.26, 1-1-2010]

#### **2.81.4.27     DESIGNEE:**

**A.** At any point during a protest proceeding the executive director of the board may appoint a designee, to preside over the proceeding. The designee will have all of the powers described in this Rule except the power to issue a written determination under 2.81.4.24 NMAC. The designee only has authority to recommend a resolution to the executive director or the board under that section.

**B.** Any person other than the procurement officer directly involved in the procurement or any person having made a proposal in response to the RFP may serve as a designee to preside over the proceeding.

**C.** A designee shall present a recommended written resolution to the executive director or the board and mail a copy to each of the parties. No party may appeal from the recommended resolution of the designee.

**D.** The executive director or the board shall approve, disapprove or modify the recommended resolution of the designee in writing. Such approval, disapproval or modification shall be the written determination required by 2.81.4.24 NMAC. Any party may file a motion for reconsideration of the written determination pursuant to 2.81.4.26 NMAC.

[6/15/98; 2.81.4.27 NMAC - Rn, 2 NMAC 81.4.27, 1-1-2010]

#### **2.81.4.28     FINAL DETERMINATION:**

**A.** In those proceedings in which no motion for reconsideration is filed, the written determination issued pursuant to 2.81.4.24 NMAC shall be the final determination for purposes of the time limits for seeking judicial review under Section 13-1-183 NMSA 1978.

**B.** Motion for reconsideration: In those proceedings in which a motion for reconsideration is filed, the written response to the motion issued pursuant to 2.81.4.24 NMAC shall be the final determination for purposes of the time limits for seeking judicial review under Section 13-1-183 NMSA 1978.

[6/15/98; 2.81.4.28 NMAC - Rn, 2 NMAC 81.4.28, 1-1-2010]

#### **2.81.4.29     COPIES OF COMMUNICATIONS:**

**A.** Each party to a protest proceeding shall certify that it has provided every other party with copies of all documents or correspondence addressed or delivered to the executive director or the board.

**B.** No party shall submit to the executive director or the board, ex parte, any material, evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in a protest.

[6/15/98; 2.81.4.29 NMAC - Rn, 2 NMAC 81.4.29, 1-1-2010]

#### **2.81.4.30 CONTRACTS - AUDITS:**

**A.** The NMRHCA has the primary responsibility for contract compliance monitoring. The board or its consultant if any, shall audit contracts on a random basis to determine:

- (1)** if the tasks called for in the scope of services have been performed;
- (2)** if the contract was completed in time and within budget;
- (3)** if the services were performed to the satisfaction of the NMRHCA.

**B.** For purposes of compliance with this provision, every contract shall require the contractor to maintain detailed time records which indicate the date, time and nature of services rendered.

[6/15/98; 2.81.4.30 NMAC - Rn, 2 NMAC 81.4.30, 1-1-2010]

#### **2.81.4.31 VOUCHER APPROVAL - PROFESSIONAL SERVICES:**

**A.** No voucher for payment of professional services will be approved by the board or its third party administrators, other than a payroll voucher or travel voucher, unless the contract and any amendments to the contract has been approved were required by these rules. All vouchers must contain the contract identification number.

**B.** The board or its third party administrators shall not approve any voucher for the payment of professional services unless the voucher certifies that the services have been rendered.

[6/15/98; 2.81.4.31 NMAC - Rn, 2 NMAC 81.4.31, 1-1-2010]

### **PART 5: CONTRIBUTIONS**

#### **2.81.5.1 ISSUING AGENCY:**

NM Retiree Health Care Authority ("NMRHCA").

[6/15/98; 2.81.5.1 NMAC - Rn, 2 NMAC 81.5.1, 1-1-2010]

#### **2.81.5.2 SCOPE:**

This rule applies to:

- A.** eligible retirees, spouses, domestic partners, and their dependents;
- B.** participating employers; and
- C.** pension administrators.

[6-15-98; 2.81.5.2 NMAC - Rn & A, 2 NMAC 81.5.2, 1-1-2010]

#### **2.81.5.3 STATUTORY AUTHORITY:**

This rule is promulgated pursuant to the Retiree Health Care Act ("Act"), Sections 10-7C-1 et seq. NMSA 1978.

[6/15/98; 2.81.5.3 NMAC - Rn, 2 NMAC 81.5.3, 1-1-2010]

#### **2.81.5.4 DURATION:**

Permanent.

[6/15/98; 2.81.5.4 NMAC - Rn, 2 NMAC 81.5.4, 1-1-2010]

#### **2.81.5.5 EFFECTIVE DATE:**

June 15, 1998, unless a later date is cited at the end of a section.

[6/15/98; 2.81.5.5 NMAC - Rn & A, 2 NMAC 81.5.5, 1-1-2010]

#### **2.81.5.6 OBJECTIVE:**

The objective of this rule is to establish procedures governing the determination of amounts of monthly contributions by eligible retirees, spouses, domestic partners, and dependents for the basic medical plan and optional coverages and to establish procedures for collection of contributions and participation fees. The objective of this rule is to identify the payroll date beginning from which employer/employee contributions shall begin under Section 15 of the act and to define "salary" and "annual salary" for the purpose of calculating the participating employer, employee contributions.

[6/15/98; 2.81.5.6 NMAC - Rn & A, 2 NMAC 81.5.6, 1-1-2010]

#### **2.81.5.7 DEFINITIONS:**

**A.** "Act" means the Retiree Health Care Act (Sections 10-7C-1 et seq. NMSA 1978).

**B.** "Salary".

**(1)** For those independent public employers and participating employers affiliated with the Public Employees Retirement Act (PERA), "salary" has the meaning ascribed to it as set forth in the Public Employees Retirement Act, Section 10-11-2 NMSA 1978, and as amended from time to time.

**(2)** For those participating employers affiliated with the Educational Retirement Act (ERA) "salary" means the total remuneration paid for personal services rendered to the employer by the employee for services rendered during each of the four calendar quarters of a fiscal year, beginning July 1 and ending June 30. This includes payment made directly to the employee of a third party on behalf of or for the benefit of the employee except that lump sum payment to the employee for accrued sick leave shall not be included. Bonuses or incentive pay for early retirement during the four quarters preceding the member's retirement shall not be included. Lump sum payment for up to thirty days of accrued annual or vacation leave shall be included. Sixty percent of the amount paid to an employee under a school bus owner/driver contract shall be included. Lump sum or payments over time made to an employee where services are not rendered are not included in the definition of annual salary such as where the employer "buys-out" the employee's contract. Included is any sums due the employee but withheld and paid for benefits of a voluntary "cafeteria" plan.

[6/15/1998; 2.81.5.7 NMAC - Rn, 2 NMAC 81.5.7, 1/1/2010; A, 1/1/2022]

#### **2.81.5.8 ELIGIBILITY AND CONTRIBUTIONS OF EMPLOYEES OF INDEPENDENT SCHOOL BUS CONTRACTORS:**

**A.** There are also persons employed by independent school bus contractors. They are not owner/drivers. They are employees of bus contractors providing bus services to public school districts and other educational entities. They are eligible to participate in the insurance overages of the New Mexico public school insurance authority. On approval of the executive director of the retiree health care authority, the public school district or other educational entity may at their option irrevocably contract with the NMRHCA to: withhold the employer/employee contributions from the payments due the school bus contractor; and pay on behalf of the school bus contractor the employer and employee contributions provided for in Section 15. A. and B. of the act.

**B.** This option may only be exercised prior to January 1, 1991 and if exercised after July 1, 1990, the contributions required shall be retroactive to July 1, 1990 but without interest. Those retirees, their spouses, domestic partners, and dependents who are current retirees, their spouses, domestic partners, and dependents retired from service in the employment of a school bus contractor contracting with a public school district or other educational entity which does not enter into an irrevocable agreement shall not be

eligible for the benefits of the act and shall not be allowed to purchase coverages offered under the act.

**C.** Those retirees, their spouses, domestic partners, and dependents who are current retirees, their spouses, domestic partners, and dependents retired from service in the employment of a school bus contractor contracting with a public school district or other educational entity which does enter into an irrevocable agreement shall be eligible for the benefits of the act and shall be allowed to purchase coverages offered under the act at such time as they have complied with the provisions of Subsection B of 2.81.7.7 NMAC, and 2.81.7.8 NMAC, 2.81.7.9 NMAC and 2.81.7.10 NMAC.

[6/15/98; 2.81.5.8 NMAC - Rn & A, 2 NMAC 81.5.8, 1-1-2010]

#### **2.81.5.9 BASIC PLAN OF MEDICAL BENEFITS/ DETERMINATION OF THE LEVEL OF CONTRIBUTIONS:**

Pursuant to the provisions of Section 8 B. of the act, the board of the NMRHCA shall provide for the collection of contributions from eligible retirees, spouses, domestic partners, and dependents which money when combined with other money appropriated to the fund, shall be sufficient to provide the required insurance coverage and to pay the expenses of the NMRHCA. The board shall in the month of February of each year review and make a determination with regard to contribution levels for all lines of coverages offered by the NMRHCA. Such contributing levels shall be effective the following first day of July of the subsequent year.

[6/15/98; 2.81.5.9 NMAC - Rn & A, 2 NMAC 81.5.9, 1-1-2010]

#### **2.81.5.10 OPTIONAL PLANS/DETERMINATION OF CONTRIBUTION/PARTICIPATION FEE COLLECTION:**

**A.** Pursuant to Section 13 B. of the act, for those eligible retirees, spouses, domestic partners, and dependents who desire to participate in the optional plans or list of coverage, collection of additional contributions to pay the cost to the authority of such plans shall be accomplished by the NMRHCA third party administrator. The monthly contribution to cover the NMRHCA cost of providing the optional plans or lines of coverage shall be established by the board. Any eligible retiree, spouse, domestic partner or dependent must pay the contributions required for optional coverages at least thirty days in advance of the first day of the month of coverage. Provided, however, these time requirements may be altered if payment for such optional plan is authorized by payroll deduction by the retirees pension system under a payment schedule approved in writing by the NMRHCA executive director.

**B.** Failure to make timely payments shall result in termination of coverage. Those former employers of retirees who enter into an arrangement with their retirees and desire to pay some or all of the retiree contribution required under Section 13 A. of the act, may make such payments monthly pursuant to an arrangement approved in writing

by the executive director of the NMRHCA. Provided, however, the \$5.00 monthly participation fee required of current retirees and non-salaried eligible participating entity governing authority members who become eligible retirees must be paid by the retiree or eligible governing authority member. Payments agreed to be made or required to be made by former employers of retirees shall be made at least thirty days in advance of the first day of the month of coverage. If with regard to an individual retiree, either the payment agreed to be made by the former employer or the fee required to be paid by the retiree is not timely paid, coverage is terminated. In all other situations, payment shall be made in advance for the first month of coverage and for subsequent months by the tenth day of the month preceding the month of coverage.

[6/15/98; 2.81.5.10 NMAC - Rn & A, 2 NMAC 81.5.10, 1-1-2010]

#### **2.81.5.11 EMPLOYER/EMPLOYEE CONTRIBUTIONS - BEGINNING DATE:**

Any eligible employer that chooses to become a participating employer after December 31, 1997 shall begin making the employer and employee contributions to the fund in the amount determined appropriate by the board on the July 1 immediately following the employer's official choice to become a NMRHCA participating employer. On the following January 1, eligible retirees of those participating employers and their eligible dependents shall be eligible to receive group health insurance coverage pursuant to the provisions of the Retiree Health Care Act.

[6/15/98; 2.81.5.11 NMAC - Rn, 2 NMAC 81.5.11, 1-1-2010]

### **PART 6: RETIREE SPOUSE, DOMESTIC PARTNER AND DEPENDENT BENEFIT COVERAGE ENROLLMENT:**

#### **2.81.6.1 ISSUING AGENCY:**

New Mexico Retiree Health Care Authority ("NMRHCA").

[2.81.6.1 NMAC - Rp, 2.81.6.1 NMAC, 1/1/2017]

#### **2.81.6.2 SCOPE:**

This rule applies to all eligible retirees, eligible spouses, eligible domestic partners, and eligible dependents authorized to participate in the NMRHCA coverages.

[2.81.6.2 NMAC - Rp, 2.81.6.2 NMAC, 1/1/2017]

#### **2.81.6.3 STATUTORY AUTHORITY:**

This rule is promulgated pursuant to the Retiree Health Care Act, Sections 10-7C-1 to 16 NMSA 1978.

[2.81.6.3 NMAC - Rp, 2.81.6.3 NMAC, 1/1/2017]

**2.81.6.4 DURATION:**

Permanent.

[2.81.6.4 NMAC - Rp, 2.81.6.4 NMAC, 1/1/2017]

**2.81.6.5 EFFECTIVE DATE:**

January 1, 2017 unless a later date is cited at the end of a section.

[2.81.6.5 NMAC - Rp, 2.81.6.5 NMAC, 1/1/2017]

**2.81.6.6 OBJECTIVE:**

The objective of this rule is to establish the enrollment policy for eligible retirees, eligible spouses, eligible domestic partners, and dependents authorized to participate in the NMRHCA's coverage. The objective is to establish rules for new eligible retiree, spouse, domestic partners, and dependent enrollment, change in status enrollment for eligible dependents and new dependent enrollment. The objective of this rule is to clarify when proof of medical insurability will be required in these cases, requiring certain documentation of retirees, spouses, domestic partners, and those claiming improper loss of coverages.

[2.81.6.6 NMAC - Rp, 2.81.6.6 NMAC, 1/1/2017]

**2.81.6.7 DEFINITIONS:**

**A. "Act"** means the Retiree Health Care Act (Sections 10-7C-1 to 16 NMSA 1978).

**B. "Domestic partner"** means a person at least 18 years of age, not married or a member of another domestic partnership, who is in an exclusive committed relationship with and for the benefit of the retiree member, and who has shared a primary residence with the retiree member for twelve or more consecutive months, is jointly responsible with the retiree member for each other's common welfare, shares joint financial obligations with the retiree member, and does not have a blood relationship with the retiree member such as to preclude marriage between them under New Mexico law.

**C. "Open enrollment period"** means any of the periods commencing January 1, 2017, and ending January 31, 2017, or commencing on January 1 and ending on January 31 of every odd-numbered year thereafter, in which an eligible retiree, eligible spouse, eligible domestic partner or dependents authorized to participate in NMRHCA's coverage may enroll into NMRHCA programs and outside of such periods an eligible retiree, eligible spouse, eligible domestic partner or eligible dependent may enroll into

NMRHCA programs only upon the occurrence of a qualifying event as provided in 26 U.S.C. Section 125, as amended, and the regulations promulgated thereunder.

**D. "Termination of domestic partnership"** means the cessation of the joint and mutually

responsible financial and exclusive committed relationship required for a domestic partnership.

[2.81.6.7 NMAC - Rp, 2.81.6.7 NMAC, 1/1/2017]

#### **2.81.6.8 REQUIREMENTS FOR ENROLLMENT IN COVERAGES:**

An eligible retiree, spouse, domestic partner or dependent shall be enrolled pursuant to his/her actual status at the time of enrollment or at any time thereafter when a change in status occurs. A retiree may add eligible dependents at the time of acquiring them. A retiree may enroll himself/herself only, and any eligible dependents, or no eligible dependents. Each such enrollee's status must be the same for all lines of coverage (i.e. single, two party or family). An eligible spouse, domestic partner or dependent of a retiree may not be enrolled unless the eligible retiree is enrolled, except as otherwise provided by court order pursuant to the Mandatory Medical Support Act Sections 40-4C-1 to 14 NMSA 1978. A spouse, domestic partner or dependent of a deceased eligible retiree receiving a survivor's pension benefit may enroll separately. Any eligible retiree, spouse, domestic partner or dependent desiring to enroll for coverages shall meet the following requirements:

**A. Spouse, domestic partner and dependent enrollment/medical insurability:**

An eligible retiree, spouse, domestic partner or dependent may enroll without evidence of medical insurability only during an open enrollment period.

**B. Eligible retiree, spouse, domestic partner, dependent change in status/enrollment:** Where an eligible retiree, spouse, domestic partner or dependent was receiving or eligible to receive group health benefit coverages through a third party and because of a change in status they lose the coverage and become ineligible for the coverage the eligible retiree, spouse, domestic partner or dependent may be enrolled without evidence of medical insurability if enrolled during an open enrollment period. If the loss of coverage due to the change in status was not caused by any neglect or wrong doing by the eligible retiree, spouse, domestic partner or dependent, they may enroll at any time so long as they do so within 31 calendar days of the change of status. If an eligible retiree is employed by an employer offering its employees a basic plan of benefits, the coverage provided by the NMRHCA plan shall be secondary regardless of whether the retiree enrolls in his employer's plan.

**C. Domestic partner enrollment:** An eligible domestic partner may enroll upon the submittal of sworn statements of domestic partnership executed by both domestic partners on a form approved by the board.

**D. Prohibition against duplicate coverage:** An eligible retiree, spouse, domestic partner or dependent is prohibited from having duplicate coverage from the NMRHCA for any line of coverage. An eligible retiree, spouse, domestic partner or dependent is also prohibited from having retiree coverage and dependent coverage at the same time from the NMRHCA for any line of coverage.

**E. More than one eligible retiree in a family:** Where an eligible retiree, spouse, domestic partner or dependent are all three or two of them eligible retirees, either may enroll into coverage as the eligible retiree and the other be treated as an eligible spouse, domestic partner or dependent.

**F. Participation requirements for eligible retiree, spouse, domestic partner or dependent enrollment:** An eligible retiree, spouse, domestic partner or dependent is not permitted to enroll for a particular line of coverage unless the minimum participation level as determined by the NMRHCA is met.

**G. Switching coverage:** The eligible retiree, spouse, domestic partner or dependent shall all select the same line or lines of coverage and shall only be permitted to switch, add or delete coverages during an open enrollment period.

**H. Dropping coverage:** An eligible retiree, spouse, domestic partner or dependent (except for dental or vision coverages) may drop any line of coverage at any time at their discretion. If they drop a line of coverage, they cannot re-enroll except as this rule permits. Members of the same family shall not be allowed to carry different lines of coverage.

**I. Dental or vision/dropping coverage:** Once enrolled in dental or vision coverages an eligible retiree, spouse, domestic partner or dependent may drop such coverages any time after enrollment. However, once a NMRHCA participant drops dental or vision coverage, that individual may not reenroll in that line of coverage until the open enrollment period immediately following the fourth anniversary of such dropped coverage. The four year waiting period does not apply to an involuntary loss of coverage and such eligible retiree, spouse, domestic partner or dependent may reenroll in that line of coverage during the next open enrollment period.

**J. Proper documentation:** Proper documentation, including evidence of medical insurability where required, must be provided by the eligible retiree, spouse, domestic partner or dependent seeking coverage within thirty-one days of the application for coverage. Coverage may be rejected where adequate proof and documentation satisfactory to the NMRHCA is not submitted in a timely manner. In the event such documentation is not timely submitted, the coverage shall not be effective and any contribution paid by the retiree, spouse, domestic partner or dependent shall be returned without interest.

**K. Eligible spouse, domestic partner dependent/open enrollment:** During an open enrollment period of eligible spouses, domestic partners, and dependents may be

enrolled without evidence of medical insurability. A new spouse, domestic partner or newborn dependent of an eligible retiree is eligible for coverage from date of birth, the date of marriage or date of submission of affidavit of domestic partnership, respectively, without providing evidence of medical insurability if the eligible retiree submits the required contribution and proper documentation within 31 calendar days of the birth, marriage or commencement of domestic partnership. Newly eligible dependents are also eligible for coverage from the date that a court order establishes their dependent status without providing evidence of medical insurability, if the eligible retiree submits the required contribution and proper documentation within 31 calendar days of the court order. In the event they fail to enroll within this period of time, they may not do so without providing evidence of medical insurability unless they subsequently enroll during an open enrollment period. Those persons considered to be a new eligible spouse, domestic partner or dependent are persons becoming related to the eligible retiree by marriage, establishment of a domestic partnership, the birth of a child, establishment of legal guardianship status and other similar situations where he or she becomes a new family member and is otherwise an eligible spouse, domestic partner or dependent under these rules.

**L. Eligible retiree, dependent, domestic partner or spouse/same coverage as eligible retiree:** The eligible spouse, domestic partner or dependent has no greater coverage than the eligible retiree participant and the eligible spouse, domestic partner or dependent can maintain coverage only to the extent that the eligible retiree participant maintains his/her coverage.

**M. Re-enrollment of eligible dependent student:** In those situations in which the eligible retiree maintains dependent coverage on an eligible dependent child under Paragraph (3) of Subsection F of Section 10-7C -4 NMSA 1978 and the child student loses coverage because the child no longer qualifies as a full time student and at some later time the child again becomes a full time student and the student otherwise qualifies as an eligible dependent, the child may re-enroll at a time other than during an open enrollment period an eligible dependent, without evidence of medical insurability if notification and proper documentation is provided within 31 days of the change in status.

**N. Certificate of eligibility:** On certification by the executive director of the public schools insurance authority, the executive director of the public employees retirement association, the executive director of the educational retirement association or the certifying official designated by board rule of an independent public employer or other public entity, eligible retirees, spouses, domestic partners and dependents will be permitted to enroll in coverages within 31 days without proof of medical insurability. Certification shall be on a form approved by the executive director of the NMRHCA.

**O. Retirement documentation:** Employees contemplating retirement are responsible for submitting documentation prior to retirement so as to assure no break in coverage occurs.

**P. Prohibition of split coverages:** Retirees who have spouses or domestic partners who are employed by employers who offer or provide an employer benefits plan may choose to be covered by the spouses or domestic partner's employers' plan of benefits or the retiree may choose to be covered by the plan of benefits offered by the NMRHCA. Provided, however, the entire family shall be required to select to be covered under either the NMRHCA or the spouse's employer. Any responsibility for continued coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) shall be the responsibility of either the NMRHCA or the spouse or domestic partner employer coverage selected.

**Q. Coverage after marriage dissolution:** Where there is a dissolution of marriage by decree which results in either of the former spouses no longer being eligible for coverage, that spouse shall be eligible only for such continuation of coverage as is required by COBRA.

**R. Termination of domestic partnership:** Eligibility for benefit coverage shall terminate for the non-retiree member of the domestic partnership upon the termination of the domestic partnership. The retiree member must notify the NMRHCA of the termination of his/her domestic partnership in writing, which must include the name of the former domestic partner and the effective date of the termination of the partnership, within 31 days of the termination.

[2.81.6.8 NMAC - Rp, 2.81.6.8 NMAC, 1/1/2017]

#### **2.81.6.9 ENROLLMENT AND ELIGIBILITY/ CONFLICT BETWEEN NMRHCA-CARRIER AGREEMENTS, NMRHCA RULES AND REGULATIONS, INDEMNITY POLICIES, HMO INDIVIDUAL SUBSCRIBER AGREEMENTS AND NMRHCA POLICY MISCOMMUNICATIONS:**

**A. Carrier contracts:** As to questions of enrollment and eligibility, in the event there is a conflict between the carrier contract with the NMRHCA and this rule the rule will prevail.

**B. Miscommunication:** As to questions of enrollment and eligibility, if miscommunication occurred, the party negligently communicating shall initiate action to correct the error.

**C. Dispute resolution:** As to questions of enrollment and eligibility, disputes not resolved between the retiree and the NMRHCA or its contractors shall be submitted to and resolved by the NMRHCA executive director. Any aggrieved person may within 30 days of the executive director's decision, appeal such to the NMRHCA board and its decision shall be final, except as otherwise provided by law.

[2.81.6.9 NMAC - Rp, 2.81.6.9 NMAC, 1/1/2017]

#### **2.81.6.10 ENROLLMENT IN OPTIONAL, VOLUNTARY, OR SUPPLEMENTAL PLANS:**

Eligible retirees, and their spouses, domestic partners, and dependents, may enroll in optional, voluntary, or supplemental plans such as dental, vision, and life without enrolling in an NMRHCA medical plan of benefits. The eligible retirees and their spouses, domestic partners, and dependents enrolling in such optional, voluntary, and supplemental plans shall pay a monthly premium which will cover the total cost for each benefit plan they elect to receive.

[2.81.6.10 NMAC - Rp, 2.81.6.10 NMAC, 1/1/2017]

### **PART 7: BENEFITS ELIGIBILITY OR NON ELIGIBILITY FOR RETIREES OF INDEPENDENT PUBLIC EMPLOYERS**

#### **2.81.7.1 ISSUING AGENCY:**

NM Retiree Health Care Authority ("NMRHCA").

[6-15-98; 2.81.7.1 NMAC - Rn, 2 NMAC 81.7.1, 4/30/02]

#### **2.81.7.2 SCOPE:**

This rule applies to independent public employers. It applies to their employees, retirees, spouses, domestic partners, and dependents.

[6-15-98; 2.81.7.2 NMAC - Rn, 2 NMAC 81.7.2, 4/30/02; A, 1-1-2010]

#### **2.81.7.3 STATUTORY AUTHORITY:**

This rule is promulgated pursuant to the Retiree Health Care Act, ("Act"), Sections 10-7C-1 et seq. NMSA 1978.

[6-15-98; 2.81.7.3 NMAC - Rn, 2 NMAC 81.7.3, 4/30/02]

#### **2.81.7.4 DURATION:**

Permanent.

[6-15-98; 2.81.7.4 NMAC - Rn, 2 NMAC 81.7.4, 4/30/02]

#### **2.81.7.5 EFFECTIVE DATE:**

June 15, 1998, unless a later date is cited in the history note at the end of a section.

[6-15-98; 2.81.7.5 NMAC - Rn, 2 NMAC 81.7.5, 4/30/02; A, 1-1-2010]

#### **2.81.7.6 OBJECTIVE:**

The objective of this rule is to describe the impact of inclusion in coverage and the impact of exclusion from or failure to act to become a participating employer on employees and retirees of independent public employers. The additional objective is to clarify the act with regard to eligibility of retirees to participate in coverages under the act if those retirees have a work history involving work for the state or public schools which is mandated into the act and also have worked for other governmental units which may be excluded from being a participating employer or may choose to be excluded from being a participating employer under the act or who may have been excluded as individuals from the public pension plan though having worked for an employer affiliated with a public pension plan.

[6-15-98; 2.81.7.6 NMAC - Rn, 2 NMAC 81.7.6, 4/30/02]

#### **2.81.7.7 DEFINITIONS:**

**A. "Act"** means the Retiree Health Care Act (Sections 10-7C-1 et seq. NMSA 1978)

**B. "Credited Service"** means the same service as is included for purposes of determining "annual salary" or "salary" as defined in 2.81.5.7 NMAC.

**C. "Independent Public Employer"** means a municipality, county or public entity which is not a retirement system employer (Section 10-7C-4(G)(2) NMSA 1978)

**D. "Public Entity"** means a flood control authority, economic development district, council of governments, regional housing authority, conservancy district or other special district or special purpose government (Section 10-7C-4(N) NMSA 1978)

[6-15-98; 2.81.7.7 NMAC - Rn, 2 NMAC 81.7.7, 4/30/02]

#### **2.81.7.8 RETIREES/ELIGIBILITY FOR COVERAGE:**

To be eligible for coverage an eligible retiree must satisfy the service requirement pursuant to 2.81.7.10 NMAC in the employment of a participating employer which has timely petitioned to become and has been admitted as a participating employer under the act.

[6-15-98; 2.81.7.8 NMAC - Rn & A, 2 NMAC 81.7.8, 4/30/02]

#### **2.81.7.9 APPLICANTS FOR COVERAGE/NOT ELIGIBLE:**

Acceptance of a contribution by an applicant for coverage shall not constitute a determination by the NMRHCA, any of its officers, agents or employees that the applicant, spouse or dependents are eligible for coverage. The third party administrator shall be responsible for making a determination with regard to eligibility of applicants for

coverage. In the event the third party administrator determines the applicant to be ineligible, the contribution shall be returned without interest. Such determination may be appealed to the NMRHCA board by the applicant and the board shall at its next regular meeting after notice of appeal hear and make a final decision on the issue, which decision is not appealable.

[6-15-98; 2.81.7.9 NMAC - Rn, 2 NMAC 81.7.9, 4/30/02]

#### **2.81.7.10 RETIREES/TIME IN SERVICE OF INDEPENDENT PUBLIC EMPLOYER AND RETIREMENT SYSTEM PUBLIC EMPLOYER:**

**A. Normal Retirement:** The service requirement for coverage for those persons having served a participating employer affiliated with a public pension plan, but having been individually excluded from the public pension plan, or having served an independent public employer which has opted to become a participating employer is five or more years of creditable service. Periods of employment with, or retirement from, a non-participating employer shall not affect an employee's eligibility, so long as the employee has met the minimum requirement for years of creditable service with a participating employer and is eligible to receive a pension from the participating employer's pension system.

**B. Duty Disability:** Without regard to age or length of service, an applicant for coverage based on duty disability shall be granted coverage if the incident resulting in the disability arose from and in the course of performance of duties by the applicant for the participating employer and if the applicant is unable, after the incident, to perform the job which the applicant was performing prior to the time of the incident resulting in the disability. In the event there is a determination that the applicant is unable to perform the job being performed by the applicant at the time of the incident leading to the duty disability, the applicant will be granted temporary duty disability for a period up to one year. Prior to the end of the temporary period of duty disability, there shall be a second inquiry to determine whether or not the applicant can perform any gainful employment. In the event, on the initial inquiry it is determined that the applicant can perform the job that was being performed at the time of the incident resulting in the disability or in the second inquiry it is determined that the applicant is capable of performing any gainful employment, the applicant shall be denied coverages provided by the act.

**C. Non-Duty Disability:** A person shall be entitled to coverages under the act provided that person has five or more years of credited service with a participating employer. The applicant must show that the applicant is not capable of any gainful employment. In the event the applicant fails to show that the applicant has five or more years of credited service in employment with a participating employer or fails to show that he is incapable of holding any gainful employment, the applicant shall not be entitled to coverages under the act.

**D. Survivor's benefit:** survivor pension beneficiary means a person entitled to a survivor's benefit either pursuant to the retirement program of a participating independent public employer or if the person meets the tests that would be applicable pursuant to 10-11-1 et seq. NMSA 1978.

**E. Administrative Determination:** The executive director of the retiree health care authority shall review and grant or deny the opportunity for coverage under the act on a form approved by the executive director. The executive director shall provide notice of the determination by regular mail and notify the applicant of the right of appeal.

**F. Appeal:** The applicant may appeal an adverse decision of the executive director. The appeal shall be filed with the office of executive director thirty days following the day on which the executive director's determination is deposited in the mail.

**G. Board Determination Final:** The board, at a time mutually convenient for the applicant, executive director and board shall review the appeal. A formal hearing shall not be held unless the board determines that substantial material factual issues are present that cannot be resolved satisfactorily through an examination of written documents in the record. The applicant may request a hearing, but such requests shall be deemed denied unless specifically granted. Hearings, when held, should be as informal as practicable under the circumstances, but the board has absolute discretion in establishing the degree of formality for any particular hearing. In no event is the executive director or board required to adhere to formal rules of evidence or procedure. The decision of the board shall be final and not subject to appeal.

**H. Retirees Not Eligible For Coverage:** Persons who retire from an employer which does not become or does not remain a participating employer shall not be eligible for retiree, spouse, domestic partner or dependent coverage unless they have been employed by a participating employer under the act and have satisfied prior to or after July 1, 1990, the age and service requirements of 2.81.7.10 NMAC while employed by a participating employer under the act. The time during which employees have exempted themselves from the employer-provided retirement system shall not be considered time in service.

[6-15-98; 2.81.7.10 NMAC - Rn & A, 2 NMAC 81.7.10, 4/30/02; A, 1-1-2010]

#### **2.81.7.11 BENEFITS ELIGIBILITY/CERTIFYING OFFICIAL:**

Pursuant to Subsection M of 2.81.6.8 NMAC, the certifying official designated to certify permission to enroll in coverages by retirees, spouses, domestic partners, and dependents of persons having served an independent public employer or non-retirement system institution of higher education is the executive director of the NMRHCA. Certification shall be on a form approved by the executive director of the NMRHCA.

[6-15-98; 2.81.7.11 NMAC - Rn, 2 NMAC 81.7.11, 4/30/02; A, 1-1-2010]

## **PART 8: INDEPENDENT PUBLIC EMPLOYER OPTION**

### **2.81.8.1 ISSUING AGENCY:**

NM Retiree Health Care Authority ("NMRHCA").

[12-31-96, 6-15-98; 2.81.8.1 NMAC - Rn, 2 NMAC 81.8.1, 05-14-04]

### **2.81.8.2 SCOPE:**

Applies to those municipalities, counties and public entities which are independent public employers and who exercise an option to be included therein after December 31, 1997.

[6-5-90, 12-31-96, 6-15-98; 2.81.8.2 NMAC - Rn, 2 NMAC 81.8.2, 05-14-04]

### **2.81.8.3 STATUTORY AUTHORITY:**

This rule is promulgated pursuant to the Retiree Health Care Act ("act"), Sections 10-7C-1 et seq. NMSA 1978.

[6-5-90, 12-31-96, 6-15-98; 2.81.8.3 NMAC - Rn, 2 NMAC 81.8.3, 05-14-04]

### **2.81.8.4 DURATION:**

Permanent.

[12-31-96, 6-15-98; 2.81.8.4 NMAC - Rn, 2 NMAC 81.8.4, 05-14-04]

### **2.81.8.5 EFFECTIVE DATE:**

June 15, 1998, unless a later date is cited at the end of a section.

[12-31-96, 6-15-98; 2.81.8.5 NMAC - Rn & A, 2 NMAC 81.8.5, 05-14-04]

### **2.81.8.6 OBJECTIVE:**

The objective of this rule is to establish procedures governing the process by which independent public employers may exercise their option to be included as participating employers under the act after December 31, 1997.

[6-5-90, 6-15-98; 2.81.8.6 NMAC - Rn, 2 NMAC 81.8.6, 05-14-04]

### **2.81.8.7 DEFINITIONS:**

**A. "Act"** means the Retiree Health Care Act (Sections 10-7C-1 et seq. NMSA 1978).

**B. "Independent public employer"** means a municipality, county or public entity which is not a retirement system employer (Section 10-7C-4(G)(2) NMSA 1978).

**C. "Public entity"** means a flood control authority, economic development district, council of governments, regional housing authority, conservancy district or other special district or special purpose government (Section 10-7C-4(N) NMSA 1978).

**D. "Retirement system employer"** means an institution of higher education, a school district or other entity participating in the public school insurance authority, a state agency, state court, magistrate court, municipality, county or public entity, each of which is affiliated under or covered by the Educational Retirement Act, the Public Employees Retirement Act, the Judicial Retirement Act, the Magistrate Retirement Act or the Public Employees Retirement Reciprocity Act (Section 10-7C-4(G)(1) NMSA 1978).

[6-15-98; 2.81.8.7 NMAC - Rn, 2 NMAC 81.8.7, 05-14-04]

#### **2.81.8.8 EXERCISE OF OPTION IN BY MUNICIPALITIES, COUNTIES AND PUBLIC ENTITIES WHICH ARE INDEPENDENT PUBLIC EMPLOYERS:**

Municipalities, counties and public entities that are independent public employers may at their option irrevocably determine by ordinance or resolution, following a public hearing and published notice of the hearing, to become a participating employer under the act. In addition to complying with all other required notice and public hearing or meeting requirements, any such independent public employer seeking to become a NMRHCA participating employer shall be subject to the following conditions:

**A.** Thirty days prior to the public hearing or public meeting on the proposed ordinance or resolution, the employer shall notify the NMRHCA of the date, time and place of the public hearing or public meeting. If the notice is by means other than certified mail, the notice is not deemed to have been given until receipt is acknowledged in writing by the NMRHCA. The NMRHCA executive director has the authority, on a case by case basis, to waive the thirty-day notice requirement if he/she determines:

(1) there is good cause to waive the requirement; and

(2) if he/she determines that the NMRHCA has received sufficient actual notice. Notice to the NMRHCA must be in the following form:

#### **FORM NOTICE LETTER**

Executive Director

Retiree Health Care Authority

625 Don Gaspar (or current address)

Santa Fe, NM 87503

Dear Executive Director

The (INSERT NAME OF APPLICANT EMPLOYER) hereby gives notice that on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ at \_\_\_\_\_ the governing body will conduct a public hearing on the question of including the (INSERT NAME OF APPLICANT EMPLOYER) in coverage by the Retiree Health Care Act.

This notice was authorized to be provided by a formal vote of the governing body of the (INSERT NAME OF APPLICANT EMPLOYER) held on the \_\_\_\_\_ day of \_\_\_\_\_.

(INSERT NAME OF APPLICANT EMPLOYER)

By

\_\_\_\_\_

Its

\_\_\_\_\_

**B.** The employer may validly exercise the option to be included in the coverage only if it does so by adoption of an ordinance or resolution in the form required by the NMRHCA. The form may be updated by the NMRHCA as necessary without revision of this rule. As of the effective date of this rule, the NMRHCA required ordinance/resolution form is as follows:

ORDINANCE/RESOLUTION FORM NO.

AN ORDINANCE ADOPTED PURSUANT TO THE RETIREE HEALTH CARE ACT, SECTIONS 10-7C-1 ET SEQ. NMSA 1978, EXERCISING THE IRREVOCABLE OPTION TO DETERMINE TO BE INCLUDED IN COVERAGE UNDER THE RETIREE HEALTH CARE ACT

WHEREAS, the governing body has considered the issue of retiree health care for its employees, retirees, their spouses and dependents;

WHEREAS, the governing body has considered the opportunity afforded by the Retiree Health Care Act ("act"), Sections 10-7C-1 et seq. NMSA 1978 to provide basic and optional retiree health coverages. The single basic plan of benefits rate may be

adjusted from time to time pursuant to Section 13 of the act. The current single basic plan of benefits rate is \_\_\_\_\_ (AMOUNT TO BE OBTAINED FROM THE NMRHCA); and

WHEREAS, the governing body has considered that pursuant to Section 15 of the act, Retiree Health Care Authority participation requires participating employer and/or employee contributions to the Retiree Health Care Authority fund in the amount determined to be appropriate by the NMRHCA Board and which may be adjusted from time to time; and

WHEREAS, the governing body determines to irrevocably include \_\_\_\_\_, its employees and retirees in the requirements of the employer/employee contributions and retiree benefits under the act.

NOW, THEREFORE, BE IT ORDAINED by the governing body of the \_\_\_\_\_

Section 1. Thirty days prior to public hearing on this Ordinance the Retiree Health Care Authority was notified by certified mail of the public hearing on this Ordinance.

Section 2. Pursuant to the terms of the act the \_\_\_\_\_ determines to be included in coverage under the Retiree Health Care Act.

Section 3. Passed, adopted and approved this \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
Mayor or Chairperson

Attest

by: \_\_\_\_\_

its: \_\_\_\_\_

On this \_\_\_\_ day of \_\_\_\_\_ before me appeared \_\_\_\_\_ known to me as a duly-authorized representative of the \_\_\_\_\_ and having been first sworn on his/her oath deposed and stated that the hereinbefore recited ordinance was adopted by a vote of \_\_\_\_\_ in favor and \_\_\_\_\_ opposed and that the governing body of the \_\_\_\_\_ consists of \_\_\_\_\_

members plus a mayor or including a chairperson and that a sufficient number of them voted in favor of passage of the ordinance or resolution that it is in effect.

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Notary Public

My Commission Expires

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[6-5-90, 12-31-96, 6-15-98; 2.81.8.8 NMAC - Rn, 2 NMAC 81.8.8, 05-14-04]

**2.81.8.9 RETIREES, SPOUSES, DOMESTIC PARTNERS OR DEPENDENTS OF RETIREES OF INDEPENDENT PUBLIC EMPLOYERS THAT FAIL TO PETITION FOR PARTICIPATION IN THE ACT NOT ELIGIBLE FOR BENEFITS:**

Those retirees, their spouses, domestic partners or dependents who are current retirees, their spouses, domestic partners or dependents as defined in the act or who retire from service with an independent public employer which fails to become a participating employer under the act shall not be eligible for the benefits of the act and shall not be allowed to purchase coverages offered under the act.

[6-5-90, 6-15-98; 2.81.8.9 NMAC - Rn, 2 NMAC 81.8.9, 05-14-04; A, 1-1-2010]

**2.81.8.10 INDEPENDENT PUBLIC EMPLOYERS PETITIONING AFTER DECEMBER 31, 1997, REQUIRED TO MAKE SIX MONTHS OF APPROPRIATE EMPLOYER/ EMPLOYEE CONTRIBUTIONS BEFORE ELIGIBLE FOR NMRHCA PARTICIPATION:**

An independent public employer that chooses to become a participating employer after December 31, 1997, shall submit their opt-in ordinance or opt-in resolution to the NMRHCA board prior to the board's semi-annual review meeting. Following acceptance by the NMRHCA board, the employer shall begin making employer and employee contributions to the fund in an amount determined to be appropriate by the NMRHCA board on the January 1 or July 1, immediately following the adoption of the ordinance or resolution. On the following January 1 or July 1, eligible retirees of those participating employers and their eligible dependents shall be eligible to receive group health insurance coverage pursuant to the provisions of the Retiree Health Care Act.

[6-5-90, 12-31-96, 6-15-98; 2.81.8.10 NMAC - Rn & A, 2 NMAC 81.8.10, 05-14-04]

**2.81.8.11 NMRHCA BOARD ANNUAL REVIEW MEETING:**

Twice a year, at the NMRHCA board's regularly-scheduled June and December meetings the board will review the ordinances and resolutions of eligible employers who

are seeking NMRHCA participation and accept those employers who have met the requirements of the Retiree Health Care Act and the NMRHCA board's rules and regulations. The board in its discretion may reschedule these meetings.

[12-31-96; 2.81.8.11 NMAC - Rn & A, 2 NMAC 81.8.11, 05-14-04]

## **PART 9: AFFILIATED MUNICIPAL, COUNTY, INSTITUTION OF HIGHER EDUCATION AND PUBLIC ENTITY OPTION**

### **2.81.9.1 ISSUING AUTHORITY:**

NM Retiree Health Care Authority ("NMRHCA").

[12/31/96; Rn, 2 NMAC 81.10.1, 6/15/98; 6/15/98; 2.81.9.1 NMAC - Rn, 2 NMAC 81.9.1, 1-1-2010]

### **2.81.9.2 SCOPE:**

Applies to those municipalities, counties, institutions of higher education or public entities who are retirement system employers as defined and who exercise their option to be included therein after December 31, 1997.

[6/5/90, 12/31/96; Rn, 2 NMAC 81.10.2, 6/15/98; 6/15/98; 2.81.9.2 NMAC - Rn, 2 NMAC 81.9.2, 1-1-2010]

### **2.81.9.3 STATUTORY AUTHORITY:**

This rule is promulgated pursuant to the Retiree Health Care Act ("Act"), Sections 10-7C-1 et seq. NMSA 1978.

[6/5/90, 12/31/96; Rn, 2 NMAC 81.10.3, 6/15/98; 6/15/98; 2.81.9.3 NMAC - Rn, 2 NMAC 81.9.3, 1-1-2010]

### **2.81.9.4 DURATION:**

Permanent.

[12/31/96; Rn, 2 NMAC 81.10.4, 6/15/98; 2.81.9.4 NMAC - Rn, 2 NMAC 81.9.4, 1-1-2010]

### **2.81.9.5 EFFECTIVE DATE:**

July 15, 1998 unless a later date is cited at the end of a section.

[12/31/96; Rn, 2 NMAC 81.10.5, 6/15/98; 6/15/98; 2.81.9.5 NMAC - Rn & A, 2 NMAC 81.9.5, 1-1-2010]

#### **2.81.9.6 OBJECTIVE:**

The objective of this rule is to establish procedures governing the process by which eligible municipalities, counties, institutions of higher education and public entities the Act) [sic] who may exercise their option to be included into coverage under the act after December 31, 1997.

[6/5/90, 12/31/96; Rn, 2 NMAC 81.10.6, 6/15/98; 6/15/98; 2.81.9.6 NMAC - Rn, 2 NMAC 81.9.6, 1-1-2010]

#### **2.81.9.7 DEFINITIONS:**

**A. "Act"** means the Retiree Health Care Act (Sections 10-7C-1 et seq. NMSA 1978).

**B. "Independent public employer"** means a municipality, county, or public entity which is not a retirement system employer (Section 10-7C-4(G)(2) NMSA 1978).

**C. "Public entity"** means a flood control authority, economic development district, council of governments, regional housing authority, conservancy district or other special district or special purpose government (Section 10-7C-4(N) NMSA 1978).

**D. "Retirement system employer"** means an institution of higher education, a school district or other entity participating in the public school insurance authority, a state agency, state court, magistrate court, municipality, county or public entity, each of which is affiliated under or covered by the Educational Retirement Act, the Public Employees Retirement Act, the Judicial Retirement Act, the Magistrate Retirement Act or the Public Employees Retirement Reciprocity Act (Section 10-7C-4(G)(1) NMSA 1978).

[6/15/98; 2.81.9.7 NMAC - Rn, 2 NMAC 81.9.7, 1-1-2010]

#### **2.81.9.8 EXERCISE OF OPTION OUT/ MUNICIPALITIES AND COUNTIES WHICH ARE RETIREMENT SYSTEM EMPLOYERS AS DEFINED IN SECTION 4. G. OF THE ACT:**

Any municipality or county who has some (it need not be all) of its workforce affiliated with the Public Employee Retirement Act system as of February 14, 1990 shall be considered to be mandated into the coverage of the Act with the option pursuant to this rule to choose not to be a participating employer under the act.

[6/5/90, 12/31/96; Rn 2 NMAC 81.10.8, 6/15/98; 6/15/98; 2.81.9.8 NMAC - Rn, 2 NMAC 81.9.8, 1-1-2010]

**2.81.9.9 EXERCISE OF OPTION IN/ MUNICIPALITIES, COUNTIES, INSTITUTIONS OF HIGHER EDUCATION AND PUBLIC ENTITIES WHICH ARE RETIREMENT SYSTEM EMPLOYERS AS DEFINED IN SECTION 4. G. OF THE ACT:**

Municipalities, counties, institutions of higher education and public entities who are retirement system employers may at their option irrevocably determine by ordinance or resolution to be included as participating employers under the act. In addition to complying with all other required notice and public hearing or meeting requirements, any such retirement system employer seeking to become a NMRHCA participating employer shall be subject to the following conditions:

**A.** Thirty days prior to the public hearing or public meeting on the proposed ordinance or resolution, the employer shall notify the NMRHCA of the date, time and place of the public hearing or public meeting. If the notice is by means other than certified mail, the notice is not deemed to have been given until receipt is acknowledged in writing by the NMRHCA. The NMRHCA executive director has the authority, on a case-by-case basis, to waive the thirty-day notice requirement if he/she determine:

**(1)** there is good cause to waive the requirement; and

**(2)** if he/she determines that the NMRHCA has received sufficient actual notice. Notice to the NMRHCA must be in the following form:

**FORM NOTICE LETTER**

Executive Director

Retiree Health Care Authority

625 Don Gaspar (or current address)

Santa Fe, NM 87503

Dear Executive Director:

The (INSERT NAME OF APPLICANT EMPLOYER) hereby gives notice that on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ at \_\_\_\_\_ the governing body will conduct a public hearing on the question of including the (INSERT NAME OF APPLICANT EMPLOYER) in coverage by the Retiree Health Care Act.

This notice was authorized to be provided by a formal vote of the governing body of the (INSERT NAME OF APPLICANT EMPLOYER) held on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

(INSERT NAME OF APPLICANT EMPLOYER, )

By: \_\_\_\_\_

Its: \_\_\_\_\_

**B.** The employer may validly exercise the option to be included in the coverage only if it does so by adoption of an ordinance or resolution, in the form required by the NMRHCA. The form may be updated by the NMRHCA as necessary without revision of this rule. As of the effective date of this rule, the NMRHCA required ordinance/resolution form is as follows:

ORDINANCE/RESOLUTION NO.

AN ORDINANCE/RESOLUTION ADOPTED PURSUANT TO THE RETIREE HEALTH CARE ACT, SECTIONS 10-7C-1 ET SEQ. NMSA 1978 EXERCISING THE IRREVOCABLE OPTION TO DETERMINE TO BE INCLUDED IN COVERAGE UNDER THE RETIREE HEALTH CARE ACT

WHEREAS, the governing body has considered the issue of retiree health care for its employees, retirees, their spouses and dependents;

WHEREAS, the governing body has considered the opportunity afforded by the Retiree Health Care Act ("Act"), Sections 10-7C-1 et seq. NMSA 1978 to provide basic and optional retiree health coverages. The single basic plan of benefits rate may be adjusted from time to time pursuant to the act. The current single basic plan of benefits rate is \_\_\_\_\_ (AMOUNT TO BE OBTAINED FROM THE NMRHCA); and

WHEREAS, the governing body has considered that pursuant to the act, retiree health care authority participation requires participating employer and/or employee contributions to the retiree health care authority fund in the amount determined appropriate by the NMRHCA board and which may be adjusted from time to time: and

(INCLUDE THIS PARAGRAPH ONLY IF APPLICABLE TO THE ENTITY)  
WHEREAS, the governing body revokes its previous decision to be excluded from coverage by the act.

WHEREAS, the governing body determines to irrevocably include \_\_\_\_\_, its employees and retirees in the requirements of the employer/employee contributions and retiree benefits under the act.

NOW, THEREFORE, BE IT ORDAINED by the governing body of the \_\_\_\_\_

Section 1. Thirty days prior to public hearing on this ordinance the retiree health care authority was notified by certified mail of the public hearing on this ordinance.

Section 2. Pursuant to the terms of the act the \_\_\_\_\_ determines to be included in coverage under the Retiree Health Care Act.

Section 3. Passed, adopted and approved this \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
Mayor or Chairperson

\_\_\_\_\_  
Attest

by: \_\_\_\_\_

its: \_\_\_\_\_

On this \_\_\_\_ day of \_\_\_\_\_ before me appeared \_\_\_\_\_ known to me as a duly-authorized representative of the \_\_\_\_\_ and having been first sworn on his/her oath deposed and stated that the hereinbefore recited ordinance was adopted by a vote of \_\_\_\_\_ in favor and \_\_\_\_\_ opposed and that the governing body of the \_\_\_\_\_ consists of \_\_\_\_\_ members plus a mayor or including a chairperson and that a sufficient number of them voted in favor of passage of the ordinance or resolution that it is in effect.

\_\_\_\_\_  
Notary Public

My Commission Expires  
\_\_\_\_\_

[6/5/90, 12/31/96; Rn, 2 NMAC 81.10.9, 6/15/98; 6/15/98; 2.81.9.9 NMAC - Rn, 2 NMAC 81.9.9, 1-1-2010]

**2.81.9.10 RETIREES, SPOUSES, DOMESTIC PARTNERS OR DEPENDENTS OF RETIREES OF AFFILIATED MUNICIPALITIES, COUNTIES, INSTITUTIONS OF HIGHER EDUCATION OR PUBLIC ENTITIES FAILING TO OPT INTO THE NMRHCA NOT ELIGIBLE FOR BENEFITS:**

Those retirees, their spouses, domestic partners or dependents who are current retirees, their spouses, domestic partners or dependents as defined in the act or who retire from service with an eligible municipality, county, institution of higher education or

public entity which fails to opt-in to the NMRHCA shall not be eligible for the benefits of the act and shall not be allowed to purchase coverages offered under the act.

[6/5/90, 12/31/96; Rn, 2 NMAC 81.10.10, 6/15/98; 6/15/98; 2.81.9.10 NMAC - Rn & A, 2 NMAC 81.9.10, 1-1-2010]

**2.81.9.11 AFFILIATED MUNICIPALITIES, COUNTIES, INSTITUTIONS OF HIGHER EDUCATION AND PUBLIC ENTITIES OPTING TO BE INCLUDED IN NMRHCA COVERAGE AFTER DECEMBER 31, 1997 REQUIRED TO MAKE SIX MONTHS OF APPROPRIATE EMPLOYER/EMPLOYEE CONTRIBUTIONS BEFORE BECOMING ELIGIBLE FOR NMRHCA PARTICIPATION:**

Any municipality, county, institution of higher education or public entity that enacts an ordinance or resolution to become a participating employer after December 31, 1997, shall submit their opt-in ordinance or opt-in resolution to the NMRHCA board prior to the board's annual review meeting. Following acceptance by the NMRHCA board, the employer shall begin making the appropriate employer and employee contributions to the fund as determined by the NMRHCA board on the July 1, immediately following the adoption of the ordinance or resolution. On the following January 1, eligible retirees of those participating employers and their eligible dependents shall be eligible to receive group health insurance coverage pursuant to the provisions of the Retiree Health Care Act.

[12/31/96; Rn, 2 NMAC 81.10.11, 6/15/98; 6/15/98; 2.81.9.11 NMAC - Rn, 2 NMAC 81.9.11, 1-1-2010]

**2.81.9.12 NMRHCA BOARD ANNUAL REVIEW MEETING:**

Once a year, at the NMRHCA board's regularly-scheduled June meeting the board will review the ordinances and resolutions of eligible employers who are seeking NMRHCA participation and accept those employers who have met the requirements of the Retiree Health Care Act and the NMRHCA board's rules and regulations. The board in its discretion may reschedule this meeting.

[12/31/96; Rn, 2 NMAC 81.10.12, 6/15/98; 2.81.9.12 NMAC - Rn, 2 NMAC 81.9.12, 1-1-2010]

**PART 10: POST-1997 PARTICIPATING EMPLOYER/EMPLOYEE CONTRIBUTIONS RULE**

**2.81.10.1 ISSUING AGENCY:**

NM Retiree Health Care Authority ("NMRHCA").

[6-15-98; 2.81.10.1 NMAC - Rn, 2 NMAC 81.10.1, 01/01/2007]

#### **2.81.10.2 SCOPE:**

Applies to employers who opt to become NMRHCA participating employers after December 31, 1997 and to their employees.

[6-15-98; 2.81.10.2 NMAC - Rn, 2 NMAC 81.10.2, 01/01/2007]

#### **2.81.10.3 STATUTORY AUTHORITY:**

This Rule is promulgated pursuant to the Retiree Health Care Act ("Act"), Sections 10-7C-1 et seq. NMSA 1978.

[6-15-98; 2.81.10.3 NMAC - Rn, 2 NMAC 81.10.3, 01/01/2007]

#### **2.81.10.4 DURATION:**

Permanent.

[6-15-98; 2.81.10.4 NMAC - Rn, 2 NMAC 81.10.4, 01/01/2007]

#### **2.81.10.5 EFFECTIVE DATE:**

June 15, 1998.

[6-15-98; 2.81.10.5 NMAC - Rn, 2 NMAC 81.10.5, 01/01/2007]

#### **2.81.10.6 OBJECTIVE:**

The objective of this rule is to define and establish processes for determining the NMRHCA contribution and fee amounts for employers who opt to become NMRHCA participating employers after December 31, 1997 and for determining the NMRHCA contribution levels of their employees.

[6-15-98; 2.81.10.6 NMAC - Rn, 2 NMAC 81.10.6, 01/01/2007]

#### **2.81.10.7 DEFINITIONS:**

**A. "Eligible employer"** means either:

(1) a "**retirement system employer**" which means an institution of higher education, a school district or other entity participating in the public school insurance authority, a state agency, state court, magistrate court, municipality, county or public entity, each of which is affiliated under or covered by the Educational Retirement Act, the Public Employees Retirement Act, the Judicial Retirement Act, the Magistrate Retirement Act or the Public Employees Retirement Reciprocity Act; or

**(2)** an "**independent public employer**" which means a municipality, county or public entity which is not a retirement system employer.

**B. "Participating employer"** means an eligible employer who has satisfied the conditions for participating in the benefits of the Retiree Health Care Act, including the requirements of Subsection M of Section 10-7C-7 NMSA 1978 and Subsection D, E or G of Section 10-7C-9 NMSA 1978, as applicable.

**C. "Post-1997 participating employers"** are those eligible employers who opt to become NMRHCA participating employers after December 31, 1997.

[6-15-98; 2.81.10.7 NMAC - Rn, 2 NMAC 81.10.7, 01/01/2007]

#### **2.81.10.8 SURPLUS-AMOUNT CONTRIBUTION:**

Post-1997 participating employers must pay the applicable surplus-amount contribution for each NMRHCA fiscal year beginning with FY91 through the fiscal year in which the employer is accepted into the NMRHCA program.

**A.** The surplus-amount contribution for each of the NMRHCA's fiscal years since the inception of the NMRHCA (Paragraph (2) of Subsection C of 2.81.10.8 NMAC) is calculated by using either the retiree formula or the active employee formula. On a case by case basis, the formula which results in the greater contribution payment to the NMRHCA shall be used to set the surplus-amount contribution of each post-1997 participating employer.

**(1) Retiree formula:** Using this formula, the surplus-amount contribution equals the surplus amount added to the NMRHCA trust account at the end of the fiscal year after all bills were paid divided by the number of NMRHCA participating retirees during that fiscal year and then multiplied by the number of the post-1997 participating employer's eligible retirees in that fiscal year. **Retiree formula example:** Employer opted to become a NMRHCA participating employer in 1998. In fiscal year 91, the NMRHCA had an applicable surplus of \$9,247.756 and an average of 10,412 participating retirees which amounts to a FY91 surplus per participating retiree of \$888.18. Employer Apple had 30 employees in FY91 which multiplied by the \$888.18 FY 91 surplus/participating retiree equals a surplus-amount contribution of \$26,645.40. Employer Apple must also pay surplus-amount contribution for each fiscal year between 1990 and date that Employer Apple becomes a participating employer, which amounts to eight years.

**(2) Active employee formula:** Using this formula, the surplus-amount contribution equals the surplus amount added to the NMRHCA trust account at the end of the fiscal year after all bills were paid divided by the number of NMRHCA active employees during that fiscal year and then multiplied by the number of the post-1997 participating employer's active employees in that same fiscal year. **Active employee example:** Employer Orange opted to become a NMRHCA participating employer in

1998. In Fiscal Year 1991, the NMRHCA had an applicable surplus of \$9,247.756 and an average of 71,585 active employees which amounts to a surplus per active employee of \$129.19. Employer Orange had 200 employees in FY91 which multiplied by the \$129.19 FY91 surplus/employee equals a surplus-amount contribution of \$25,838.00. Employer Orange must also pay surplus-amount contributions for each fiscal year between 1990 and date that Employer Orange becomes a participating employer, which amounts to eight years.

**B. EXTENDED PAYMENTS AND INTEREST:** Post-1997 participating employers may either pay the entire surplus-amount contribution upon being accepted into the NMRHCA program or choose to pay the fee over an extended period of time. Post-1997 participating employers that elect to pay the surplus-amount contribution over time, shall have no more than 13 years to complete such payments. Interest in the amount of seven and one-half percent (7.5 %) per annum shall accrue and be charged on all surplus-amount contribution amounts not paid within 30 days of the employer's acceptance into the program, except that, on the basis of its unique equitable circumstances in having submitted its participation petition prior to January 1, 1998, and having been denied participation at that time solely due to its technical ineligibility, the middle Rio Grande conservancy district, notwithstanding the other provisions of this section, in paying its surplus-amount contribution over time, may pay interest at the rate of five percent (5 %) per annum. The NMRHCA will provide each employer with a payment schedule of monthly principal/interest payments.

(1) Example 1: Employer opted to become a participating employer in 1998, Employer Apple owes surplus-amount contributions for FY91 through FY98. Employer Apple opts to pay the fee over time and has 13 years to pay the total surplus-amount contribution at the interest rate of 7.5 % per annum, or at 5 % per annum in the case of the middle Rio Grande conservancy district. There would be no interest charges if Employer Apple paid the surplus-amount contribution in full within 30 days of being accepted into the NMRHCA program.

(2) Subject to approval by the NMRHCA board, a post-1997 participating employer, may petition to make interest-only payments for the first-year of the employer's NMRHCA participation. If employer's petition is approved, the employer will be required to begin making normal principal and interest payments at the end of the first year of NMRHCA participation.

**C.** The NMRHCA trust fund surplus amounts for past years (through FY97) are as follows:

Fiscal Year 91 = \$888.18 per retiree (Paragraph (2) of Subsection C of 2.81.10.8 NMAC) \$129.19 per active employee.

Fiscal Year 92 = \$679.54 per retiree - \$102.19 per active employee.

Fiscal Year 93 = \$358.76 per retiree - \$ 56.73 per active employee.

Fiscal Year 94 = \$801.74 per retiree - \$137.41 per active employee.

Fiscal Year 95 = \$713.84 per retiree - \$132.82 per active employee.

Fiscal Year 96 = \$887.07 per retiree - \$174.64 per active employee.

Fiscal Year 97 = \$993.61 per retiree - \$213.07 per active employee.

(1) The annual surplus amounts shall be calculated by the NMRHCA annually and made public by July 30th of each year or as soon as possible.

(2) In calculating the trust fund surplus for fiscal year 91, all employer and employee contributions received prior to December 31, 1990 were not included.

D. The post-1997 participating employer can determine the percentage of the surplus-amount contributions and interest to be paid by its employees, provided that the employees' percentage does not exceed one-third of the total amount.

E. Notwithstanding and in lieu of Subsection A, post 2006 participating employers must pay the actuarial accrued liability associated with their participating retirees and active employees determined in accordance with the statements of the governmental accounting standards board (GASB).

(1) Such calculation shall be performed by the NMRHCA actuary utilizing the same methodology and assumptions as the last valuation performed for GASB reporting purposes, except that the discount rate shall be 7.75% regardless of the rate utilized by the actuary for other purposes.

(2) In addition, the post 2006 participating employer must pay a fee not to exceed \$10,000 at the time of petitioning for membership in NMRHCA for the purpose of defraying the cost of the actuarial valuation required to establish the amount due as the surplus amount calculation, and must provide all necessary participant data on active and retired employees necessary to perform the valuation.

[6-15-98; A, 1-15-99; 2.81.10.8 NMAC - Rn & A, 2 NMAC 81.10.8, 01/01/2007]

#### **2.81.10.9 EMPLOYER/EMPLOYEE CONTRIBUTIONS (MADE IN ADDITION TO SURPLUS-AMOUNT CONTRIBUTIONS):**

In addition to surplus-amount contributions, post-1997 participating employers are responsible for making employer/employee contributions in the amount determined by the NMRHCA board. Post-1997 participating employer/employee monthly contributions shall be the greater of the following:

**A.** employer contributions in the amount of one percent of each participating employee's annual salary and employee contributions in an amount equal to one-half of one percent of the each employee's salary; or

**B.** the average monthly employer/employee contribution per participating employee received by the NMRHCA during the previous fiscal year multiplied by the NMRHCA ratio of contributing employees vs. eligible retirees during the previous fiscal year multiplied by the post-1997 participating employer's current number of retirees;

**example:** Employer Red has 10 retirees, the average monthly combined employer and employee contributions received by the NMRHCA per retiree for the previous fiscal year is \$35.00; the NMRHCA ratio of contributing employees vs. eligible retirees for the previous fiscal year is 5:1; Employer Red must make a monthly combined employer/employee contribution of \$175.00 (\$35.00 x 5) multiplied by the total number of Employer Red's retirees (10) for a total monthly combined contribution of \$1,750.00;

**(1)** the NMRHCA shall calculate its average monthly employer/employee contribution per retiree on an annual basis and make the amount public by July 30th of each year or as soon as possible;

**(2)** the NMRHCA shall calculate the current NMRHCA ratio of contributing employees vs. eligible retirees on an annual basis and make the ratio information public by July 30th of each year or as soon as possible;

**(3)** the number of each post-1997 participating employer's current retirees and employees shall be updated monthly;

**(4)** the post-1997 participating employer can determine the percentage of the combined employer/employees contribution to be paid by its employees, provided that the employees' percentage does not exceed one-third of the total amount.

[6-15-98; 2.81.10.9 NMAC - Rn, 2 NMAC 81.10.9, 01/01/2007]

#### **2.81.10.10 SURVIVING SPOUSE:**

Surviving spouses are counted as eligible retirees for purposes of determining post-1997 participating employers' employee/eligible retiree ration.

[6-15-98; 2.81.10.10 NMAC - Rn, 2 NMAC 81.10.10, 01/01/2007]

#### **2.81.10.11 POST-1997 PARTICIPATING EMPLOYER/EMPLOYEES CONTRIBUTIONS START DATE:**

Post-1997 participating employers shall begin making their surplus-amount contribution and their employer/employee contributions on the July 1 immediately following the board's acceptance of the employer as a NMRHCA participating employer.

[6-15-98; 2.81.10.11 NMAC - Rn, 2 NMAC 81.10.11, 01/01/2007]

#### **2.81.10.12 ESTIMATES AND ADJUSTMENTS OF SURPLUS-AMOUNT CONTRIBUTIONS AND EMPLOYER/EMPLOYEE CONTRIBUTIONS:**

If complete statistics are not available at the time of calculating surplus-amount contributions and employer/employee contributions, the NMRHCA may use the available estimated figures to calculate the fees and contributions. When the complete statistics are provided to the NMRHCA, the NMRHCA shall promptly make any necessary adjustments to the surplus-amount contributions and employer/employee contributions.

[6-15-98; 2.81.10.12 NMAC - Rn, 2 NMAC 81.10.12, 01/01/2007]

#### **2.81.10.13 EMPLOYER'S OBLIGATION AND RIGHT TO AUDIT:**

All post-1997 participating employers are obligated to cooperate fully with the NMRHCA in providing timely, complete and accurate information regarding employer's employees, retirees and dependents. The NMRHCA has the right to conduct a full audit of all participating employer's with respect to any and all information the NMRHCA deems necessary to administer the NMRHCA plans and programs.

[6-15-98; 2.81.10.13 NMAC - Rn, 2 NMAC 81.10.13, 01/01/2007]

### **PART 11: ESTABLISHING SUBSIDY LEVELS ON THE BASIS OF YEARS OF CREDITABLE SERVICE**

#### **2.81.11.1 ISSUING AUTHORITY:**

New Mexico Retiree HealthCare Authority ("NMRHCA").

[2.81.11.1 NMAC - N, 02-14-02]

#### **2.81.11.2 SCOPE:**

This rule applies to eligible retirees of NMRHCA-participating employers who become eligible on or after July 1, 2001, and to the dependents of such retirees.

[2.81.11.2 NMAC - N, 2-14-02]

#### **2.81.11.3 STATUTORY AUTHORITY:**

This rule is promulgated pursuant to the Retiree Health Care Act ("Act"), Sections 10-7C-1 et seq. NMSA 1978, as amended.

[2.81.11.3 NMAC - N, 02-14-02]

#### **2.81.11.4 DURATION:**

Permanent.

[2.81.11.4 NMAC - N, 02-14-02]

#### **2.81.11.5 EFFECTIVE DATE:**

February 14, 2002 unless a later date is cited at the end of a section.

[2.81.11.5 NMAC - N, 02-14-02]

#### **2.81.11.6 OBJECTIVE:**

The objective of this rule is to establish subsidy levels commensurate with a retiree's years of credited service with a participating employer for employees who become eligible for enrollment into the NMRHCA health care program on or after July 1, 2001, and their dependents, and subject to a minimum retiree age for employees who become eligible for enrollment into the NMRHCA health care program on or after July 31, 2021.

[2.81.11.6 NMAC - N, 2/14/2002; A, 1/1/2021; A, 7/31/2021]

#### **2.81.11.7 DEFINITIONS:**

**A. "Board"** means, the board of directors of the NMRCHA.

**B. "Credited service"** means the number of full years of employment with a participating employer as verified by the authority.

**C. "Disabled retiree"** means an eligible retiree who has been authorized to retire due to disability by the appropriate state retirement agency.

**D. "Member of an enhanced retirement plan"** means a member of a retirement plan as defined by Section 10-7C-15 NMSA 1978.

**E. "Retiree health care authority" or "authority" or "NMRHCA"** means, the retiree health care authority established by chapter 6 laws of New Mexico, 1990 (Sections 10-7C-1 *et seq.*, NMSA 1978).

**F. "State retirement agency"** means each of the agencies created and authorized by law to administer the educational retirement act, the public employees retirement act, the judicial retirement act, the magistrate retirement act, the public employees retirement reciprocity act, or the retirement program of an independent public employer on or before July 1, 1990.

**G. "Subsidy"** means a set portion of the cost of an eligible retiree's monthly coverage, a varying percentage of which is borne by the authority as determined by the board.

[2.81.11.7 NMAC - N, 2/14/2002; A, 12/30/2002; A, 1/1/2021; A, 7/31/2021]

**2.81.11.8 NMRHCA CONTRIBUTION OF A PERCENTAGE OF A SUBSIDY TO MONTHLY PREMIUMS OF ELIGIBLE RETIREES:**

**A.** Except as otherwise provided in 2.81.11.9 NMAC, for eligible retirees who are members of an enhanced retirement plan and become eligible for participation on or after July 1, 2001, or are not members of an enhanced retirement plan and become eligible for participation on or after July 1, 2001 but before July 31, 2021, and the eligible dependents of such retirees, the NMRCHA will contribute the following percentages of the subsidy to the monthly premiums according to the corresponding numbers of years of credited service with an NMRHCA-participating employer:

**(1)** Example: If the subsidy for a particular plan is one half the premium cost, then for a retiree with 20 years of credited service the NMRHCA would provide one hundred percent of the subsidy; half the cost.

**(2)** Example: For the same subsidy of one half the premium cost, the percent of subsidy for a retiree with eight years of credited service would be twenty-five percent of the fifty percent subsidy: twelve and one-half percent of the cost.

Years of credited service	Percentage of subsidy
5	6.25
6	12.50
7	18.75
8	25.00
9	31.25
10	37.50
11	43.75
12	50.00
13	56.25
14	62.50
15	68.75
16	75.00
17	81.25
18	87.50
19	93.75
20	100.00

**B.** Subject to 2.81.11.10 NMAC and except as otherwise provided in 2.81.11.9 NMAC, for eligible retirees who are not members of an enhanced retirement plan and become eligible for participation on or after January 1, 2021, and the eligible dependents of such retirees, the NMRCHA will contribute the following percentages of the subsidy to the monthly premiums according to the corresponding numbers of years of credited service with an NMRHCA-participating employer:

**(1)** Example: If the subsidy for a particular plan is one half the premium cost, then for a retiree with 25 years of credited service the NMRHCA would provide one hundred percent of the subsidy; half the cost.

**(2)** Example: For the same subsidy of one half the premium cost, the percent of subsidy for a retiree with twelve years of credited service would be thirty-eight and one-tenth percent of the fifty percent subsidy: nineteen and five-hundredths percent of the cost.

Years of credited service	Percentage of subsidy
5	4.76
6	9.52
7	14.29
8	19.05
9	23.81
10	28.57
11	33.33
12	38.10
13	42.86
14	47.62
15	52.38
16	57.14
17	61.90
18	66.67
19	71.43
20	76.19
21	80.95
22	85.71
23	90.48
24	95.24
25	100.00

[2.81.11.8 NMAC - N, 2/14/2002; A, 4/30/2003; A, 1/1/2021; A, 7/31/2021]

#### **2.81.11.9 SUBSIDIES FOR DISABLED RETIREES:**

Notwithstanding any other provision of this rule:

**A.** The subsidy paid by the NMRHCA for a disabled retiree with a “duty disability,” as described in Subsection B of 2.81.7.10 NMAC, and to the dependents of such a retiree, shall be at the one hundred percent level, corresponding to the applicable maximum year level set forth in 2.81.11.8 NMAC, regardless of such retiree’s period of credited service and age.

**B.** The subsidy paid by the NMRHCA for a disabled retiree with a “non-duty disability,” as described in Subsection C of 2.81.7.10 NMAC, and to the dependents of such a retiree, shall be as set forth in Subsection A of 2.81.11.9 NMAC, *provided*, that, as a condition of eligibility for benefits, such retiree has five or more years of credited service.

[2.81.11.9 NMAC - N, 2/14/2002; A, 12/30/2002; A, 4/30/2003; A, 1/1/2021; A, 7/31/2021]

#### **2.81.11.10 AGE REQUIREMENT FOR SUBSIDIES:**

Except as otherwise provided in 2.81.11.9 NMAC, for eligible retirees who are not members of an enhanced retirement plan and become eligible for participation on or after January 1, 2021, the minimum retiree age requirement to be eligible for subsidies is 55.

[2.81.11.10 NMAC - N, 1/1/2021]

### **PART 12: ELECTION OF THE CLASSIFIED STATE EMPLOYEE BOARD MEMBER**

#### **2.81.12.1 ISSUING AUTHORITY:**

NM Retiree Health Care Authority ("NMRHCA").

[4-28-99; 2.81.12.1 NMAC - Rn, 2 NMAC 81.12.1, 4/30/02]

#### **2.81.12.2 SCOPE:**

Applies to NMRHCA.

[4-28-99; 2.81.12.2 NMAC - Rn, 2 NMAC 81.12.2, 4/30/02]

#### **2.81.12.3 STATUTORY AUTHORITY:**

This rule is promulgated pursuant to the Retiree Health Care Act ("Act"), Sections 10-7C-1 et seq. NMSA 1978.

[4-28-99; 2.81.12.3 NMAC - Rn, 2 NMAC 81.12.3, 4/30/02]

#### **2.81.12.4 DURATION:**

Permanent.

[4-28-99; 2.81.12.4 NMAC - Rn, 2 NMAC 81.12.4, 4/30/02]

#### **2.81.12.5 EFFECTIVE DATE:**

April 28, 1999.

[4-28-99; 2.81.12.5 NMAC - Rn, 2 NMAC 81.12.5, 4/30/02]

#### **2.81.12.6 OBJECTIVE:**

The objective of this rule is to establish rules and procedures for the election of a classified state employee member of the NMRHCA Board of Directors, as required by Section 10-7C-6 (B)(10) of the Act.

[4-28-99; 2.81.12.6 NMAC - Rn, 2 NMAC 81.12.6, 4/30/02]

#### **2.81.12.7 DEFINITIONS:**

A. "Act" means the Retiree Health Care Act (Sections 10-7C-1 et seq. N.M. Stat. Ann. 1978).

B. "Classified State Employee Board Member" means the member of the NMRHCA Board of Directors to be selected by the active state employees pursuant to Section 10-7C-6(B)(10) of the Act.

C. "Election Committee" means the Executive Committee of the NMRHCA Board of Directors.

[4-28-99; 2.81.12.7 NMAC - Rn, 2 NMAC 81.12.7, 4/30/02]

#### **2.81.12.8 TERM OF THE CLASSIFIED STATE EMPLOYEE BOARD MEMBER:**

A. The Classified State Employee Board Member shall be elected for a term of four years and, unless removed or otherwise vacated from his/her office, shall serve until his/her successor is duly elected and has qualified.

B. The election of the Classified state Employee Board Member shall be held every four years, with the completion of the election to coincide with the completion of the term of the current Classified State Employee Board Member as closely as possible.

[4-28-99; 2.81.12.8 NMAC - Rn, 2 NMAC 81.12.8, 4/30/02]

#### **2.81.12.9 ELECTION COMMITTEE:**

The executive committee of the NMRHCA Board shall also serve as the election committee under these rules and regulations.

A. The election Committee may utilize and shall oversee any contractors hired by the Board to help conduct the election. The election committee may utilize NMRHCA staff to assist in the election committee's oversight responsibilities.

B. The further duties of the election committee are described in the rules below.

[4-28-99; 2.81.12.9 NMAC - Rn, 2 NMAC 81.12.9, 4/30/02]

#### **2.81.12.10 NOMINATIONS FOR CLASSIFIED STATE EMPLOYEE BOARD MEMBER:**

A. At the earliest possible Board meeting during the Classified state Employee Board Member election year, the NMRHCA Board shall adopt a resolution specifying when nominating petitions shall be made available for distribution and when the nominating petitions are due to be returned to the NMRHCA. These nominating petitions are due not earlier than three months prior and not later than one month prior to the date set for canvassing the election ballots. Within 5 days of the adoption of the resolution, the NMRHCA shall give public notice of said resolution by arranging for the resolution to be published in the state employee newsletter and in a New Mexico newspaper of general circulation.

B. Nominating petition forms may be obtained from the NMRHCA offices located at 810 West San Mateo, Suite D, Santa Fe, New Mexico 87505.

C. In order to be eligible to hold the position of Classified State Employee NMRHCA Board member an individual must:

(1) Not be an employee of the New Mexico Retiree Health Care Authority,  
and

(2) Be a current classified state employee who contributes to the NMRHCA fund pursuant to the Act (N.M.Stat.Ann. 10-7C-1 et seq.)

D. Nominating petitions shall be in the form prescribed by the NMRHCA. Nominating petitions may only be signed by active state employees as defined below by these rules in Subsection B of 2.81.12.11 NMAC. A nominating petition must have a minimum of 50 valid signatures for the candidate to be eligible. The five candidates with the highest number of valid nominating signatures shall be included on the ballot, and the others shall be eliminated. The names of the five candidates receiving the highest number of nominating signatures shall be placed on the election ballot in descending order according to the number of valid nominating signatures received and submitted by each candidate. In case of a tie, the election committee shall determine the order in which candidates are placed on the ballot by drawing names.

E. In the event that only one qualifying nominating petition is received under the terms of the procedures specified herein, then no election shall be conducted, but the sole candidate so qualifying shall be declared the winner by the election committee.

[4-28-99; 2.81.12.10 NMAC - Rn, 2 NMAC 81.12.10, 4/30/02]

#### **2.81.12.11 ELECTION OF CLASSIFIED STATE EMPLOYEE BOARD MEMBER:**

A. Secret election ballots shall be mailed at least thirty days prior to the deadline for their return. Ballots shall be held by the NMRHCA in a locked box until the date and time set by the election committee for canvassing. To be counted, ballots must have been received at the Santa Fe Post Office by 12:00 noon on the date set by the Board to canvass the election returns.

B. All active state employees shall be eligible to receive a ballot and vote in the election as provided below.

(1) For purposes of the election of the Classified State Employee Board Member, "active state employees" are the following:

(a) All persons who are current state employees at least sixty (60) days prior to the mailing of the ballots and who contribute from their paycheck to the NMRHCA fund pursuant to the Retiree Health Care Act; and

(b) All persons who became current state employees contributing from their paycheck to the NMRHCA fund pursuant to Retiree Health Care Act (N.M.Stat. Ann. 10-7C-1 et seq.) within the sixty (60) day period prior to the mailing of the ballots.

(2) While all active state employees shall qualify for a ballot, in the case of those new active state employees listed in Subparagraph (b) of Paragraph (1) of Subsection B of 2.81.12.11 NMAC, above, a written request for a ballot must be made to NMRHCA.

C. Each ballot shall be self-proving containing the following affirmation: By voting this ballot, I certify that I am a current state employee contributing to the NMRHCA from my income as a state employee pursuant to the Retiree Health Care Act (N.M.Stat. Ann. 10-7C-1 et seq.) and that I am eligible to vote in this election."

D. Each election ballot shall be returned, one per envelope, in the envelope provided.

E. Active state employees who do not receive ballots or whose ballots have been mutilated or spoiled may request and receive another ballot, but only when the original mailed ballot is returned to the NMRHCA prior to the election ballot canvassing date.

F. Ballots shall be counted by the election committee, and a report shall be made to the Board at the next regularly scheduled Board meeting. The candidate receiving the greatest number of votes shall be declared the winner of the election by the election committee. In the event of a tie, the election committee shall select by lottery or similar method the name of the winner. The remaining four candidates shall be alternates for the Board member position.

G. If the election committee recommends for good cause that the results of the election be invalidated, and the Board adopts such recommendation, a new election shall be held as soon as possible thereafter.

H. Insignificant departures from the requirements set forth in these regulations pertaining to the conduct of elections shall not invalidate the election unless the results of the election are proven to have been sufficiently affected in the judgment of a majority of the members of the election committee.

I. The Classified State Employee Board Member shall be considered to be "qualified" for office pursuant to the Act, N.M.Stat. Ann. 10-7C-6(B)(10), when the Board has accepted the election results and the newly elected Board member has been sworn into office.

[4-28-99; 2.81.12.11 NMAC - Rn, 2 NMAC 81.12.11, 4/30/02]

**2.81.12.12 VACANCY ON THE BOARD BY CLASSIFIED STATE EMPLOYEE MEMBER:**

A. In the event the classified state employee board member of the NMRHCA board ceases to be a classified state employee for any reason, is removed from the board, resigns from the board, or dies, that member shall be considered to have resigned from the board and the board shall, by resolution, declare that office vacant as of the date of the adoption of such resolution. Such resolution shall be adopted within 30 days after the board member's retirement, resignation or death.

B. In the event the classified state employee member of the NMRHCA board ceases to be employed as a classified state employee, and is not reemployed as a classified state employee within thirty (30) days, that member shall be considered to have resigned from the board.

C. In the event the classified state employee board member of the NMRHCA board ceases to be a classified state employee or resigns from the board, that member shall, within 15 days of the board's adoption of the resolution of vacancy, designate an active classified state employee to complete the balance of the member's term as classified state employee member by identifying such person in a letter to the chairperson of the board, who shall, by letter to the person so designated, appoint such person as successor classified state employee member.

D. In the event the classified state employee board member of the NMRHCA board is removed from the board or dies, an active classified state employee shall be designated as successor classified state employee board member by vote of the remaining members of the board within 15 days of the board's adoption of the resolution of vacancy.

[4-28-99; 2.81.12.12 NMAC - Rn & A, 2 NMAC 81.12.12, 4/30/02]

## **CHAPTER 82: EDUCATIONAL RETIREMENT**

### **PART 1: GENERAL PROVISIONS**

#### **2.82.1.1 ISSUING AGENCY:**

Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129.

[2.82.1.1 NMAC - Rp, 2.82.1.1 NMAC, 11-15-12]

#### **2.82.1.2 SCOPE:**

This rule addresses the organization and operations of the educational retirement board.

[2.82.1.2 NMAC - Rp, 2.82.1.2 NMAC, 11-15-12]

#### **2.82.1.3 STATUTORY AUTHORITY:**

The Educational Retirement Act, [Section 22-11-1](#) to 22-11-55 [NMSA 1978](#).

[2.82.1.3 NMAC - Rp, 2.82.1.3 NMAC, 11-15-12]

#### **2.82.1.4 DURATION:**

Permanent

[2.82.1.4 NMAC - Rp, 2.82.1.4 NMAC, 11-15-12]

#### **2.82.1.5 EFFECTIVE DATE:**

November 15, 2012, unless a later date is cited at the end of a section.

[2.82.1.5 NMAC - Rp, 2.82.1.5 NMAC, 11-15-12]

#### **2.82.1.6 OBJECTIVE:**

The purpose of this rule is to establish procedures and functions of the educational retirement board, its director, officers and committees.

[2.82.1.6 NMAC - Rp, 2.82.1.6 NMAC, 11-15-12]

**2.82.1.7        DEFINITIONS: [RESERVED]**

**2.82.1.8        BOARD MEMBERS AND OFFICERS:**

Ex-officio members of the board shall take office upon their qualifying for the offices enumerated in Section 22-11-3 NMSA 1978. The board member elected by the New Mexico educational association shall be elected in the manner prescribed by the constitution of that body and shall take office on January 1 following such election. The board member elected by the New Mexico members of the American association of university professors shall be elected in accordance with the constitution of that body and shall take office on July 1 following such election. The board member elected by the New Mexico association of educational retirees shall be elected in the manner prescribed by the constitution of that body and shall take office on July 1 following such election. The board member elected by the American federation of teachers New Mexico shall be elected in the manner prescribed by the constitution of that body and shall take office on July 1 following such election. The board members appointed by the governor shall take office upon their receipt of appointment. All board members shall hold office until their successors qualify regardless of the length of the term and office. At the regular August meeting of each year, the members of the board shall elect a chairman, a vice-chairman, and a secretary. The duties of the officers shall include the following.

**A.** The chairman shall preside at all meetings of the board.

**B.** The vice-chairman shall serve as the chairman in the absence of the chairman.

**C.** The secretary shall attest to the official actions of the board when such is required. The vice-chairman may attest to the official actions of the board in the secretary's absence.

[2.82.1.8 NMAC - Rp, 2.82.1.8 NMAC, 11/15/2012; A, 05/24/2022]

**2.82.1.9        MEETINGS:**

**A.** The New Mexico educational retirement board shall hold regular meetings in the months of February, April, June, August, October and December; provided however, that the board may change the date of a meeting by board action, which action shall be noted in the minutes. Special board meetings may be held in accordance with state law at the call of the chairman or by any three board members. Committee meetings shall be scheduled as directed by the chairman of each committee.

**B.** Five members of the board shall constitute a quorum at any regular or special meeting.

**C.** Notice of all meetings of the board and its committees shall be made in accordance with the Open Meetings Act (Chapter 10, Article 15, NMSA 1978) and the Open Meetings Resolution adopted by the board and shall be posted on the board's website and distributed as otherwise directed by the board. Notice shall be given at least eight days in advance of any regular meeting scheduled by the board at its last meeting. Notice shall be given at least three days in advance of any special meeting called by the chairman or any three members of the board.

**D.** The chairman shall set the agenda of board meetings; provided however, that if the chairman refuses to place an item on the agenda, three individual board members may petition in writing and place an item on the agenda without the chairman's consent. Committee chairmen shall set the agendas of their respective committees. Notice of agendas shall be made in accordance with the Open Meetings Act and the Open Meetings Resolution adopted by the board and the director shall distribute board and committee agendas to board members, post the agendas to the board's website, and distribute the agendas as otherwise directed by the board.

**E.** Board members and their designees may attend and participate in any regular or special board meeting by telephone or other electronic device if:

(1) the member or designee cannot attend the meeting due to an emergency or unforeseen circumstance;

(2) the member or designee can clearly be heard by everyone attending the meeting and the member or designee clearly identifies themselves before speaking or participating in a vote;

(3) the member or designee has not attended regular meetings electronically more than twice in a rolling 12 month period;

(4) no more than two members or designees who otherwise qualify for participation under this section may do so at the same meeting; and

(5) the member or designee otherwise complies with the Open Meetings Act.

**F.** Failure of any board member other than the state treasurer, secretary of public education or secretary of higher education to attend four consecutive regular meetings unless such absence is excused by the board at a board meeting will be considered resignation from the board by that board member. Failure of the designee of the state treasurer, the secretary of public education or the secretary of higher education, respectively, to attend four consecutive regular meetings when the state treasurer, the secretary of public education or the secretary of higher education is absent will be

considered resignation from the board by that designee. An excused absence must be recorded in the board meeting minutes.

**G.** Board members not officially assigned to the committee which is meeting may be temporarily appointed to the committee by the committee chairperson when necessary to achieve a quorum.

[2.82.1.9 NMAC - Rp, 2.82.1.9 NMAC, 11/15/2012; A, 9/26/2017; A, 05/24/2022]

#### **2.82.1.10 SANCTIONS AND ENFORCEMENT:**

**A.** Any breach of a board member's fiduciary duty or violation of the rules or policies adopted by the board made known to the board or of which the board becomes aware shall be reviewed by the board. If a majority of the entire board so request, an alleged breach or violation may be investigated by an independent person or entity not otherwise associated or affiliated with any member of the board or the board's staff. Such person or entity shall be selected by at least five board members and designees, if such be sitting for board members.

**B.** Any hearing addressing an alleged breach of fiduciary duty or violation of the rules or the policies adopted by the board shall be conducted by the entire board, excepting the member accused of such a breach or violation, in accordance with the rule governing administrative appeals adopted by the board prior to the alleged breach or violation having occurred. If the rule governing administrative appeals is amended between the time that an alleged breach of fiduciary duty or violation of such rules or policies occurred and the time of the hearing, the board shall conduct the hearing in accordance with the rule that existed prior to its amendment.

**C.** Removal of a board member should occur only when necessary for the board to fulfill its fiduciary duty. A decision to remove a board member should be based on a determination that allowing the member to continue to serve on the board would be a violation of the other board members' fiduciary duty and would be detrimental to the educational retirement fund and the board. Removal should not be undertaken solely to inflict a penalty for a board member's past action(s) unrelated to the matter before the board.

(1) Removal is appropriate in instances of gross misconduct, violation of the board member's fiduciary duty, repeated violation of the rules and policies adopted by the board, or failure to fulfill the duties of a board member. "Gross misconduct" is defined as violation of a clearly established rule or policy, dereliction of duty, unlawful behavior involving matters of dishonesty or deception, gross negligence, but not negligence or carelessness.

(2) Removal of a board member other than the state treasurer, the secretary of public education or the secretary of higher education shall occur only after a full

investigation, hearing, and an affirmative vote by not less than five board members and designees, if such are sitting for a board member.

(3) The state treasurer, the secretary of public education and the secretary of higher education may be removed from the board only by removal from their respective offices by an authority possessing such power. The board may nevertheless, in compliance with the procedures set forth herein, make a finding that the actions of a state treasurer, a secretary of public education or a secretary of higher education warrant removal from the board and report such finding to appropriate authorities. A designee of the state treasurer, the secretary of public education or the secretary of higher education, respectively, shall not participate in board discussions or votes related to the board's consideration of a matter pursuant to this subparagraph that involve the board member who named that person as a designee.

(4) The designees of the state treasurer, the secretary of public education and the secretary of higher education, respectively, may be removed from the board in accordance with the procedures set forth herein. A designee so removed may not be reappointed as a designee by either the state treasurer, the secretary of public education or the secretary of higher education.

**D.** Board members or designees found to be in violation of the rules and policies adopted by the board or who fail to fulfill their duties, or who otherwise conduct themselves in a manner that is not appropriate for a member of a board governing a public pension fund, may be subject to formal reprimand or admonishment by the board. Reprimand or admonishment shall be done upon a public vote of not less than five board members and designees, if such are sitting for board members, and shall be permanently recorded in the board minutes.

(1) The board may choose to reprimand a board member or designee upon determining that the member's or designee's violation of the rules and policies adopted by the board or conduct as a board member warrant censure or reproof but do not warrant removal from the board.

(2) The board may choose to admonish a board member or designee upon determining that member or designee should be advised or cautioned regarding actions such as a failure to fulfill the duties of a board member or conduct that is inappropriate for a member of a board governing a public pension fund.

**E.** The board may not impose a fine on a board member or designee; however, the board may order a board member or designee to repay expenses paid by the board on behalf of a board member or designee for education or travel where a board member or designee did not fulfill the purpose for which the education or travel expense was provided. In addition, a board member or designee may be required to repay the donor of a gift accepted in violation of Section 22-11-5.1 NMSA 1978 or the rules and policies adopted by the board.

[2.82.1.10 NMAC - N, 11/15/2012; A, 05/24/2022]

#### **2.82.1.11 FUNCTION OF THE BOARD:**

**A.** The board shall function primarily as a policy making body and except for such ministerial acts as may be required by law, administrative matters shall be the responsibility of the director. The board shall adopt administrative rules and regulations through which the director shall implement the policies of the board.

**B.** In the consideration of cases involving individual members of the educational retirement system, it shall be the stated policy of the board to consider all appeals on their merits, guided by the Educational Retirement Act and the rules or regulations adopted by this board.

**C.** Pursuant to the board's fiduciary duty to the fund, the board has sole discretion in determining whether there is adequate funding for any proposed change in benefits or the funding formula.

[2.82.1.11 NMAC - Rp, 2.82.1.10 NMAC, 11-15-12]

#### **2.82.1.12 ADMINISTRATIVE BUDGETS:**

The director shall prepare budgets and requests for appropriations, which shall be considered and approved by the board prior to submission to the department of finance and administration or legislature.

[2.82.1.12 NMAC - Rp, 2.82.1.11 NMAC, 11-15-12]

#### **2.82.1.13 EMPLOYMENT OF STAFF:**

**A.** The board, at a regular meeting, shall employ a director who shall serve at the pleasure of the board and at a salary to be set by the board.

**B.** The board shall annually approve an organizational chart coincident with the adoption of the budget. This chart shall include a description of all positions required for the operation of the office, and the director shall be responsible for staffing these positions. This responsibility shall include the authority for the employment, promotion and dismissal of all employees.

[2.82.1.13 NMAC - Rp, 2.82.1.12 NMAC, 11-15-12]

#### **2.82.1.14 INVESTMENT COMMITTEE:**

The investments of the retirement fund shall be under the direction of an investment committee composed of the chairman of the board, and two members of the board appointed by the chairman and approved by the board, for terms of one year. The

chairman shall appoint two members to the investment committee at the board's regular October meeting each year. In the event of a vacancy on the committee, the chairman shall appoint a member of the board to serve for the remaining portion of the one year term. The appointment shall become effective immediately; provided, however, that it shall be subject to the approval by the board at its first meeting occurring after said appointment. The actions of the committee shall be subject to applicable statutes governing investment of the educational retirement fund, and the administrative rules and policies adopted by the board relating to investments of the fund.

[2.82.1.14 NMAC - Rp, 2.82.1.13 NMAC, 11/15/2012; A, 12/30/2013; A, 3/14/2017; A, 05/24/2022]

#### **2.82.1.15 MEDICAL REVIEW AUTHORITY AND APPEAL OF RECOMMENDATIONS:**

**A.** The board shall engage a medical review authority. The authority shall review all disability examination reports and advise the board of the nature and extent of disability for all applicants for disability benefits and the nature and extent of disability for those members already approved for benefits when it becomes necessary to determine their continued eligibility.

**B.** The director may engage physicians and other qualified persons throughout the state to perform independent medical examinations upon applicants for disability, if necessary. Results of such examinations shall be reported in detail to, and reviewed by, the medical review authority. The director is authorized to pay a reasonable fee for the examinations.

**C.** Applicants for disability benefits and recipients of disability benefits whose benefits are subject to re-examination shall be given written notice of those recommendations of the medical review authority which propose denial of the application for disability or termination of disability benefits. The written notice shall contain the following:

**(1)** the recommendation of the medical review authority, and a clear and concise statement of the reasons supporting the recommendation;

**(2)** a statement that the applicant or disability recipient may appeal the recommendation within thirty (30) days after receipt of the notice in accordance with 2.82.11 NMAC.

[2.82.1.15 NMAC - Rp, 2.82.1.14 NMAC, 11-15-12; A, 6-16-15; A, 9-26-17]

#### **2.82.1.16 ACTUARY:**

The director shall recommend an actuarial firm to be engaged for the purpose of performing routine actuarial services and actuarial investigations and evaluations to be provided for in a contract to be approved by the board.

[2.82.1.16 NMAC - Rp, 2.82.1.15 NMAC, 11-15-12]

#### **2.82.1.17 CONDUCT OF BUSINESS:**

**A.** The business affairs of the board shall be conducted by the director within the authority outlined by the Educational Retirement Act and rules and procedures adopted by the board.

**B.** On behalf of the board, the director is authorized to execute vouchers, delegate others to execute vouchers, buy and sell, or assign, or otherwise acquire or dispose of stocks, bonds, notes, or other securities held by the board, and execute such other documents as may be necessary to the administration of the Educational Retirement Act.

**C.** The director shall obtain the board's approval before requesting a formal opinion interpreting the law from the attorney general. The director may, however, obtain advice, either oral or written, from the attorney general as the need may arise.

**D.** The director is authorized to decide whether the agency will seek lead plaintiff status in securities class action lawsuits in order to insure a timely decision is made in accordance with applicable deadlines set out by the court. The director shall promptly apprise the chair of such decisions. All such decisions shall be presented at the next board meeting and the board may ratify or reject the director's decision. If the board rejects the director's decision, the agency shall seek to remove itself from lead plaintiff status.

**E.** The rules and procedures of the board may be amended or expanded in the following manner:

**(1)** At any regular meeting, the board may request the director to prepare amendments or new rules for action at a subsequent meeting of the board.

**(2)** The director may, at any time, propose amendments or new rules for action at any meeting of the board.

**(3)** Any proposed amendment or new rule shall be drafted by the director and sent to each board member with the agenda for the meeting at which the proposal will be considered, and all proposed rule changes will be sent to all local administrative units, within a reasonable time, prior to being considered by the board.

**F.** Interest rates that are to be set by the board under the Educational Retirement Act may be changed at any meeting of the board but shall at a minimum be set at a board meeting held in the final fiscal quarter of the year.

[2.82.1.17 NMAC - Rp, 2.82.1.16 NMAC, 11-15-12; A, 6-16-15; A, 09-26-17]

## **PART 2: MEMBERSHIP**

### **2.82.2.1 ISSUING AGENCY:**

Educational Retirement Board, P.O. Box 26129, Santa Fe, New Mexico 87502-0129.

[2.82.2.1 NMAC - Rp, 2.82.2.1 NMAC, 10/31/2017]

### **2.82.2.2 SCOPE:**

This rule defines membership status and processes within the Educational Retirement Act, Sections 22-11-1 through 22-11-55 NMSA 1978.

[2.82.2.2 NMAC - Rp, 2.82.2.2 NMAC, 10/31/2017]

### **2.82.2.3 STATUTORY AUTHORITY:**

The Educational Retirement Act, Sections 22-11-1 to 22-11-55 NMSA 1978.

[2.82.2.3 NMAC - Rp, 2.82.2.3 NMAC, 10/31/2017]

### **2.82.2.4 DURATION:**

Permanent.

[2.82.2.4 NMAC - Rp, 2.82.2.4 NMAC, 10/31/2017]

### **2.82.2.5 EFFECTIVE DATE:**

October 31, 2017, unless a later date is cited at the end of a section.

[2.82.2.5 NMAC - Rp, 2.82.2.5 NMAC, 10/31/2017]

### **2.82.2.6 OBJECTIVE:**

The purpose of this rule is to govern operations and define the types of membership eligible for coverage, as well as employees excluded from coverage.

[2.82.2.6 NMAC - Rp, 2.82.2.6 NMAC, 10/31/2017]

#### **2.82.2.7 DEFINITIONS:**

**[RESERVED]**

#### **2.82.2.8 EMPLOYEES AND EMPLOYERS COVERED BY THE EDUCATIONAL RETIREMENT ACT:**

**A.** Employers who are designated by statute as "local administrative units" shall be the following schools, institutions, and agencies:

- (1)** all public school districts in New Mexico;
- (2)** educational institutions enumerated in Article 12, Section 11 of the constitution of New Mexico;
- (3)** public education department;
- (4)** educational retirement board;
- (5)** girls' welfare home;
- (6)** New Mexico boys' school;
- (7)** Los Lunas medical center;
- (8)** technical and vocational institutes created pursuant to the Technical and Vocational Institute Act;
- (9)** community colleges (also known as "junior colleges") created pursuant to the Community College Act;
- (10)** New Mexico activities association; and
- (11)** regional education cooperatives.

**B.** In addition to the local administrative units enumerated in Subsection A, any state institution or agency providing an educational program and employing certified school instructors shall be a local administrative unit with coverage in such unit limited to certified school instructors.

[2.82.2.8 NMAC - Rp, 2.82.2.8 NMAC, 10/31/2017]

#### **2.82.2.9 REGULAR MEMBERS:**

**A.** In four-year colleges, technical and vocational institutes and community or junior colleges, public school districts, and state operated schools, "regular members" shall be

all employees other than retired members, retired members who have returned to work under 2.82.5.15 NMAC, 2.82.5.16 NMAC, or 2.82.5.17 NMAC, participants in the alternative retirement plan (ARP) or employees excluded under 2.82.2.11 NMAC.

**B.** Any member except retired members who have returned to work under 2.82.5.15 NMAC, 2.82.5.16 NMAC, or 2.82.5.17 NMAC, participants in the alternative retirement plan (ARP), or employees excluded under 2.82.2.11 NMAC, who is regularly employed in any of the following local administrative units, shall be a "regular member" if the member holds a license issued by the public education department at the time of commencement of employment in such local administrative units:

- (1) northern New Mexico college;
- (2) New Mexico boys' school;
- (3) girls' welfare home;
- (4) Los Lunas medical center;
- (5) public education department;
- (6) educational retirement board;
- (7) New Mexico school for the blind and visually impaired;
- (8) New Mexico school for the deaf;
- (9) New Mexico activities association; and
- (10) regional education cooperatives.

**C.** Except retired members who have returned to work under 2.82.5.15 NMAC, 2.82.5.16 NMAC, or 2.82.5.17 NMAC, participants in the alternative retirement plan (ARP) or employees excluded under 2.82.2.11 NMAC, regular membership is a condition of employment and all local administrative unit employees who qualify as "regular members" must be covered under the Educational Retirement Act, commencing with the first day of employment.

**D.** Except retired members who have returned to work under 2.82.5.15 NMAC, 2.82.5.16 NMAC, or 2.82.5.17 NMAC, participants in the alternative retirement plan (ARP) or employees excluded under 2.82.2.11 NMAC, any person regularly employed, whether full-time or part-time, in any state institution or agency described in Subsection B of 2.82.2.8 NMAC, shall be a regular member if employed in an educational program and holds a license issued by the public education department.

[2.82.2.9 NMAC - Rp, 2.82.2.9 NMAC, 10/31/2017; A, 11/12/2019; A, 7/14/2020]

#### **2.82.2.10 PROVISIONAL MEMBERS:**

**A.** Any provisional member employed by any of the following local administrative units may elect to be covered under the public employees retirement association in lieu of coverage under the Educational Retirement Act within the first six months of employment or re-employment, but may not be exempted completely from being covered under either retirement system unless excluded from coverage under 2.82.2.11 NMAC:

- (1) New Mexico boys' school;
- (2) girls' welfare home;
- (3) New Mexico school for the deaf;
- (4) educational retirement board
- (5) public education department;
- (6) northern New Mexico college;
- (7) Los Lunas medical center;
- (8) New Mexico school for the blind and visually impaired;

(9) until or unless such provisional member does elect coverage under the Public Employees Retirement Act that provisional member must be covered under the Educational Retirement Act commencing with the first day of his employment, or re-employment in any of the local administrative units enumerated in this section. Likewise, the election of coverage under the Public Employees Retirement Act requires continued coverage under that act for the duration of employment or re-employment in any of the units specified in this section.

(10) It shall be the policy of the board, in cooperation with the public employees retirement association ("PERA"), to determine annually if there are provisional members employed by these local administrative units who are retired from one system while having elected to participate in the second system.

**B.** To elect coverage under the Public Employees Retirement Act, a provisional member must complete a form provided by the board for that purpose. The local administrative unit shall forward the completed form to the director. The director shall approve the election of such coverage if it is in order and forward a copy of the approved form to PERA and to the local administrative unit as notice that the employee's election to be covered under the Public Employees Retirement Act has been approved. The director shall retain the original approved election form as the board's record of the approved election.

**C.** No provisional member may be covered under the Public Employees Retirement Act in lieu of the Educational Retirement Act unless a properly approved form electing such coverage is on file with the director.

[2.82.2.10 NMAC - Rp, 2.82.2.10 NMAC, 10/31/2017]

**2.82.2.11 EMPLOYEES EXCLUDED FROM COVERAGE:**

**A.** Any person enrolled as a student in any of the local administrative units outlined in Subsection A of 2.82.2.8 NMAC, and who is also employed by the local administrative unit in which he is enrolled, shall be considered a student and not eligible for either "regular" or "provisional" membership under the Educational Retirement Act, except that members of the faculty or full-time staff, who may be incidentally enrolled in classes, shall not be affected by this rule. Under no circumstances shall graduate assistants, teaching fellows, or students in positions of similar nature, be considered eligible for coverage under the Educational Retirement Act. This includes any and all participation in the teacher enhancement program or participation in similar graduate programs.

**B.** Any person whose full time equivalency ("FTE") is .25 or less, and who is not a covered employee of another local administrative unit, shall not be covered for contribution purposes. For purposes of calculating a person's FTE, employment with all local administrative units shall be aggregated. Any person employed on July 1, 1994 who was then covered under the Educational Retirement Act shall continue to be covered for the duration of that employment.

**C.** Independent contractors who perform services for local administrative units on a fee basis are not eligible for membership under the Educational Retirement Act as a result of having performed such service, and sums paid for such service shall not be covered for purposes of contributions. The following factors shall be considered in determining whether an individual qualifies as an independent contractor:

(1) registration with the New Mexico department of taxation and revenue to pay gross receipts tax;

(2) the existence of a written contract with the local administrative unit setting forth the services to be provided and the compensation to be paid;

(3) whether the person receives benefits such as paid annual or sick leave, health insurance and other benefits that the local administrative unit provides its regular employees or is paid as an employee by the local administrative unit;

(4) whether the person satisfies internal revenue service guidelines for determining that an individual is an independent contractor rather than an employee;

(a) as necessary, the director shall make available forms for use by local administrative units for use in making this determination;

(b) the board reserves the right to examine the complete forms, contracts and other agreements, and any other materials as may be necessary for the purpose of determining whether an individual is an independent contractor or employee.

D. All students enrolled in any public school, grades 1-12.

[2.82.2.11 NMAC - Rp, 2.82.2.11 NMAC, 10/31/2017; A, 11/12/2019; A, 7/14/2020]

#### **2.82.2.12 RETIRED MEMBERS:**

For the purposes of 2.82.5.15 NMAC, 2.82.5.16 NMAC and 2.82.5.17 NMAC, a retired member shall be defined as any member who has retired pursuant to the Educational Retirement Act.

[2.82.2.12 NMAC - Rp, 2.82.2.12 NMAC, 10/31/2017; A, 7/14/2020]

#### **2.82.2.13 MEMBERSHIP ENROLLMENT; RECORDS:**

A. Enrollment; changes in contact information.

(1) Members are required to complete a new employment form each time that they are hired or rehired by a local administrative unit and to provide the board with contact information, including their mailing address and e-mail address.

(2) Active members and retirees are responsible for providing the board notice in writing of any change of their mailing address or e-mail address on forms made available for this purpose by the director.

B. Local administrative units. For the purposes of providing members information regarding the board and the members' accounts, local administrative units are required to provide the educational retirement board the e-mail addresses assigned to members by a local administrative unit upon the board's request.

[2.82.2.13 NMAC - Rp, 2.82.2.13 NMAC, 10/31/2017]

### **PART 3: MEMBER AND ADMINISTRATIVE UNIT CONTRIBUTIONS**

#### **2.82.3.1 ISSUING AGENCY:**

Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129.

[2.82.3.1 NMAC - Rp, 2.82.3.1 NMAC, 7/1/2012]

#### **2.82.3.2 SCOPE:**

This rule defines earnings on which member contributions shall be made, refund of contributions, purchase of contributory employment and non-reported service, and the payment of interest on refunds.

[2.82.3.2 NMAC - Rp, 2.82.3.2 NMAC, 7/1/2012; A, 10/15/2012]

#### **2.82.3.3 STATUTORY AUTHORITY:**

The Educational Retirement Act, Section 22-11-1 to 22-11-55, NMSA 1978.

[2.82.3.3 NMAC - Rp, 2.82.3.3 NMAC, 7/1/2012]

#### **2.82.3.4 DURATION:**

Permanent.

[2.82.3.4 NMAC - Rp, 2.82.3.4 NMAC, 7/1/2012]

#### **2.82.3.5 EFFECTIVE DATE:**

July 1, 2012, unless a later date is cited at the end of a section.

[2.82.3.5 NMAC - Rp, 2.82.3.5 NMAC, 7/1/2012]

#### **2.82.3.6 OBJECTIVE:**

Clarification of the definition of earnings on which member contributions shall be made, the process to obtain refunds and to purchase contributory employment and non-reported service and the calculation of interest on such refunds and purchases.

[2.82.3.6 NMAC - Rp, 2.82.3.6 NMAC, 7/1/2012]

#### **2.82.3.7 DEFINITIONS:**

**A.** Terms used herein shall have the definitions as set forth in the Educational Retirement Act. Additional definitions used in this regulation are set forth below.

**B. "Non-reported service"** means service for which contributions should have been made by both a member and a local administrative unit pursuant to the Educational Retirement Act, but which were not made.

**C. "Refund rate"** means the rates at which interest is calculated for refunds to a member pursuant to Section 22-11-15 NMSA 1978, or to the beneficiary or estate of a member for refunds pursuant to Section 22-11-29 NMSA 1978. The refund rate shall be

calculated based upon the process adopted by the board in its resolution entitled "the educational retirement board of trustees' adoption of a revised process for calculating and credit interest for refunds", June 4, 2010, or by a superseding resolution.

**D. "Student teacher"** means a person engaged in classroom teaching as part of a teacher education or training program whose employment in a local administrative unit is incidental to that person's status as a student. For purposes of example, a student in a teacher training program who receives a stipend, salary or other compensation while student teaching is a "student teacher"; a regular employee of a local administrative unit who also is enrolled in classes, possibly related to that employee's employment, in that or another local administrative unit, is not a student teacher.

[2.82.3.7 NMAC - N, 7/1/2012]

#### **2.82.3.8 SALARY COVERED; SALARY EXCLUDED:**

**A.** Except as otherwise set forth herein and subject to the limitations set forth in Section 22-11-21.2 NMSA 1978, a member's annual salary for the purpose of contributions to the fund and computation of the member's benefit shall consist of total compensation or wages paid to the member for services rendered during each of the four calendar quarters of a fiscal year, beginning July 1 and ending June 30. For purposes of determining contribution rates, a member's expected annual salary at the beginning of the fiscal year shall be considered. When relevant, a member's annual salary shall take into consideration the FTE of the position and the aggregation of salaries if the member will have multiple positions with the same or other local administrative units during the fiscal year. If a member's total annual salary is more than \$24,000, the member shall be subject to the contribution rate set forth in Subsection A of Section 22-11-21 NMSA 1978. If a member's total annual salary is \$24,000 or less the member shall be subject to the lower contribution rate set forth in Subsection B of Section 22-11-21 NMSA 1978. When a member whose salary is \$24,000 or less earns in excess of the \$24,000 limit during the fiscal year, the member shall be subject to the higher contribution rate in Subsection A of Section 22-11-21 NMSA 1978 effective the first day of the month in which the member earns in excess of the \$24,000 limit. However, if a member whose salary is \$24,000 or less changes positions with a local administrative unit during the fiscal year or engages in additional employment with the same or other local administrative unit during the fiscal year, and that change in employment creates the expectation that the member's total annual salary shall be more than \$24,000, then the member's contribution rate shall be adjusted in accordance with the change in employment beginning the first day of the month of the change in employment.

**(1)** Salary includes payments made directly to the member or to a third party on behalf of or for the benefit of the member. Salary includes, without limitation:

**(a)** base salary, compensation, or wages;

**(b)** salary, compensation or wages for additional services rendered; examples include: teaching courses in addition to or above a full teaching load during the September to May academic year; teaching courses or performing research during summer (e.g., June through August) where such courses or research are not included in the duties on which the member's salary is based; and, performing work in addition to that specified in the employee's job description; performing administrative duties, such as serving as a department head, head of a faculty or staff group, or for providing other additional services;

**(c)** salary, compensation or wages based on professional certifications or qualifications, or skills such as being bilingual or multilingual;

**(d)** overtime, shift differential, and 'on-call' or call back pay.

**(2)** Retirement contributions shall be made by a local administrative unit and a member on base salary earnings before the salary is reduced due to the local administrative unit and member entering into a voluntary "cafeteria" plan.

**(3)** The salary or compensation paid to a member under a school bus owner-driver contract shall be covered for contributions and benefit calculation purposes. Contributions for compensation paid under a school bus owner-driver contract shall be based upon and limited to the compensation amount paid to a person who drives a single school bus owned by that person over a regularly established route under a regular contract in that person's name with a local administrative unit.

**(4)** Tips or other remuneration paid to a member by a third party are considered salary to the extent that a local administrative unit reports such amounts as the member's income for tax purposes.

**B.** The following items shall not be considered annual salary for the purposes of contributions to the fund and computation of the member's annual benefit:

**(1)** Bonuses, awards and prizes, pay supplements or salary supplements or other "one-time" payments which do not increase an employee's annual base pay or which are made in lieu of an increase in base pay, and similar additional payments, as well as allowances or reimbursements for travel, housing, food, equipment or similar items.

**(2)** Lump-sum payments to the member for accrued sick leave made at any time, and lump-sum payments of accrued annual leave (also referred to as "vacation leave") made after July 1, 2010. Lump-sum payments for accrued annual leave made on or before July 1, 2010 shall be includable as annual salary only to the extent that it does not include payment for more than 30 days of such leave.

**(3)** Payments made by a local administrative unit to a member where services are not rendered. By way of example, and with limitation to such examples: (a)

payments by an employer to "buy-out" the remaining term of a member's employment contract or in connection with an early retirement program are not payments for services rendered, irrespective of whether payment is made in a lump-sum or distributed over a period of time, and (b) payments as a result of a legal settlement, whether related to the member's employment or otherwise, are not payments for services rendered, unless such payments are specifically made for salary that was not previously paid.

(4) Stipends, salary, or other compensation paid to student teachers.

(5) Stipends or one-time payments for attending training sessions where such payments are not reimbursements for travel expenses.

(6) Allowances or reimbursements for, or expenses related to, travel, housing, food, equipment, cars, or similar items.

(7) After July 1, 2012, additional pay or a pay differential that is based solely on a member performing duties at (a) a location that is different than the location at which the member regularly performs his or her job duties or (b) that is based on the member performing duties outside of the United States and its insular areas, territories, and possessions (e.g., a location differential or hazard or hazardous duty pay).

[2.82.3.8 NMAC - Rp, 2.82.3.8 NMAC, 7/1/2012; A, 10/15/2012; A, 9/26/2017; A, 11/12/2019]

### **2.82.3.9 REFUNDS OF CONTRIBUTIONS:**

**A.** In the event that a member should terminate employment for reasons other than retirement, disability, or death, the member shall be entitled to a refund of the member's contributions, plus interest calculated at the refund rate, reduced by the sum of any disability benefits which that member might have previously received. Contributions made by an employer on behalf of an employee (also referred to as a "member") pursuant to Subsection A of Section 22-11-21 NMSA 1978 are "employee contributions" and are subject to refund. A member is not entitled to a refund of any "employer contributions" (also referred to as "local administrative unit contributions") made pursuant to Subsection B of Section 22-11-21 NMSA 1978. Interest paid by a member to reinstate withdrawn service credit is nonrefundable.

**B.** Any employee who was retired pursuant to the Public Employees Retirement Act (Chapter 10, Article 11 NMSA 1978) and who had made contributions to the fund prior to July 1, 2003, shall be entitled to a refund of such contributions, with interest calculated at the refund rate upon a bona fide termination of employment with the local administrative unit.

**C.** In order to obtain a refund of contributions, the eligible member must file a written request with the director on forms provided by the board.

**D.** A refund of a terminated member's contributions shall be made as soon as practical after receipt of a fully executed refund request form in the office of the board. If the member's record has been inactive for a full calendar quarter, the refund may be processed without further certification of termination by the last employer or the final monthly report upon which the member appears. If the member requesting a refund has an active record (i.e., a record reflecting contributions made in the preceding completed calendar quarter), the refund request shall not be processed without the last employer's certification of termination and the final monthly report upon which the refunding member will appear. No refund shall be processed until the board has received all required contributions. The board shall not accept contributions subsequent to the submission of the final monthly report, as certified by the employer. If a refunding member returns to employment with any local administrative unit before the refund process is complete, the refund request shall be denied. For purposes of this rule, "termination" means a complete severance of the employment relationship with no contract for, promise of, or expectation of future employment with any local administrative unit.

**E.** Refund of contributions for any period of service performed subsequent to July 1, 1957, will cancel all "prior service" credit which may have been credited to the member at the time of the refund. Restoration of all contributions withdrawn, together with interest calculated at the refund rate, will cause the prior service to be restored; provided, however, that as set forth Subsection C of 2.82.3.11 NMAC, effective July 1, 2011, a member who was a member at any time prior to July 1, 2010 and who, on or before June 30, 2010, had all of his or her member contributions refunded pursuant to Section 22-11-15 NMSA 1978, and who, on or after July 1, 2010, returns to employment or returns the withdrawn contributions to the fund together with interest at the rate set by the board, is eligible to retire as if initially becoming a member on or after July 1, 2010.

**F.** Whenever a terminated member leaves a balance of \$500.00 or less in the member's account, the account shall be closed into "unallocated income" after the member has been terminated for a period of not less than two years. The record of the terminated member's contribution balance at the time that it was closed into "unallocated income" shall be maintained. If the terminated member subsequently returns to employment, the balance shall be restored to that member's account. Alternatively, if the terminated member should later claim or request a refund of the amount transferred to unallocated income, such amount shall be restored to the terminated member's account and refunded.

**G.** Whenever a terminated member has received a refund in excess of the amount due the member, such excess may be "closed out" into unallocated income by the director if it does not exceed \$1,000.00 after the excess refund has been outstanding for a period of not less than two years, provided that staff has first made two or more separate attempts to contact the terminated member in writing and collect the excess refund. All such attempts must be documented by staff. All such "close out" actions shall be reported to the board in writing at its first regular meeting following that action. If a terminated member who received an excess refund that was closed into "unallocated

income" should return to employment, such excess refund shall be charged to the member's contribution account.

**H.** If a terminated member shall have received a refund in excess of \$1,000.00 over the amount due that member, and two or more separate attempts have been made to contact the terminated member and collect the excess refund, the director may, after taking into account the costs of doing so, direct staff to pursue legal action to recover the excess. If the amount is deemed uncollectible by the director, the matter shall be brought before the board to determine any further action.

**I.** Member contributions which have been withheld and paid to the educational retirement fund in error for a member who is not eligible to receive service credit for the time covered by the withholding, shall be returned to the employer, without interest, upon the member's written request or upon the board learning that the member was not eligible to receive service credit for the time covered. The employer shall be responsible for returning such contributions to the member.

[2.82.3.9 NMAC - Rp, 2.82.3.9 NMAC, 7/1/2012; A, 6/30/2016; A, 9/26/2017]

#### **2.82.3.10 REFUNDS OF CONTRIBUTIONS IN THE EVENT OF DEATH OF MEMBER OR BENEFICIARY:**

**A.** In the event of the death of an active member who is not vested, member contributions together with interest calculated at the refund rate shall be refunded to the member's beneficiary or to the member's estate upon completion of the proper refund forms as provided for herein.

**B.** In the event of the death of a vested member who did not select Option B benefits prior to the effective date of retirement, the deceased member's beneficiary shall be have the option of electing to receive a refund of the member's contributions or receiving benefits in the form of Option B as provided in Section 22-11-29 NMSA 1978. Refunds, together with interest calculated at the refund rate and reduced by the sum of any disability benefits which that member previously received, shall be paid to the member's surviving beneficiary, surviving spouse or domestic partner if no beneficiary had been named, or if there is no named surviving beneficiary, surviving spouse or domestic partner, to the member's estate. If a beneficiary defers payment after the member dies as described in Section 22-11-29 NMSA 1978 and requests a lump sum payment in lieu of benefit under Option B, interest shall be calculated at the refund rate though the end of the calendar quarter prior to the date on which the completed refund request is received by the ERB. Under the provisions of Options B and C, if both the member and the designated beneficiary die before the total of the retirement benefits received by the member and the beneficiary equal the total contributions made by the member, the difference, less any disability benefits previously paid to the member, shall be paid to the member's or the beneficiary's estate.

**C.** In order to obtain a refund of contributions after the death of a member, the member's beneficiary must notify the director of the member's death and furnish a copy of the death certificate or other proof of death acceptable to the director, whereupon the director shall furnish the beneficiary the proper forms to request a refund.

**D.** If the amount of a deceased member's contribution does not exceed the sum of \$1,000.00 and no written claim is made to the board for it within one year from the date of the member's death, by the member's surviving beneficiary or estate, payment thereof may be made to the named beneficiary or, if none is named, to the person that the board determines to be entitled to the contribution under the laws of New Mexico.

**E.** A person will be considered a domestic partner if the person submits a completed ERB domestic partner affidavit form and two of the following documents: proof of shared residence via joint mortgage statement, joint rental agreement, or deed; automobile title or registration showing joint ownership of a vehicle; joint checking, bank, or investment account statement; joint credit account statement; a will or life insurance policy that designates the other person as primary beneficiary; or such other supporting document(s) approved by the director.

[2.82.3.10 NMAC - Rp, 2.82.3.10 NMAC, 7/1/2012; A, 10/15/2012; A, 11/12/2019]

#### **2.82.3.11 RETURN OF REFUNDED CONTRIBUTIONS AND RETIREMENT ELIGIBILITY:**

**A.** Member contributions which have been withdrawn from the fund by a member who has terminated employment may be returned to the fund, together with interest at the rate set by the board, without the member being required to return to employment if the termination was under one of the following circumstances:

**(1)** the member terminated employment for reasons other than by retirement, disability or death;

**(2)** the member exempted himself or herself from the Educational Retirement Act; or

**(3)** the member has not been reemployed following a period of disability during which the member received disability benefits.

**B.** Contributions restored to the fund after having been withdrawn by a member that were originally made prior to July 1, 1971 shall not be considered as having been paid to the fund after July 1, 1971 for the purpose of earning interest and no interest shall be paid on such restored contributions.

**C.** Effective July 1, 2011, a member who was a member at any time prior to July 1, 2010 and who, on or before June 30, 2010, had all of his or her member contributions refunded pursuant to Section 22-11-15 NMSA 1978, and who, on or after July 1, 2010,

returns to employment or returns the withdrawn contributions to the fund together with interest at the rate set by the board, is eligible to retire as if initially becoming a member on or after July 1, 2010.

[2.82.3.11 NMAC - Rp, 2.82.3.11 NMAC, 7/1/2012, A, 10/15/2012]

#### **2.82.3.12 PURCHASE OF NON-REPORTED SERVICE; FAILURE TO DEDUCT MEMBER CONTRIBUTIONS:**

**A.** Non-reported service must be purchased at the time it is discovered. Payment for non-reported service shall be at the contribution rate in effect at the time the non-reported service is discovered. The full fiscal year salary for the position for which the member was hired shall determine whether a member pays the contribution rate applicable to members who earn \$24,000 or less per year in accordance with Section 22-11-21 NMSA 1978.

**B.** If the local administrative unit fails to deduct the applicable contribution from the salary paid to a member for each payroll period, the local administrative unit shall be responsible to remit to the fund the total amount due for both the member and the local administrative unit plus interest at a rate set by the board.

[2.82.3.12 NMAC - N, 7/1/2012; A, 9/26/2017; A, 11/12/2019]

#### **2.82.3.13 INTEREST CREDITS AND PAYMENTS ON MEMBER CONTRIBUTIONS:**

At the time of refund of a member's contributory balance, interest shall be paid at the refund rate through the end of the calendar quarter preceding the date of the refund; except that no interest shall be paid on contributions credited to a member's account for any period prior to July 1, 1971, nor shall interest be paid on contributions on deposit for less than one year.

[2.82.3.13 NMAC - N, 7/1/2012]

### **PART 4: SERVICE CREDITS**

#### **2.82.4.1 ISSUING AGENCY:**

Educational Retirement Board, P.O. Box 26129, Santa Fe, New Mexico 87502-0129.

[2.82.4.1 NMAC - Rp, 2.82.4.1 NMAC, 10/31/2017]

#### **2.82.4.2 SCOPE:**

This rule applies to earned and allowed service credit.

[2.82.4.2 NMAC - Rp, 2.82.4.2 NMAC, 10/31/2017]

**2.82.4.3 STATUTORY AUTHORITY:**

The Educational Retirement Act, Sections 22-11-1 to 22-11-55 NMSA 1978.

[2.82.4.3 NMAC - Rp, 2.82.4.3 NMAC, 10/31/2017]

**2.82.4.4 DURATION:**

Permanent.

[2.82.4.4 NMAC - Rp, 2.82.4.4 NMAC, 10/31/2017]

**2.82.4.5 EFFECTIVE DATE:**

October 31, 2017, unless a later date is cited at the end of a section.

[2.82.4.5 NMAC - Rp, 2.82.4.5 NMAC, 10/31/2017]

**2.82.4.6 OBJECTIVE:**

Clarifies requirements, conditions and procedures for determining a member's years of service, and the purchase of allowed service credit.

[2.82.4.6 NMAC - Rp, 2.82.4.6 NMAC, 10/31/2017]

**2.82.4.7 DEFINITIONS:**

**[RESERVED]**

**2.82.4.8 EARNED SERVICE CREDIT:**

**A.** Earned service credit shall be granted on a quarterly basis.

**B.** A member shall receive one quarter of credit for each calendar quarter in which the member has earnings from regular employment and renders services for a minimum of 16 days. A member is considered to have rendered services for each day upon which the member is paid salary, regardless of whether the member is on annual, sick, administrative or other form of paid leave. Four calendar quarters of credit shall constitute one year. The calendar quarters of a year shall begin and end as follows: July 1 through September 30; October 1 through December 31; January 1 through March 31; and April 1 through June 30.

**C.** Members who are granted paid sabbatical leave shall receive one calendar quarter of earned service credit for each quarter in which they receive pay for such.

**D.** If a member is granted earned service credit while on paid sabbatical leave and that sabbatical leave is subsequently revoked, with salary payments returned to, or demanded by the administrative unit, under the terms of the leave agreement between the administrative unit and the member, the earned service credit granted during such sabbatical leave shall be revoked.

**E.** In the event of revocation of earned service credit as provided in Subsection D of 2.82.4.8 NMAC, disposition of contributions made by the member and local administrative unit relating to the revoked period of earned service credit shall be as follows:

**(1)** Local administrative unit contributions shall be credited to the local administrative unit to be used against future contribution costs.

**(2)** Before the member contribution shall be disbursed, or credited, the local administrative unit shall furnish the board with proof of the settlement which has been made with the member. Following the receipt of this proof, the member contributions shall be handled as follows:

**(a)** If the local administrative unit has completed the financial settlement with the member without being reimbursed for member contributions relating to the leave and paid to the board, the administrative unit shall be granted credit for such member contributions to be used against the future administrative unit contribution costs.

**(b)** If the local administrative unit has been reimbursed by the member for member contributions relating to the leave and paid to the board, such member contributions shall be paid to the member on a refund voucher separate from any other refund which might be requested by the member.

**F.** An exchange teacher who is working outside the New Mexico public schools, but who is being paid a regular salary by a local administrative unit, shall receive earned service credit for such service.

**G.** The board shall not allow contributory service credit when token salaries are paid or when gratuitous service is performed. The ERB shall rule on each case involving gratuitous service or token salaries when each case is presented.

**H.** The board may accept rollover and employer payroll deduction contributions for the restoration of withdrawn earned 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 indemnification 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 restore the withdrawn earned service credit.

**I.** For payments to restore earned 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 Sections 402(c), 403(b)(8), 408(d) or 457(e)(16) of the Internal Revenue Code.

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

**(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 earned 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 restore the withdrawn earned service credit.

**J.** A person who is employed by a local administrative unit and receives retirement benefits pursuant to the Public Employees Retirement Act shall not earn service credit unless the person has suspended their benefit.

[2.82.4.8 NMAC - Rp, 2.82.4.8 NMAC, 10/31/2017, A, 11/12/2019]

#### **2.82.4.9 ALLOWED SERVICE CREDIT:**

**A.** For purposes of granting allowed service credit pursuant to Paragraph (2) of Subsection A of Section 22-11-34 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 18 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.** For purposes of granting allowed service credit pursuant to Paragraph (3) of Subsection A of Section 22-11-34 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 Paragraph (3) of Subsection A of Section 22-11-34 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 60 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 Paragraph (3) of Subsection A of Section 22-11-34 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 Paragraph (3) of Subsection A of Section 22-11-34 NMSA 1978, the "average annual actual salary" shall be based upon the member's most recent 20 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 Paragraph (3) of Subsection A of Section 22-11-34 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 Subsection C of Section 22-11-33 NMSA 1978; such repayment shall be made at the same time as the lump sum payment for allowed service credit as specified in Paragraph (3) of Subsection A of Section 22-11-34 NMSA 1978.

**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 Paragraphs (3) and (4) of Subsection A of Section 22-11-34 NMSA 1978 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, 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.

**D.** For the purpose of granting allowed service credit, pursuant to Paragraph (4) of Subsection A of Section 22-11-34 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 Subparagraph (a) of Paragraph (4) of Subsection A of Section 22-11-34 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.

**E.** Prior to the purchase of allowed service credit under Subparagraph (d) of Paragraph (4) of Subsection A of Section 22-11-34 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.

**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.

**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 Sections 402(c), 403(b)(8), 408(d) or 457(e)(16) of the Internal Revenue Code.

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

(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.

[2.82.4.9 NMAC - Rp, 2.82.4.9 NMAC, 10/31/2017]

#### **2.82.4.10 RETURN TO WORK:**

No service credit can be earned, purchased or otherwise credited for any of the time a retired member is employed by a local administrative unit unless the retired member has suspended their retirement benefit. While a retired member is employed by a local administrative unit, no service credit can be purchased for service previously earned or withdrawn unless the retired member has suspended their retirement benefit.

[2.82.4.10 NMAC - Rp, 2.82.4.10 NMAC, 10/31/2017; A, 11/12/2019]

#### **2.82.4.11 SICK LEAVE SERVICE CREDIT:**

**A.** Beginning July 1, 2020, a member may pay to convert unused sick leave to earned service credit in accordance with Section 22-11-34.1 NMSA 1978. Earned service credit that is purchased in accordance with Section 22-11-34.1 NMSA 1978 shall be known as "sick leave service credit." To purchase sick leave service credit a member shall:

(1) submit an application on a form provided by the director specifying the number of days of unused sick leave the member desires to use to purchase earned service credit;

**(2)** be currently employed by a local administrative unit (LAU) as a regular member as defined under the Educational Retirement Act;

**(3)** pay to the fund the actuarial present value, as determined by the board, of the benefit attributable to the conversion; and

**(4)** have acquired at least five years of contributory employment to be eligible for retirement.

**B.** The member shall make full payment in a single lump sum within 90 calendar days of the date that the member is informed of the amount of the payment.

**C.** The board may accept rollovers or transfers for the purchase of sick leave 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 must submit satisfactory documentation, releases or indemnification 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)** The board may not accept rollovers or transfers in excess of the amount required to purchase sick leave service credit.

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

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

**(6)** The rollovers and transfers shall contain only pre-tax deferred contributions and earnings on the contributions. The member 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.

**D.** Any sick leave for which the member has been paid or which the member has otherwise used shall not be eligible for conversion to sick leave service credit.

**E.** The member shall only be eligible to convert his or her own earned sick leave to earned service credit. Donated sick leave or sick leave available to the member from a sick leave bank or similar repository shall not be eligible for conversion to sick leave service credit.

**F.** The LAU employing the member shall certify to ERB:

**(1)** the number of days of unused sick leave the member has available for conversion, and

**(2)** the number of days of unused sick leave the member wishes to convert to sick leave service credit.

**G.** The director shall review the member's application for sick leave service credit and the information certified by the LAU. The director may request additional documentation or information from the LAU or the member that may be relevant to the processing of the application.

**H.** Unused sick leave that is converted to earned service credit shall be cancelled by the LAU and shall no longer be available to the member for use as sick leave or as a basis for monetary payment.

**I.** If a member receives a refund of the member's contributions, all sick leave service credit shall be cancelled from the member's account and shall not be available for purchase or be reinstated.

**J.** Conversion of unused sick leave to earned service credit is irrevocable. Sick leave service credit shall not convert back into or become unused sick leave.

**K.** Payments received by ERB for the purchase of sick leave service credit are nonrefundable.

**L.** A retired member who has not suspended their benefit and who has returned to employment with an LAU is not eligible to purchase sick leave service credit. Sick leave earned by a retired member who has not suspended their benefit and who has returned to employment with an LAU shall not be eligible for conversion to sick leave service credit.

[2.82.4.11 NMAC - N, 7/14/2020]

## **PART 5: RETIREMENT BENEFITS**

### **2.82.5.1 ISSUING AGENCY:**

Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129.

[2.82.5.1 NMAC - Rp, 2.82.5.1 NMAC, 7/1/2024]

**2.82.5.2 SCOPE:**

This rule applies to procedures and eligibility for retirement, and the calculation of and selection of options for benefits.

[2.82.5.2 NMAC - Rp, 2.82.5.2 NMAC, 7/1/2024]

**2.82.5.3 STATUTORY AUTHORITY:**

The Educational Retirement Act, Sections 22-11-1 to 22-11-55 NMSA 1978.

[2.82.5.3 NMAC - Rp, 2.82.5.3 NMAC, 7/1/2024]

**2.82.5.4 DURATION:**

Permanent.

[2.82.5.4 NMAC - Rp, 2.82.5.4 NMAC, 7/1/2024]

**2.82.5.5 EFFECTIVE DATE:**

July 1, 2024, unless a later date is cited at the end of a section or paragraph.

[2.82.5.5 NMAC - Rp, 2.82.5.5 NMAC, 7/1/2024]

**2.82.5.6 OBJECTIVE:**

To specify procedures for retirement, benefits and options, and provide rules for the restoring process.

[2.82.5.6 NMAC - Rp, 2.82.5.6 NMAC, 7/1/2024]

**2.82.5.7 DEFINITIONS:**

**[RESERVED]**

**2.82.5.8 ELIGIBILITY:**

**A.** A member shall not be considered eligible to retire unless the member shall have completed at least five years of contributory employment even though such member might otherwise be eligible by reason of age and service, and tender of payment for contributory employment.

**B.** A school bus owner-driver shall not be eligible to retire unless the owner-driver terminates the owner-driver contract with the public schools.

[2.82.5.8 NMAC - Rp, 2.82.5.8 NMAC, 7/1/2024]

#### **2.82.5.9 APPLICATIONS:**

**A.** Retirement application forms furnished by the director and made available in each local administrative unit, may be initiated by the member or the member's employer. The member may also write to the director to apply for benefits. In either case, the application must be signed by the member.

**B.** If a member seeking retirement is not employed at the time of application, the director shall deal directly with the member in processing the application, without reference to, or concurrence of the last employer.

**C.** The application for retirement (being the completed form supplied by the director) must be filed in the office of the director prior to the desired effective date of benefits.

**D.** A member who has been re-employed following a previous retirement shall make application for benefits in the same manner as one who has not previously been retired.

**E.** Any member with an effective retirement date on or after July 1, 2015 shall provide authorization to the director for the electronic transfer of pension payments to the retiree's banking institution. Such authorization shall be executed in the form prescribed by the director. The director may waive this requirement upon a showing of exceptional circumstances.

**F.** In order to implement Section 22-11-32 NMSA 1978, the director shall, at the time of the member's application for benefits, obtain the member's written statement that the member or the member's beneficiary does or does not receive any other benefit from any public agency which would be adversely affected by the member or the member's beneficiary's receipt of benefits pursuant to the Educational Retirement Act. If the member or the member's beneficiary does, or will receive such benefits, the director shall make the benefit adjustment called for in this section.

[2.82.5.9 NMAC - Rp, 2.82.5.9 NMAC, 7/1/2024]

#### **2.82.5.10 COMPUTATION AND COMMENCEMENT OF RETIREMENT BENEFITS:**

**A.** Upon retirement, the following procedures shall apply with regard to commencement of the member's benefit:

(1) If the retiring member's employment terminated at least 90 days prior to the effective date of retirement, the benefit may be commenced at the end of the month following the effective date of retirement.

(2) If the retiring member's employment terminated within 90 days prior to the effective date of retirement, the retiring member's benefit may be estimated by the director and commenced at the end of the month following the effective date of retirement.

(3) After the employer report is received from the administrative unit, reporting the retiring member's final earnings, the director shall determine whether or not the estimated benefit is correct. If the estimated benefit is incorrect, the director shall make the appropriate adjustment to the member's benefit, retroactive to the effective date of the benefit. This adjustment, if required, shall be made at the earliest practical date. The retiring member shall be advised regarding the nature of any such adjustment. An adjustment will be made in this manner if and only if the adjustment based upon the member's actual earnings would result in a monthly benefit which differs more than one dollar from the estimated benefit.

**B.** Whenever a retiring member completes the academic or fiscal year prior to July 1, the member shall not be entitled to retirement benefits for the months of July or August if the member returns to employment at the beginning of the next following academic or fiscal year. If a member shall have received benefits for such months, the member shall be required by the director to return the sums received, to the educational retirement fund, in accordance with Section 22-11-40 NMSA 1978.

**C.** The retiring member shall be furnished with copies of all computations including a listing of the member's service credit, and the member shall have 90 days after receipt of same in which to file notice of correction with the director, after which time the computations and service may not be corrected by the member.

**D.** A member's average annual salary as defined in Section 22-11-30 NMSA 1978 shall be the average annual earnings of the member in the last 20 calendar quarters in which there were earnings preceding retirement or the average annual earnings of any 20 consecutive calendar quarters in which there were earnings, whichever is greater. Salary earned by a retiree who has returned to employment under 2.82.5.15 NMAC, 2.82.5.16 NMAC or 2.82.5.17 NMAC shall not be used in determining a member's average annual salary.

**E.** When determining a member's last five-year average annual salary (last 20 calendar quarters), the director shall use the reported earnings on which contributions have been made by the member during the 20 quarters of employment immediately preceding the member's date of termination, except that if a member's last employment terminated at least one month prior to the close of the calendar quarter (or one month prior to the close of the academic year if such ends in May), the member's last five years' earnings shall be the reported earnings upon which contributions have been made by the member during the five years of employment preceding the end of the month in which termination occurs. In such cases, any earnings in a calendar quarter shall be considered as earnings for the full quarter, except for the first quarter and the last quarter of the last five years of employment.

**F.** When the member's application for benefits has been approved and the member's effective date of retirement has been reached, the member shall then be retired.

**G.** Benefits shall not be commenced until the retiring member has elected the retirement benefit as provided in Section 22-11-30 NMSA 1978, or an optional benefit pursuant to Section 22-11-29 NMSA 1978.

**H.** Re-retirement benefits shall be computed in the following manner:

(1) The re-retirement benefit will be calculated in the same way as the member's last benefit and will be based on the last five-year average or the highest consecutive five-year average, whichever is greater, for which contributions were made, and the member's total service at re-retirement. The retirement benefit formula will be the same as at last retirement unless the member returns to employment for at least four quarters after the effective date of change in the formula. If this occurs, the benefit computation will be based on the benefit formula in effect at the time of re-retirement.

(2) The re-retirement benefit calculated above is reduced under the following conditions:

(a) At re-retirement the member's retirement age shall be the member's chronological age less any period of time(s) during which benefits were received while in retirement. If this age is under 60 and the member's total service is under 25 years, the benefit is reduced by six-tenths percent for each quarter year under 60, down to age 55, plus one and eight-tenths percent for each quarter year this age is under 55.

(b) If the last benefit was payable as a reduced benefit under the terms of an option, the same terms and reduction shall apply to the re-retirement benefit.

(c) In no case can the member's re-retirement benefit be less than the member was receiving when the member returned to employment.

[2.82.5.10 NMAC - Rp, 2.82.5.10 NMAC, 7/1/2024]

#### **2.82.5.11 EFFECTIVE DATE OF BENEFIT:**

**A.** Whenever a retiring member completes the academic year for which the member has been contracted or employed, the member's effective date of retirement shall be July 1, provided that application is made as stipulated in Subsection B of 2.82.5.11 NMAC. Whenever a retiring member terminates at a time other than at the end of the academic year for which the retiring member has been contracted or employed, the effective date may be the first day of the month following termination, provided that application must be as stipulated in Subsection B of 2.82.5.11 NMAC.

**B.** The effective date of benefits cannot in any case be earlier than the first day of the month following receipt of the completed application forms (as provided by the director) from the member or the member's employer, except as provided in Subsection D of 2.82.5.11 NMAC.

**C.** Section 22-11-28 NMSA 1978 shall be construed to mean that the effective date of benefits shall be in accordance with Subsection D of 2.82.5.11 NMAC, and further that on concurrence of the local administrative unit for retirement on a date other than July 1 has been given when the local administrative unit certifies the member's termination on the application form.

**D.** If a member's application for benefits is received after the effective date desired by the member, and such desired effective date would otherwise be in accordance with the law and rules of the board, the director may commence the member's benefit as of such date, only if the delay in filing was due to delay in processing by the local administrative unit, and not due to any fault or wish of the member. The director shall also consider an application to have been duly filed in this office on the date postmarked if the application is mailed.

[2.82.5.11 NMAC - Rp, 2.82.5.11 NMAC, 7/1/2024]

#### **2.82.5.12 APPROVAL OF RETIREMENT APPLICATION:**

The director is authorized to approve duly executed applications for age and service retirement on behalf of the board in order to insure timely approval of same; however, all such approvals must be ratified by the educational retirement board at a subsequent meeting of the board.

[2.82.5.12 NMAC - Rp, 2.82.5.12 NMAC, 7/1/2024]

#### **2.82.5.13 OPTIONS:**

**A.** Option B provided in accordance with Subsection D of Section 22-11-29 NMSA 1978 shall be operative:

- (1) during periods of non-participation, if contributions are not withdrawn, and
- (2) during periods of time when a member is receiving disability benefits, and
- (3) during the period of time from a member's effective retirement date until the final election of option is received in the ERB office.

**B.** If a member with option B coverage should terminate employment and withdraw the member's contributions, thereby causing the option B to become inoperative, the member may restore the amount withdrawn, together with required interest, and cause the option to become operative again.

**C.** An option election on file with the director by a member who has not retired shall become void on July 1, 1984, at which time the member will automatically be afforded the coverage of option B.

**D.** Upon retirement, a member may elect an optional benefit in accordance with Section 22-11-29 NMSA 1978. If electing coverage under option B, the member may not designate a beneficiary more than 10 years younger than the member unless the beneficiary is the member's spouse. In order that the retiring member may have the opportunity to properly consider this decision and to allow sufficient time for the member and the board to carry out necessary administrative procedures relating to the election of an option, an option election filed with the director subsequent to the effective date of retirement, but prior to commencement of benefit payments, shall be deemed to have been filed in accordance with the provisions of Section 22-11-29 NMSA 1978.

**E.** Whenever a member with option B coverage dies prior to the member's effective retirement date, it shall be incumbent upon the member's beneficiary to furnish proof of death to the director. The director shall then advise the beneficiary of the amount payable as a lump-sum settlement. Additionally, the director shall advise the beneficiary of the monthly amount of benefit payable as of the first of the month following the death of the member, as well as the approximate monthly amount payable, if the beneficiary defers receipt of the benefit to the date on which the member would have been age 60, had the member lived. The beneficiary shall then advise the director, in writing, whether the member's wishes to receive a lump-sum payment, commence the benefit at the earliest possible date, or defer the benefit to a date not later than the date on which the member would have attained age 60, had the member lived. If the beneficiary chooses a monthly benefit, the member shall not be required to make formal application for such benefit as required of members seeking retirement status. If the beneficiary chooses to defer the benefit to a later date, the member must advise the director at least 30 days in advance of the date on which the member's wishes benefit to start.

**F.** Upon the death of a member who has the automatic option B coverage, and who has failed to name or who has incorrectly named a beneficiary under the option, the following shall apply:

(1) If the member has named one person on the ERB beneficiary designation form or form 42, that person shall be declared the beneficiary under option B.

(2) If more than one person is named on the ERB beneficiary designation form or form 42 of which one is the spouse of the member, the spouse shall be declared the beneficiary for option B purposes.

(3) If the beneficiary named on the ERB beneficiary designation form or form 42 is deceased, a lump-sum payment of contributions plus applicable interest will be paid to the estate of the member.

(4) If the beneficiary named on the ERB beneficiary designation form or form 42 is a minor child, the legal guardian, if other than the parent, will designate the manner in which the alternative payments under option B will be paid to the minor.

(5) If the beneficiary named on the ERB beneficiary designation form or form 42 is a minor child in the care and custody of a parent, the parent shall designate the method of payment to the minor child under the option B.

(6) If more than one person is named on the ERB beneficiary designation form or form 42, none of which is the spouse of the member, a lump-sum payment of contributions plus appropriate interest shall be made to the beneficiaries as per the directions of the member on the ERB beneficiary designation form or form 42. In the absence of contrary directions by the member, equal shares will be made. If one or more of the beneficiaries are minors, the distribution to the minor(s) shall be made to:

(a) a trust fund for the minor(s), if established, or

(b) on behalf of the minor(s), a person who has care and custody of the minor, or

(c) directly to the beneficiary(ies) upon attainment of age 18.

(d) these methods of distribution of payments shall also apply to Paragraphs (4) and (5) above.

(7) If the beneficiary named on the ERB beneficiary designation form or form 42 is not a human being, the beneficiary shall not be eligible for Option B coverage and shall receive a lump-sum payment of the member's contributions plus applicable interest at the rate set by the board.

[2.82.5.13 NMAC - Rp, 2.82.5.13 NMAC, 7/1/2024]

#### **2.82.5.14 COST-OF-LIVING ADJUSTMENTS:**

**A.** The adjustment factor to be applied annually to eligible benefits shall be determined by using the "*Consumer Price Index for All Urban Consumers U.S. City Average All Items*".

**B.** If a member who was certified by the board as disabled at the time of regular retirement returns to gainful employment with a local administrative unit in a position commensurate with the member's background, education and experience, the member's benefit shall no longer be subject to adjustments as provided for in Subsection G of Section 22-11-31 NMSA 1978. Any adjustments made prior to the date of reemployment shall remain in effect. All future adjustments shall be made solely as provided for in Subsections B and C of Section 22-11-31 NMSA 1978.

**2.82.5.15 RETURN TO WORK PROGRAM:**

**A.** A retired member cannot return to employment with any LAU until the member submits and ERB approves a return to work application prescribed by the Board verifying their eligibility for the return to work program.

**B.** For purposes of return to work, including Sections 15 through 18 of 2.82.5 NMAC, a retired member is deemed "employed" if a retired member is or should be included in the work report provided by the employing LAU to the ERB pursuant to 2.82.9.8. NMAC as being paid a wage.

**C.** If a retired member who would otherwise qualify for a return to work program receives a written notice ("Notice of Violation") from ERB notifying the member that the member failed to submit the required return to work application prior to returning to employment, the member shall:

- (1) Immediately terminate employment and notify ERB of such termination; or
- (2) Submit a completed return to work application for the appropriate return to work program within 30 days of the date of the Notice of Violation.

**D.** A retired member who receives a Notice of Violation who would qualify for a return to work program but fails to terminate employment or submit a return to work application within 30 days of the date of the Notice of Violation shall have their retirement suspended immediately and before their monthly retirement benefits can resume must:

- (1) certify to ERB and provide documentation from their employer(s) verifying that they have terminated all LAU employment, and
- (2) reapply for retirement by completing the application process provided in 2.82.5.9 NMAC as if a first-time applicant.

**E.** A retired member who receives a Notice of Violation who would not qualify for a return to work program because the member has not satisfied the 90-day layout has not had a bona fide termination and is ineligible to receive a retirement benefit and shall have their retirement suspended immediately and shall pay to the educational retirement fund a sum equal to the total retirement benefits the member received while employed and before their monthly retirement benefits can resume must:

- (1) certify to ERB and provide documentation from their employer(s) verifying that they have terminated all LAU employment, and

(2) reapply for retirement by completing the application process provided in 2.82.5.9 NMAC as if a first-time applicant.

**F.** If the retired member did not render service to any LAU for at least 90 consecutive days after the date of retirement ("layout") and before they returned to employment, the member is not required to layout for an additional 90 consecutive days and shall be deemed to have satisfied the 90-day non-service requirement under Paragraph (1) of Subsection A of 2.82.5.17 NMAC and Paragraph (1) of Subsection A of 2.82.5.18 NMAC.

**G.** Periods of employment or wages received by a retired member prior to their approval in a return to work program under this Paragraph C shall count against the limits provided in rules 2.82.5.16, 2.82.5.17, and 2.82.5.18 NMAC.

**H.** No time that a retired member has been employed by a local administrative unit ("LAU") under any return to work ("return to work") program may be used in the calculation of retirement benefits and a retired member cannot acquire or purchase service credit for the period of the retired member's re-employment with a LAU under any return to work program.

**I.** A retired member who returns to work under an approved return to work program may, if qualified, change programs once per year by submitting a return to work application for the different program within the month of July. If mailed, an application will be deemed submitted as of the postmark date.

**J.** Independent Contractors. A retired member who is not employed by an LAU and whose independent contractor application has been approved by ERB may provide services to that LAU as an independent contractor.

(1) A retired member who wants to provide services as an independent contractor to an LAU or through an arrangement with a third party contracting with an LAU shall submit and obtain approval of an independent contractor application from ERB prior to providing such services.

(2) A retired member who fails to submit and obtain approval as an independent contractor prior to providing services to an LAU may be subject to any appropriate action contained in this rule if ERB determines that the member was employed during the period of providing services to the LAU.

**K.** Each LAU shall create, maintain and distribute to its employees an internal return to work policy consistent with the applicable statutes and 2.82.5 NMAC.

**L.** A final written decision of the director which results in a suspension of benefits for a violation of Sections 15 through 18 of 2.82.5 NMAC may be appealed pursuant to 2.82.11 NMAC.

**M.** All Notices of Violation shall be mailed certified via the United States postal service.

**N.** All applications, notices and other communications required from members pursuant to Sections 15 through 18 of 2.82.5 NMAC should be mailed certified via the United States postal service; provided that ERB shall accept delivery of any such applications, notices and other communications when received regardless of the delivery method. By accepting delivery of an application, notice or other communications, ERB does not waive any deadline, requirement for completion or other requirement contained in Sections 15 through 18 of 2.82.5 NMAC.

[2.82.5.15 NMAC - Rp, 2.82.5.15 NMAC, 7/1/2024]

**2.82.5.16 RETURN TO WORK .25 FTE OR LESS:**

**A.** A retired member may return to employment (includes "substitution") at a level of .25 FTE or less without affecting the retired member's retirement benefit provided the retired member submits a return to work application and is approved by ERB prior to commencing employment.

**B.** In the event that a retired member enters into an agreement which provides for employment at a level greater than .25 FTE or actually works greater than .25 FTE becomes ineligible to receive retirement benefits. The retired member's retirement benefit will be suspended for the unauthorized period of the employment, and the retired member will be returned to an active status effective the first day of the month following the month in which the retired member's employment exceeded .25 FTE. The retired member shall pay the educational retirement fund a sum equal to all retirement benefits the retired member received while ineligible.

**C.** If suspended, before the member's monthly retirement benefits can resume, the suspended retired member must certify to ERB and provide documentation from their employer(s) verifying that they have terminated all employment that would disqualify them from retirement under the Educational Retirement Act and must reapply for retirement.

[2.82.5.16 NMAC - Rp, 2.82.5.16 NMAC, 7/1/2024]

**2.82.5.17 RETURN TO WORK LESS THAN \$15,000 PER YEAR:**

**A.** A retired member may return to employment (includes "substitution") pursuant to Subsection H of Section 22-11-25.1 NMSA 1978 without affecting the retired member's retirement benefit provided that:

(1) the retired member has not rendered service to an LAU for at least 90 consecutive days after the date of retirement;

(2) prior to the date of retirement or within 90 days after the date of retirement, the retired member did not enter into a formal or informal agreement with a LAU or a contractor providing services to a LAU to return to employment;

(3) the retired member earns less than fifteen thousand (\$15,000) per fiscal year; and

(4) The retired member submits a return to work application and is approved by ERB prior to commencing employment.

**B.** If a retired member earns fifteen thousand (\$15,000) or more per fiscal year, the retired member becomes ineligible to receive retirement benefits and the retired member's retirement benefit shall be suspended for the duration of the employment and the retired member shall be returned to active status effective the first day of the month following the month in which the retired member has earnings in excess of the above limit. The retired member shall pay the educational retirement fund a sum equal to all retirement benefits the retired member received while ineligible.

**C.** If suspended, before the member's monthly retirement benefits can resume, the suspended retired member must certify to ERB and provide documentation from their employer(s) verifying that they have terminated all LAU employment and must reapply for retirement. The member's retirement will commence as of the first day of the month following the date ERB has received the necessary documentation.

[2.82.5.17 NMAC - Rp, 2.82.5.17 NMAC, 7/1/2024]

#### **2.82.5.18 RETURN TO WORK 36 MONTHS:**

**A.** A retired member may return to employment pursuant to Subsection I of Section 22-11-25.1 NMSA 1978 without affecting the retired member's retirement benefit provided that:

(1) the retired member has not rendered service to a local administrative unit for at least 90 consecutive days after the date of retirement;

(2) the retired member returns to employment for a period of no more than 36 consecutive or nonconsecutive months; and

(3) the retired member submits a return to work application and is approved by ERB prior to commencing employment.

**B.** If a retired member returns to employment for more than 36 consecutive or nonconsecutive months pursuant to Subsection I of Section 22-11-25.1 NMSA 1978, the retired member becomes ineligible to receive retirement benefits and the retired member's retirement benefit shall be suspended for the period of employment which exceeds 36 consecutive or nonconsecutive months and the retired member shall be

returned to active status effective the first day of the month following the month in which the retired member's employment exceeded 36 consecutive or nonconsecutive months. The retired member shall pay the educational retirement fund a sum equal to all retirement payments the retired member received while ineligible.

**C.** If suspended, before the member's monthly retirement benefits can resume, the suspended retired member must certify to ERB and provide documentation from their employer(s) verifying that they have terminated all LAU employment and must reapply for retirement. The member's retirement will commence as of the first day of the month following the date ERB has received the necessary documentation.

[2.82.5.18 NMAC - Rp, 2.82.5.18 NMAC, 7/1/2024]

#### **2.82.5.19      TERMINATION OF PLAN; ACCRUED RIGHTS OF MEMBERS:**

The rights of members to benefits accrued, to the extent funded, will become vested to the extent required by and upon the events set forth in Treas. Reg. Section 1.401-6(a)(1). See 26 CFR 1.401-6.

[2.82.5.19 NMAC - Rp, 2.82.5.19 NMAC, 7/1/2024]

#### **2.82.5.20      INTERNAL REVENUE CODE SELECTION:**

The Educational Retirement Act of New Mexico is intended to satisfy Section 401(a) of the Internal Revenue Code and to be a governmental plan within the meaning of Section 414(d) of the Internal Revenue Code.

[2.82.5.20 NMAC - Rp, 2.82.5.20 NMAC, 7/1/2024]

#### **2.82.5.21      ROLLOVER DISTRIBUTIONS FOR NON-SPOUSE BENEFICIARIES:**

The Educational Retirement Act shall allow direct rollovers to non-spouse beneficiaries for lump sum distributions only, and such distributions must be requested before the end of the year after the year of the member's death. No partial rollovers shall be permitted. A direct rollover by a non-spouse beneficiary must be made into a traditional or Roth IRA established on behalf of the designated beneficiary and that will be treated as an inherited individual retirement account (IRA) pursuant to the provisions of Section 402(c) (11) of the Internal Revenue Code. The distribution must also otherwise satisfy the definition of an "eligible rollover distribution" under Section 401(a) (31) of the Internal Revenue Code. All other current rules applicable to rollover distributions under the Educational Retirement Act, or adopted by the board pursuant to the Educational Retirement Act, must be followed. The non-spouse beneficiary shall be notified that the member is responsible for following the applicable minimum required distribution rules under Section 401(a) (9) of the Internal Revenue Code.

[2.82.5.21 NMAC - Rp, 2.82.5.21 NMAC, 7/1/2024]

#### **2.82.5.22 DEATH BENEFITS WHILE PERFORMING MILITARY SERVICE:**

In the case of a death or disability occurring on or after January 1, 2007, if a member dies while performing qualified military service (as defined in section 414(u)), the survivors of the member are entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service not otherwise credited under the terms of the Educational Retirement Act) provided under the plan as if the member had resumed and terminated employment on account of death.

[2.82.5.22 NMAC - Rp, 2.82.5.22 NMAC, 7/1/2024]

### **PART 6: DISABILITY BENEFITS**

#### **2.82.6.1 ISSUING AGENCY:**

Educational Retirement Board, P.O. Box 26129, Santa Fe, New Mexico 87502-0129.

[2.82.6.1 NMAC - Rp, 2.82.6.1 NMAC, 10/31/2017]

#### **2.82.6.2 SCOPE:**

This rule applies to disability retirement.

[2.82.6.2 NMAC - Rp, 2.82.6.2 NMAC, 10/31/2017]

#### **2.82.6.3 STATUTORY AUTHORITY:**

The Educational Retirement Act, Sections 22-11-1 to 22-11-55 NMSA 1978.

[2.82.6.3 NMAC - Rp, 2.82.6.3 NMAC, 10/31/2017]

#### **2.82.6.4 DURATION:**

Permanent.

[2.82.6.4 NMAC - Rp, 2.82.6.4 NMAC, 10/31/2017]

#### **2.82.6.5 EFFECTIVE DATE:**

October 31, 2017 unless a later date is cited at the end of a section.

[2.82.6.5 NMAC - Rp, 2.82.6.5 NMAC, 10/31/2017]

#### **2.82.6.6 OBJECTIVE:**

Clarification of procedures and requirements for disability benefits.

[2.82.6.6 NMAC - Rp, 2.82.6.6 NMAC, 10/31/2017]

**2.82.6.7 DEFINITIONS:**

**[RESERVED]**

**2.82.6.8 ELIGIBILITY:**

The member is eligible when the member has met the statutory requirements for service and extent of disability if application is filed as provided in Subsection A of 2.82.6.9 NMAC.

[2.82.6.8 NMAC - Rp, 2.82.6.8 NMAC, 10/31/2017]

**2.82.6.9 APPLICATION:**

**A.** An application for benefits may be filed prior to, and in anticipation of a member's termination by reason of disability, or within a reasonable time following the date of termination.

**B.** Application for disability may be initiated by the member or his employer on forms furnished by the director and made available in each local administrative unit. The member may also write to the director to apply for benefits.

**C.** If the applicant for disability benefits is not employed at the time of application, the director shall deal directly with the member in processing the application, without reference to, or concurrence of, the last employer.

**D.** At the time of application, the member shall furnish medical proof satisfactory to the educational retirement board, that his termination of employment is, or was, a direct result of his disability. The member's employer, or former employer shall also be requested to advise the board, in writing, of all facts pertinent to the applicant's termination, of which the employer has knowledge.

**E.** Applicant shall furnish a list of all physicians who have examined or treated the member regarding the disability and provide copies of their reports, shall provide copies of any and all vocational rehabilitation reports made since the disability was incurred and shall provide any other information requested by the educational retirement board, the medical review authority or medical appeals hearing officer.

**F.** An applicant may review any and all evidence, physician reports etc., which the medical review authority or medical appeals hearing officer has which pertains to his/her case.

[2.82.6.9 NMAC - Rp, 2.82.6.9 NMAC, 10/31/2017]

#### **2.82.6.10 EFFECTIVE DATE OF BENEFITS:**

**A.** The effective date of disability benefits shall be the first day of the month following the member's termination of employment, or the first day of the month following receipt of the member's application, whichever is later.

**B.** The applicant for disability benefits shall not be considered to have terminated employment until all accumulated sick leave granted by the employer shall have been used. If the employer pays the member's accumulated sick leave in a lump-sum, the member's termination date shall be the date on which the last day would have been paid had payment been made in due course, rather than in a lump-sum.

**C.** In the absence of any other formal declaration of termination of employment, the member's application for disability benefits shall serve as declaration as of the date indicated thereon by employer.

[2.82.6.10 NMAC - Rp, 2.82.6.10 NMAC, 10/31/2017]

#### **2.82.6.11 DETERMINATION OF DISABILITY:**

**A.** The medical review authority shall, in its recommendation to the educational retirement board, report whether the applicant is or is not totally disabled to continue with his/her employment and unable to obtain and retain other gainful employment commensurate with his/her background, education and experience. In cases of recommended denials, reasons with sufficient detail shall also be provided.

**B.** When considering an applicant's background, education and experience, the guidelines established by the social security administration, vocational opinions, guides, books or reports and any other relevant information may be used.

**C.** If recommending disability benefits to the educational retirement board, the medical review authority or medical appeals hearing officer may, if appropriate, recommend that the applicant be referred to the division of vocational rehabilitation ("DVR") for its provision of available services to the disabled member.

[2.82.6.11 NMAC - Rp, 2.82.6.11 NMAC, 10/31/2017]

#### **2.82.6.12 CONTINUATION OF DISABILITY BENEFITS:**

**A.** The requirements of Section 22-11-36 NMSA 1978 shall be met in the following manner:

**(1)** Each recipient of disability benefits shall be required to furnish a report from his/her personal physician or health care provider or report to an assigned medical examiner for examination at least once each year following approval of disability status. The frequency of examination (not less than once each year) shall be determined in

each individual case by the medical review authority based upon the nature and extent of the disability. The director shall, in all cases, retain the authority to require an independent medical examination not called for by the medical review authority.

**(2)** Periodic examination reports on disability cases shall be studied by the medical review authority who shall make recommendations to the retirement board for consideration and action, and in no case shall a disability benefit be discontinued without the action of the retirement board.

**B.** If a member approved for disability is age 60 or more at the time of approval, or is receiving disability benefits when the member becomes age 60, the member shall be considered to have then retired by reason of age as provided in Section 22-11-38 NMSA 1978. At such time, the member may elect an optional benefit as provided in Section 22-11-29 NMSA 1978, regardless of number of years of earned service credit attained by the member.

**C.** Coincident with the annual medical report required of each member receiving disability benefits, the director shall obtain a report of the employment status of the disabled member which shall be considered along with the medical report in determining the member's continued eligibility.

**D.** In the event that a member receiving disability benefits from ERB is removed from a disability status by the board, disability payments shall continue to that member for a period of two full months following the month of removal, except if such member becomes employed before the expiration of this two-month period, the member shall be removed from the payroll on the date of employment. If the member removed from a disability status is eligible and opts for age/service retirement, disability payments shall terminate upon the effective retirement date, but in no case shall extend beyond the two-month period cited in this rule.

**E.** In making a recommendation following re-examination of a disability recipient, the medical review authority shall state whether there is or is not a substantial betterment of the member's disability. In the event a substantial betterment is concluded by the medical review authority, it shall further state whether, in light of that betterment, the member is or is not totally disabled for employment and unable to obtain and retain other gainful employment commensurate with his/her background, education and experience. In cases of recommended terminations of disability, reasons with sufficient detail shall also be provided. In the event that no substantial betterment can be concluded in any future re-examination, the medical review authority can recommend the recipient as permanently disabled.

**F.** A disability recipient who is no longer totally disabled for employment and is able to obtain and retain gainful employment commensurate with the recipient's background, education and experience, will be determined not disabled, with consequent termination of benefits. In such cases, substantial betterment should be recommended by the medical review authority to the board. The board shall take action on such

recommendation. A disability recipient who is totally disabled and unable to maintain and obtain employment commensurate with his/her background, education and experience may be determined permanently disabled without future re-examination. The permanent disability should be recommended by the medical review authority to the board, together with a statement that the recipient is permanently disabled. The board shall take action on such recommendation.

**G.** When considering a recipient's background, education and experience, the guidelines established by the social security administration, vocational opinions, guides, books or reports, reports from DVR and any other relevant information may be used.

**H.** A disability recipient shall furnish a list of all physicians who have examined or treated the recipient during the period of disability and provide copies of their reports and shall provide any other information requested by the educational retirement board, the medical review authority or the medical appeals hearing officer.

**I.** A disability recipient may review any and all evidence, physician reports, etc., which the medical review authority has which pertains to his/her case.

[2.82.6.12 NMAC - Rp, 2.82.6.12 NMAC, 10/31/2017]

#### **2.82.6.13 APPROVAL OF APPLICATION:**

The director is authorized to approve duly executed applications for disability benefits on behalf of the board in order to insure timely approval of same if the medical review authority has determined that the applicant is disabled; however, all such approvals must be ratified by the educational retirement board at a subsequent meeting of the board. At the time of ratification, the director shall make available to the board, the reports of the medical examiners, the recommendations of the medical review authority, and the member's completed application along with such other information as the board may require.

[2.82.6.13 NMAC - Rp, 2.82.6.13 NMAC, 10/31/2017]

### **PART 7: ANNUITANTS AND DISABILITY RECIPIENTS**

#### **2.82.7.1 ISSUING AGENCY:**

Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129.

[2.82.7.1 NMAC - Rp, 2 NMAC 82.7.1, 6/16/2015]

#### **2.82.7.2 SCOPE:**

This rule applies to members receiving disability benefits.

[2.82.7.2 NMAC - Rp, 2 NMAC 82.7.2, 6/16/2015]

**2.82.7.3 STATUTORY AUTHORITY:**

The Educational Retirement Act, Sections 22-11-1 to 22-11-55 NMSA 1978.

[2.82.7.3 NMAC - Rp, 2 NMAC 82.7.3, 6/16/2015; A, 10/17/2017]

**2.82.7.4 DURATION:**

Permanent.

[2.82.7.4 NMAC - Rp, 2 NMAC 82.7.4, 6/16/2015]

**2.82.7.5 EFFECTIVE DATE:**

June 16, 2015, unless a later date is cited at the end of a section.

[2.82.7.5 NMAC - Rp, 2 NMAC 82.7.5, 6/16/2015]

**2.82.7.6 OBJECTIVE:**

Clarifies requirements for disability retirement.

[2.82.7.6 NMAC - Rp, 2 NMAC 82.7.6, 6/16/2015]

**2.82.7.7 DEFINITIONS:**

**[RESERVED]**

**2.82.7.8 BENEFIT PAYMENTS:**

**A.** After the initial payment of benefits, payments shall be processed or mailed monthly, not later than the last day of the month for which they are paid.

**B.** At the time of death, a retired member's benefit shall be paid in accordance with the option selected, or if none was selected, the member's beneficiary who shall have been named at the time of retirement, shall receive the benefit for the month of the member's death or the excess of total contributions over total benefits received by the member, whichever is greater.

**C.** Upon the death of a member who is receiving disability benefits and who has rejected the coverage of option B, the member's surviving beneficiary shall receive the benefit due the member from the first day of the month of death to the date of death, inclusive, or the excess of total contributions over total benefits received by the member, whichever is greater.

(1) A member eligible to receive disability benefits, shall receive unmodified benefits as set forth in Section 22-11-37 NMSA 1978, until the member attains age 60, at which time the benefit will be modified in accordance with option selected at that time, if any, and the modifications will be based upon the then attained ages of the member and beneficiary.

(2) Upon the death prior to age 60 of a member receiving disability benefits who has option B coverage, the beneficiary of such member shall be entitled to the benefits provided by Subsection D of Section 22-11-29 NMSA 1978.

[2.82.7.8 NMAC - Rp, 2 NMAC 82.7.8, 6/16/2015; A, 10/17/2017]

#### **2.82.7.9 EMPLOYMENT:**

A. Once each calendar quarter, administrative units shall be required to report to the educational retirement board "the full-time equivalency" of members retired for age or service and members receiving disability benefits.

B. A member receiving disability benefits may engage in employment in the same manner and such employment shall be considered as partial evidence of ability to return to regular employment, and this, together with medical evidence, may be considered by the board in determining whether the member's disability benefit should continue.

C. Members retired for age or service may reside anywhere they choose, and engage in any employment which is not covered by the Educational Retirement Act, without affect to their retirement status.

D. If a member who returns to employment and is removed from a retirement status wishes to retire again, the member may do so in accordance with Section 22-11-25 NMSA 1978 and Subsection D of 2.82.5.9 NMAC.

E. Retired members who perform services for local administrative units as an independent contractor must meet the criteria set forth for an independent contractor in Subsection C of 2.82.2.11 NMAC.

[2.82.7.9 NMAC - Rp, 2 NMAC 82.7.9, 6/16/2015; A, 10/17/2017; A, 7/14/2020]

## **PART 8: INVESTMENT POLICIES AND PRACTICES**

#### **2.82.8.1 ISSUING AGENCY:**

Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129.

[6-30-99; 2.82.8.1 NMAC - Rn, 2 NMAC 82.8.1, 1-30-2004]

#### **2.82.8.2 SCOPE:**

This rule establishes guidelines for investment of the educational retirement fund under management by the educational retirement board (ERB), and it applies to the educational retirement board, the director of the agency, the investment committee and the investment division staff.

[6-30-99; 2.82.8.2 NMAC - Rn, 2 NMAC 82.8.2, 1-30-2004; A, 6-16-2015]

#### **2.82.8.3      STATUTORY AUTHORITY:**

The Educational Retirement Act, Sections 22-11-1 to 22-11-53, NMSA 1978.

[6-30-99; 2.82.8.3 NMAC - Rn, 2 NMAC 82.8.3, 1-30-2004]

#### **2.82.8.4      DURATION:**

Permanent.

[6-30-99; 2.82.8.4 NMAC - Rn, 2 NMAC 82.8.4, 1-30-2004]

#### **2.82.8.5      EFFECTIVE DATE:**

June 30, 1999, unless a later date is cited at the end of a section or paragraph.

[6-30-99; 2.82.8.5 NMAC - Rn, 2 NMAC 82.8.5, 1-30-2004]

#### **2.82.8.6      OBJECTIVE:**

Explains the organization and composition of the investment committee and investment division, and clarifies the policies and practices for investment of the ERA fund.

[6-30-99; 2.82.8.6 NMAC - Rn, 2 NMAC 82.8.6, 1-30-2004]

#### **2.82.8.7      DEFINITIONS:**

[RESERVED]

#### **2.82.8.8      INVESTMENT COMMITTEE:**

**A.** The investment committee shall be composed as set forth in 2.82.1.14 NMAC.

**B.** The investment committee shall meet regularly each calendar quarter with additional meetings as required. The committee shall elect a chairman annually who shall call special meetings and preside at all meetings. A simple majority of the board members currently serving on the committee shall constitute a quorum.

**C.** The investment committee shall have the following responsibilities:

(1) to review all actions taken by the investment division in the management of the fund and recommend to the board specific action with regard to the continuation or change in the investment practices of the investment vision;

(2) to review on a continuing basis the investment philosophy and investment guidelines of the fund, make policy recommendations to the board and generally oversee the investment activities of the fund;

(3) to recommend the employment of the services of an investment advisory firm to assist and advise the board in the management of the fund;

(4) to recommend the employment of the services of investment management firm(s) to manage a portion of the assets of the fund, either through separately managed accounts or through individual, common or collective trust funds;

(5) to establish asset allocation guidelines, which shall define asset allocation targets and ranges, and to annually review/modify these guidelines; as set forth in the ERB investment objectives and guidelines which shall be approved by the investment committee and recommended for board approval.

**D.** The investment committee may at any time withdraw the authority of the investment division to execute orders on behalf of the fund. Authority cannot be denied retroactively.

**E.** Investment committee members may attend and participate in any regular or special investment committee meeting by telephone or other electronic device only if:

(1) the member cannot attend the meeting due to an emergency or unforeseen circumstance;

(2) the member's voice can clearly be heard by everyone in attendance of the meetings and the member clearly identifies himself before speaking or participating in a vote;

(3) the member has not attended regular meetings electronically more than four times in a rolling twelve month period;

(4) no more than two members who otherwise qualify for participation under this section may do so at the same meeting; and

(5) the member otherwise complies with the Open Meetings Act.

[6-30-99; 2.82.8.8 NMAC - Rn, 2 NMAC 82.8.8, 1-30-2004; A, 3-14-2008; A, 12-30-2013; A, 3-14-2017]

## **2.82.8.9 INVESTMENT DIVISION:**

**A.** The investment division of ERB shall be managed by the chief investment officer under the direction of the director.

**B.** The role of the investment division is detailed in the investment policy.

[6-30-99; 2.82.8.9 NMAC - Rn, 2 NMAC 82.8.9, 1-30-2004; A, 6-16-2015]

#### **2.82.8.10 INVESTMENT PHILOSOPHY:**

Recognizing the important and perpetual nature of the fund and the fiduciary responsibilities of the board, the primary goal in investing the assets shall be to provide significant real returns adjusted for inflation with acceptable risk (volatility). The "prudent investor" standard, as defined in the state statutes, shall apply to the investment activities of the educational retirement board.

[6-30-99; 2.82.8.10 NMAC - Rn & A, 2 NMAC 82.8.10, 1-30-2004; A, 6-16-2015]

#### **2.82.8.11 INVESTMENT POLICY:**

**A.** The board shall adopt a written investment policy as required by Subsection B of Section 22-11-13 NMSA1978 which establishes a policy for the investment and management of the educational retirement fund. At least annually, the board shall review, ratify and provide its written investment policy to the legislative finance committee and the department of finance and administration.

**B.** Broker policy: Given the fiduciary responsibilities of the board and the chief investment officer with regard to the management of the assets of the retirement fund, the board adopts the following policies relating to the execution of the securities orders:

**(1)** Equities. The brokerage community provides important services necessary for the successful management of the retirement fund. Recognizing that the value of the services varies widely from firm to firm, the chief investment officer is directed to allocate commission business based on his/her judgment of the overall quality of service provided by each brokerage firm. The SEC, in release no. 34-23170 dated April 23, 1986, states that in judging the quality of service consideration should be given to "the value of research provided as well as execution capability, commission rate, financial responsibility, and responsiveness to the money manager." When all factors are equal within the above guidelines, preference shall be given to brokerage firms with offices in New Mexico.

**(2)** Fixed income. Recognizing the difference in the nature of the equity and fixed income markets, i.e., no central market for fixed income securities, fixed income trades will be executed through firms, that originate ideas and are able to offer/bid securities on a continuing competitive basis. When market conditions permit in the judgment of the fixed income investment officer, offerings and bids will be solicited on a competitive basis.

**(3)** Soft dollar policy. The chief investment officer, with approval of the director, and concurrence by the legislature, is authorized to use "soft dollars" to pay for research services and equipment that assist in the investment decision - making process as related to the management of the assets of the ERB retirement fund. Section 28(e) of the SEC Act of 1934, SEC interpretive release no. 34 -23170 dated April 23, 1986 and any subsequent interpretative releases shall be used as guidelines in this procedure.

[6-30-99; 2.82.8.11 NMAC - Rn & A, 2 NMAC 82.8.11, 1-30-2004; A, 6-16-2015]

## **PART 9: ADMINISTRATIVE UNIT REPORTS AND REMITTANCES**

### **2.82.9.1 ISSUING AGENCY:**

Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129.

[6-30-99; 2.82.9.1 NMAC - Rn, 2 NMAC 82.9.1, 10-31-2002]

### **2.82.9.2 SCOPE:**

This rule applies to local administrative units and state agencies required to file reports on contributions to the Educational Retirement Act (ERA) fund.

[6-30-99; 2.82.9.2 NMAC - Rn, 2 NMAC 82.9.2, 10-31-2002; A, 07-29-2016]

### **2.82.9.3 STATUTORY AUTHORITY:**

The Educational Retirement Act, Sections 22-11-1 to 22-11-55 NMSA 1978.

[6-30-99; 2.82.9.3 NMAC - Rn, 2 NMAC 82.9.3, 10-31-2002; A, 07-29-2016]

### **2.82.9.4 DURATION:**

Permanent.

[6-30-99; 2.82.9.4 NMAC - Rn, 2 NMAC 82.9.4, 10-31-2002]

### **2.82.9.5 EFFECTIVE DATE:**

June 30, 1999, unless a later date is cited at the end of a section or paragraph.

[6-30-99; 2.82.9.5 NMAC - Rn, 2 NMAC 82.9.5, 10-31-2002]

### **2.82.9.6 OBJECTIVE:**

Instructions for preparing and filing timely reports, and specifies penalties for late filing of reports or late deposit of contributions.

[6-30-99; 2.82.9.6 NMAC - Rn, 2 NMAC 82.9.6, 10-31-2002]

#### **2.82.9.7 DEFINITIONS:**

**[RESERVED]**

#### **2.82.9.8 EMPLOYER REPORTS:**

**A.** Instructions for the preparation and handling of employer reports and monthly remittances by the local administrative units shall be outlined in detail once each year and electronically transmitted to each local administrative unit by the director.

**B.** Employer reports shall encompass all local administrative unit employees including those employees whom the local administrative unit has identified as excluded from coverage.

**C.** Monthly contributions from employees and local administrative units shall be electronically transmitted no later than the 15<sup>th</sup> day of the month following the month for which contributions are withheld.

**(1)** Employer reports and contributions shall be electronically transmitted or postmarked no later than the 15<sup>th</sup> of the following month. The director may enter into an agreement with a local administrative unit for an extension of this deadline for the employer report. No such extension is available for submission of the contributions.

**(2)** When the 15<sup>th</sup> of the month falls on a weekend or holiday, the report and contributions are due on the next workday.

**(3)** Local administrative units shall be assessed late charges for not submitting reports or contributions in accordance with the above schedule. A charge of fifty dollars (\$50) per day shall be assessed for untimely reports. Upon a written showing of good cause, the director may waive charges to the local administrative unit for untimely reports. No such waiver of charges is available for late contributions. The charges for late contributions will be calculated at a rate equal to the state treasurer's overnight investment program rate plus one percent. The rate will be applied daily and cumulatively for the period of time from the 15<sup>th</sup> to the date of postmark. The late charge shall be the greater amount calculated by applying the foregoing rate or ten dollars (\$10). The director shall report any and all such assessments and waivers to the board.

**D.** The director shall prepare forms for all regular reports, or make available other means for such regular reports from the local administrative units as may be required in the administration of the Educational Retirement Act.

[6-30-99; 2.82.9.8 NMAC - Rn & A, 2 NMAC 82.9.8, 10-31-2002; A, 07-29-2016; A, 08-31-2016]

## **PART 10: RETIREMENT RECIPROCITY**

### **2.82.10.1 ISSUING AGENCY:**

Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129.

[2.82.10.1 NMAC - Rp, 2 NMAC 82.10.1, 6-16-2015]

### **2.82.10.2 SCOPE:**

This rule applies to retirees combining service from PERA and ERA for retirement purposes. The governing boards of both systems must adopt these rules.

[2.82.10.2 NMAC - Rp, 2 NMAC 82.10.2, 6-16-2015]

### **2.82.10.3 STATUTORY AUTHORITY:**

The Educational Retirement Act, Sections 22-11-1 to 22-11-53, NMSA 1978, the Retirement Reciprocity Act, Sections 10-13A-2 to 10-13A-3, NMSA 1978.

[2.82.10.3 NMAC - Rp, 2 NMAC 82.10.3, 6-16-2015]

### **2.82.10.4 DURATION:**

Permanent.

[2.82.10.4 NMAC - Rp, 2 NMAC 82.10.4, 6-16-2015]

### **2.82.10.5 EFFECTIVE DATE:**

June 16, 2015, unless a later date is cited at the end of a section.

[2.82.10.5 NMAC - Rp, 2 NMAC 82.10.5, 6-16-2015]

### **2.82.10.6 OBJECTIVE:**

Clarification of reciprocity retirement requirements adopted by the ERA and PERA boards.

[2.82.10.6 NMAC - Rp, 2 NMAC 82.10.6, 6-16-2015]

### **2.82.10.7 DEFINITIONS:**

**[RESERVED]**

**2.82.10.8 RETIREMENT RECIPROCITY:**

**A.** "Salary" is defined by each state system for that state system. Each system shall certify the member's salary as defined by that system to the payor system, and the payor system shall accept that salary for pension calculation purposes where applicable.

**B.** The Public Employees Retirement Reciprocity Act applies to normal retirement only, and does not apply to disability retirement or pre-retirement survivor pensions.

**C.** If a retired member whose service credit at retirement was acquired only under PERA, is subsequently employed by an employer covered under ERA; and the retired member becomes a contributing member of ERA; and the retired member's PERA pension is suspended for the period of membership under ERA; and the retired member acquires service credit under ERA; the subsequently acquired service credit is eligible reciprocal service credit. When the member terminates the subsequent employment and retires again, the subsequent retirement shall be governed by the provisions of the Public Employees Retirement Reciprocity Act.

**D.** If a retired member whose service credit at retirement was acquired only under ERA is subsequently employed by an employer covered under PERA; the member may remove himself from a retirement status and become a contributing member of PERA; and the member may acquire service credit under PERA which shall be eligible for reciprocity service credit. When the member terminates the subsequent employment and retires again, the subsequent retirement shall be governed by the provisions of the Public Employees Retirement Reciprocity Act.

**E.** If a member has service credit for the same period of time for employment by public employers covered under different state systems, service credit may only be acquired under one state system for the period of overlapping service credit.

**F.** If a member retires with service credit under more than one state system for an overlapping period, the member shall be granted service credit for this overlapping period as follows:

**(1)** PERA shall grant service credit earned for the months the member was employed by an employer covered under PERA in accordance with all applicable PERA statutes and rules.

**(2)** ERA shall grant service credit for the quarters of ERA service credited to the member in accordance with all applicable ERA statutes and rules less the amount of service credit granted by PERA in subsection 8.6.a (now Paragraph (1) of Subsection F of 2.82.10.8 NMAC) above.

**(3)** In no case shall a member be credited with more than one month of service credit for all service in any calendar month.

**G.** Free or purchased military service credit under any state system may only be considered eligible reciprocal service credit under one state system for reciprocity retirement purposes.

**H.** When a member retires according to the provisions of the Public Employees Retirement Reciprocity Act, each state system under which the member has acquired eligible reciprocal service credit shall furnish the payor system with a certified statement of the member's service credit, and other pertinent data necessary to compute the member's pension.

**I.** A member retired according to the provisions of the Public Employees Retirement Reciprocity Act shall receive the same cost-of-living adjustments provided by each state system under which the retired member acquired eligible reciprocal service credit. Each state system shall pay the cost-of-living adjustment due under the provisions of that state system for the portion of the total pension attributable to service credit acquired under that state system.

**J.** A member retiring according to the provisions of the Public Employees Retirement Reciprocity Act shall only elect a form of payment option with the payor system. Each state system shall calculate benefits according to the same form of payment, except in the case of a member who retires under PERA and elects form of payment D, in which case the ERA component of the pension shall be calculated according to form of payment A.

**K.** Amendments to this rule shall be adopted by the educational retirement board and the public employees retirement board.

[2.82.10.8 NMAC - Rp, 2 NMAC 82.10.8, 6-16-2015]

## **PART 11: ADMINISTRATIVE APPEALS**

### **2.82.11.1 ISSUING AGENCY:**

Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129.

[6/30/99; 2.82.11.1 NMAC - Rn, 2 NMAC 82.11.1, 3-14-2008]

### **2.82.11.2 SCOPE:**

This rule sets forth the process for appealing a denial of a claim for retirement benefits or a recommended denial of a claim for disability benefits.

[6/30/99; 2.82.11.2 NMAC - Rn, 2 NMAC 82.11.2, 3-14-2008; A, 6-16-2015]

### **2.82.11.3 STATUTORY AUTHORITY:**

The Educational Retirement Act, Sections 22-11-1 to 22-11-55 NMSA 1978.

[6/30/99; 2.82.11.3 NMAC - Rn, 2 NMAC 82.11.3, 3-14-2008; A, 10-17-2017]

### **2.82.11.4 DURATION:**

Permanent.

[6/30/99; 2.82.11.4 NMAC - Rn, 2 NMAC 82.11.4, 3-14-2008]

### **2.82.11.5 EFFECTIVE DATE:**

June 30, 1999, unless a later date is cited at the end of a section.

[6/30/99; 2.82.11.5 NMAC - Rn & A, 2 NMAC 82.11.5, 3-14-2008]

### **2.82.11.6 OBJECTIVE:**

Specification of procedures for the disability appeals process.

[6/30/99; 2.82.11.6 NMAC - Rn, 2 NMAC 82.11.6, 3-14-2008]

### **2.82.11.7 DEFINITIONS:**

**[RESERVED]**

### **2.82.11.8 GENERAL PROVISIONS:**

**A.** A final written decision of the director which results in a denial of a claim for retirement-related benefits or a recommendation of the medical review committee for a denial of an application for disability or termination of disability benefits may be appealed by an affected member.

**B.** The appeal shall be initiated by the affected party serving on the director a notice of appeal within 30 days of the date of the letter in which the member received notice of the final decision or recommendation. The notice of appeal must state the reasons for claiming the decision or recommendation is improper. If the claimant fails to submit a notice of appeal as provided herein, the decision or recommendation shall become final.

**C.** The appeal shall be heard by a hearing officer designated by the board, unless otherwise provided by the board.

**D.** Procedure.

**(1)** The office of general counsel will establish internal procedures for processing appeals within the parameters set by this rule.

**(2)** Discovery and evidence.

**(a)** Following the filing of an appeal, the parties must submit to the hearing officer, with a copy to the other parties, including copies separately addressed to the educational retirement board's (ERB) office of general counsel, at least 15 days prior to the scheduled hearing, any documentary evidence a party may wish to present for consideration at the de novo hearing. The hearing officer may grant a request for extension of time to submit documentary evidence for good cause, if such extension is not prejudicial to another party. This documentary evidence shall include all documents that will be introduced as exhibits at the hearing. Failure to comply with the requirements of this provision may result in the appeal proceeding without consideration of the documentary evidence.

**(b)** At the same time documentary evidence is due to be submitted, the ERB may, but is not required to, file a written response to claimant's notice of appeal.

**(c)** The parties shall provide to the other parties the names and addresses of persons that may be called as witnesses at the hearing.

**(d)** Upon the written request of any party, pre-hearing discovery permitted by the rules of civil procedure for the state district courts in New Mexico may be allowed as authorized by the hearing officer.

**(e)** Upon request, the claimant shall provide to the director authorizations for the release of records regarding employment (whether self-employed or as an employee or an independent contractor) and, in the case of a disability appeal, the claimant's health care records.

**(f)** The rules of evidence do not apply, but the hearing officer may admit all relevant evidence which in the hearing officer's opinion is the best evidence most reasonably obtainable, having due regard to its necessity, competence, availability and trustworthiness. Such evidence shall be given the weight the hearing officer deems appropriate.

**(g)** The hearing officer may, upon good cause shown, remand the matter back to the director or the medical review committee for reconsideration.

**(3)** Hearing.

**(a)** A hearing shall be held within 90 days of receipt of the notice of appeal unless the parties agree to an extension of time and the extension is approved in writing by the hearing officer. The hearing officer also may grant an extension upon good cause shown by one party, without the agreement of other parties. The parties shall be given

at least 30 days written notice of the scheduled hearing. The hearing shall be held in Santa Fe.

**(b)** A hearing involving the denial of disability benefits shall not be open to the public.

**(c)** The board's authority to administer oaths is delegated to the hearing officer for the purpose of conducting the hearing.

**(d)** The parties have the right to present argument and evidence orally, to present or cross-examine witnesses, and to be accompanied by a New Mexico licensed attorney.

**(e)** The parties shall appear in person at the hearing, except as provided in this rule. The claimant may appear by telephone or video conference when it is difficult or impossible for the claimant to appear in person. A claimant who wishes to appear by telephone or video conference shall submit a written request to the hearing officer at least five days prior to the hearing stating the reason(s) why it is difficult or impossible for the claimant to appear in person. Failure of the party bringing the appeal or that party's representative to appear in person or by telephone or video conference at the hearing, without prior approval from the hearing officer, shall result in automatic final denial of the appeal and any claims previously asserted. Witnesses may appear by telephone or video conference if approved by the hearing officer.

**(f)** If the party bringing the appeal or that party's representative requests rescheduling of a hearing so close to the time of the hearing that additional costs are incurred, any such additional costs may be assessed against that party, such as court reporting or other costs.

**(4)** Burden of persuasion. Unless otherwise established by law, the party bringing the appeal has the burden of proving by a preponderance of the evidence the facts relied upon to show that such party is entitled to relief or the benefit denied.

**(5)** Record. The hearing shall be recorded, and copies of all evidence offered shall be maintained by the director for a period of five years. Any party desiring a transcript of the proceedings shall be responsible for paying the cost, if any, of preparing such transcript. A party appealing the decision of the board to the district court shall make arrangements with the director for the preparation of transcripts for that appeal.

**(6)** Written closing arguments. If any party requests permission to file a written closing argument, the hearing officer may permit all parties to file written closing arguments and shall set a time for the simultaneous filing of written closing arguments.

**(7)** Recommended decision.

**(a)** The hearing officer shall prepare a recommended decision for the board's consideration. The hearing officer shall provide the parties a copy of the recommended decision upon its completion. The hearing officer's recommended decision shall be based upon the evidence adduced at the hearing and shall be issued within 60 days following the close of the record.

**(b)** The hearing officer shall propose findings of fact and conclusions of law as part of the recommended decision.

**(8)** Exceptions to recommended decision.

**(a)** The parties may file exceptions to the hearing officer's recommended decision with the board within 15 days of the date of issuance of the recommended decision. Any other party may file a response to exceptions within 15 days of the date such exceptions were filed. Upon the written request of a party, and for good cause shown, the hearing officer may extend the time to file exceptions and responses.

**(b)** Copies of such exceptions and any briefs shall be served on all parties and the hearing officer, and a statement of such service shall be filed with the exceptions.

**(c)** Exceptions to a hearing officer's recommended decision shall cite the precise substantive or procedural issue to which exceptions are taken and shall be based solely on the evidence and arguments presented at the hearing. Any exception that fails to comply with the foregoing requirements may be disregarded.

**(d)** The hearing officer may file with the board a response to any exceptions filed within 15 days of the date of filing of the exceptions and shall serve copies of the response on all parties.

**E.** Final action by the board.

**(1)** The board shall consider the hearing officer's recommended decision, any exceptions to the recommended decision together with supporting briefs, and the hearing officer's response to the exceptions, if any. The board may review all of the record made before the hearing officer.

**(2)** The board shall not consider any additional oral argument, evidence or affidavits not in the record before the hearing officer, or pleadings not filed in accordance with these rules.

**(3)** The board may request that the hearing officer be present at the time the board reviews a recommended decision and may discuss the recommended decision with the hearing officer. Board deliberations regarding the recommended decision and consultations with counsel to the board shall occur in closed session in accordance with the Open Meetings Act.

(4) The board's final action shall be rendered in an open meeting no later than 180 days after the date the hearing officer's recommended decision was issued. Board members who need additional time to review the record before taking final action may ask the board chairman for additional time to complete the review. If additional time is requested, the deadline for the board's final action shall be extended until the next regularly scheduled board meeting.

(5) Ex parte communication with board members or the hearing officer concerning a decision that is on appeal is prohibited.

(6) The board may remand a recommended decision to the hearing officer for additional findings, conclusions, clarification or the taking of additional evidence. Such a remand shall restart the time frames contained in this rule.

(7) The board shall approve, disapprove or modify the recommended decision, and shall enter a final order concerning the matter being appealed. The board may modify the proposed conclusions of law based on the proposed findings of fact. If the board wishes to modify the proposed findings of fact, it may do so only after review of the record before the hearing officer. The board shall provide a reasoned basis for changing the hearing officer's recommendation.

**F.** A refund of a member's contributions pending appeal shall result in the forfeiture of service credit and the automatic dismissal of an appeal and issuance of a notice of dismissal.

[6/30/99; 2.82.11.8 NMAC - Rn, 2 NMAC 82.11.8, 3-14-2008; Repealed, 6-16-2015; 2.82.11.8 NMAC - N, 6-16-2015; A, 10-17-2017]

#### **2.82.11.9 PRE-HEARING PROCEDURES:**

**[RESERVED]**

[6/30/99; 2.82.11.9 NMAC - Rn, 2 NMAC 82.11.9, 3-14-2008; Repealed, 6-16-2015]

#### **2.82.11.10 HEARING PROCEDURES:**

**[RESERVED]**

[6/30/99; 2.82.11.10 NMAC - Rn & A, 2 NMAC 82.11.10, 3-14-2008; Repealed, 6-16-2015]

#### **2.82.11.11 RECOMMENDED DECISION:**

**[RESERVED]**

[6/30/99; 2.82.11.11 NMAC - Rn, 2 NMAC 82.11.11, 3-14-2008; Repealed, 6-16-2015]

#### **2.82.11.12 DECISION BY THE EDUCATIONAL RETIREMENT BOARD:**

**[RESERVED]**

[6/30/99; 2.82.11.12 NMAC - Rn, 2 NMAC 82.11.12, 3-14-2008; Repealed, 6-16-2015]

### **PART 12: QUALIFIED EXCESS BENEFIT ARRANGEMENT**

#### **2.82.12.1 ISSUING AGENCY:**

Educational Retirement Board P.O. Box 26129 Santa Fe, New Mexico 87502-0129.

[2.82.12.1 NMAC - N, 4-15-2002]

#### **2.82.12.2 SCOPE:**

This rule applies to employees hired before July 1, 1999, who are not receiving retirement benefits pursuant to Section 22-11-30 or disability benefits pursuant to Section 22-11-37 as of that date, and whose benefits are limited by section 415(b) of the Internal Revenue Code. The preceding sentence shall apply to an employee who is rehired on or after July 1, 1999, if such employee was originally hired before July 1, 1999.

[2.82.12.2 NMAC - N, 4-15-2002]

#### **2.82.12.3 STATUTORY AUTHORITY:**

The Educational Retirement Act, Section 22-11-1 to 22-11-53, NMSA 1978.

[2.82.12.3 NMAC - N, 4-15-2002]

#### **2.82.12.4 DURATION:**

Permanent.

[2.82.12.4 NMAC - N, 4-15-2002]

#### **2.82.12.5 EFFECTIVE DATE:**

April 15, 2002, unless a later date is cited as the end of a section.

[2.82.12.5 NMAC - N, 4-15-2002]

#### **2.82.12.6 OBJECTIVE:**

Establish a "qualified excess benefit arrangement" within the meaning of section 415(m) of the Internal Revenue Code.

[2.82.12.6 NMAC - N, 4-15-2002]

#### **2.82.12.7 DEFINITIONS:**

A. "Excess Benefit" means the monthly actuarial equivalent of the difference between the Unrestricted Benefit and the Maximum Benefit.

B. "Maximum Benefit" means the monthly actuarial equivalent of the maximum benefit permitted by section 415(b) of the Internal Revenue Code to be paid to a member or a beneficiary of the member during any Limitation Year,

C. "Limitation Year" means the calendar year.

D. "Unrestricted Benefit" means the maximum monthly retirement benefit payable to a member during any Limitation Year under Section 22-11-30 or 22-11-37, as applicable, determined without regard to the application of section 415(b) of the Internal Revenue Code.

[2.82.12.7 NMAC - N, 4-15-2002]

#### **2.82.12.8 ELIGIBILITY:**

A member shall be considered eligible for Excess Benefits if the following conditions are met:

A. He or she shall have been hired before July 1, 1999.

B. He or she shall have elected (i) the retirement benefit as provided in Section 22-11-30 or an optional benefit pursuant to Section 22-11-29, or (ii) a disability benefit pursuant to Section 22-11-37.

C. He or she shall not have commenced receiving retirement or disability benefits as of July 1, 1999.

D. The amount of his or her retirement benefit or disability is limited by the application of section 415(b) of the Internal Revenue Code.

E. He or she shall not have elected to participate in an alternative retirement plan established pursuant to Section 22-11-47.

[2.82.12.8 NMAC - N, 4-15-2002]

#### **2.82.12.9 APPLICATIONS:**

A member or a member's beneficiary who applies to the Director for benefits shall be automatically deemed to have also applied for an Excess Benefit.

[2.82.12.9 NMAC - N, 4-15-2002]

#### **2.82.12.10 COMPUTATION, COMMENCEMENT AND FORM OF EXCESS BENEFIT**

A. A member who is receiving retirement benefits in accordance with Section 22-11-29 or 22-11-30 or disability benefits in accordance with Section 22-11-37, or a beneficiary who is receiving survivor benefits following the death of the member, shall be entitled to receive an Excess Benefit for any month in which he or she receives a monthly retirement or survivor benefit.

B. Any Excess Benefit payable to a member or a beneficiary shall be paid at such time or times and in such a form to the member or the member's beneficiary as the retirement benefit under Section 22-11-29 or 22-11-30 or the disability benefit under Section 22-11-37 is paid. The member or beneficiary shall have the right to receive as a portion of his or her first payment hereunder an amount equal to the sum of the Excess Benefit otherwise payable to him or her since July 1, 1999, had this arrangement been in effect as of July 1, 1999.

[2.82.12.10 NMAC - N, 4-15-2002]

#### **2.82.12.11 SOURCE OF PAYMENTS:**

A. The ERB shall pay all benefits arising under the qualified excess benefit arrangement and all costs, charges, and expenses related thereto, but only to the extent that ERB has sufficient funds as derived from contributions made pursuant to Sections 22-11-21 and 22-11-21.1, and except for those costs normally borne by other agencies or offices of the State of New Mexico or its political subdivisions.

B. The ERB may establish a grantor trust within the meaning of sections 671 through 678 of the Internal Revenue Code to pay benefits arising hereunder. In that event, benefits hereunder shall be paid from such trust to the extent permitted under the terms of the trust.

[2.82.12.11 NMAC - N, 4-15-2002]

#### **2.82.12.12 NON-ASSIGNABILITY OF BENEFITS:**

Except as specifically provided in the Educational Retirement Act and Subsection B and C of Section 22-11-42, benefits under the qualified excess benefit arrangement shall not be assignable in either law or in equity or be subject to execution, levy, attachment, garnishment, guarantee fund or similar assessment or any other legal process.

[2.82.12.12 NMAC - N, 4-15-2002]

### **2.82.12.13 AMENDMENT AND TERMINATION:**

The ERB may amend or terminate this qualified excess benefit arrangement at any time.

[2.82.12.13 NMAC - N, 4-15-2002]

## **CHAPTER 83: JUDICIAL RETIREMENT**

### **PART 1-99: [RESERVED]**

### **PART 100: GENERAL PROVISIONS**

#### **2.83.100.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.83.100.1 NMAC - Rn, 2 NMAC 83.100.1, 12-28-00]

#### **2.83.100.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, public employers, the retirement board, and the association under the Judicial Retirement Act.

[10-15-97; 2.83.100.2 NMAC - Rn, 2 NMAC 83.100.2, 12-28-00; A, 9-30-03]

#### **2.83.100.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Section 10-12B-3, as amended.

[10-15-97; 2.83.100.3 NMAC - Rn, 2 NMAC 83.100.3, 12-28-00]

#### **2.83.100.4 DURATION:**

Permanent.

[10-15-97; 2.83.100.4 NMAC - Rn, 2 NMAC 83.100.4, 12-28-00]

#### **2.83.100.5 EFFECTIVE DATE:**

November 1, 1994 unless a different dates is cited at the end of a section.

[10-15-97; 2.83.100.5 NMAC - Rn & A, 2 NMAC 83.100.5, 12-28-00]

#### **2.83.100.6 OBJECTIVE:**

The objective of this rule is to define terms used in the Judicial Retirement Act and its rules and regulations.

[10-15-97; 2.83.100.6 NMAC - Rn, 2 NMAC 83.100.6, 12-28-00]

#### **2.83.100.7 DEFINITIONS:**

A. "Judicial agency" means the district courts, the metropolitan courts, the court of appeals, the supreme court, or the administrative office of the courts or the employer that pays the member's salary.

B. "Public employer" means any employer covered under any state system or the Educational Retirement Act.

C. "Legal representative" means "personal representative" as defined in the Probate Code of New Mexico which includes executor, administrator, successor personal representative, special administrator and persons who perform substantially the same functions under the law governing their status, or an attorney or a person acting pursuant to a power of attorney for a member, retired member or beneficiary.

D. "State system" means a retirement program provided for in the Public Employees Retirement Act, Magistrate Retirement Act, or Judicial Retirement Act.

[10-15-97; 2.83.100.7 NMAC - Rn & A, 2 NMAC 83.100.7, 12-28-00; A, 9-30-03]

### **PART 101-199: [RESERVED]**

### **PART 200: ADMINISTRATION**

#### **2.83.200.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.83.200.1 NMAC - Rn, 2 NMAC 83.200.1, 12-28-00]

#### **2.83.200.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, public employers, retirement board, and the association under the Judicial Retirement Act.

[10-15-97; 2.83.200.2 NMAC - Rn, 2 NMAC 83.200.2, 12-28-00]

#### **2.83.200.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Section 10-12B-3, as amended.

[10-15-97; 2.83.200.3 NMAC - Rn, 2 NMAC 83.200.3, 12-28-00]

**2.83.200.4 DURATION:**

Permanent.

[10-15-97; 2.83.200.4 NMAC - Rn, 2 NMAC 83.200.4, 12-28-00]

**2.83.200.5 EFFECTIVE DATE:**

July 1, 1992 unless a different date is cited at the end of a section.

[10-15-97; 2.83.200.5 NMAC - Rn & A, 2 NMAC 83.200.5, 12-28-00]

**2.83.200.6 OBJECTIVE:**

The objective of this rule is to establish procedures for rulemaking, to provide for payment of expenses for investing and administering the judicial retirement fund, to establish procedures and requirements for the remittance of contributions, and to establish procedures for collecting pension overpayments.

[10-15-97; 2.83.200.6 NMAC - Rn, 2 NMAC 83.200.6, 12-28-00]

**2.83.200.7 DEFINITIONS:**

**[RESERVED]**

[2.83.200.7 NMAC - Rn, 2 NMAC 83.200.7, 12-28-00]

**2.83.200.8-9 [RESERVED]**

**2.83.200.10 RULEMAKING:**

A. Prior to the adoption, amendment or repeal of any rule, the board shall, at least thirty days prior to its proposed action:

(1) publish notice of its proposed action in a newspaper with a general statewide circulation. The notice shall:

(a) give the time and place of any public hearing and state the manner in which data, views or arguments may be submitted to the board by any interested person;

(b) describe the substance of the proposed action, and state the subjects and issues involved;

(c) include any additional matter required by any law, together with specific reference to the statutory authority under which the rule is proposed; and

(2) afford all interested persons reasonable opportunity to submit data, views or arguments orally or in writing; if the board finds that oral presentation is unnecessary or impracticable, it may require that presentation be made in writing; the board shall consider fully all written and oral submissions addressing the proposed rule; upon adoption of a rule contested at hearing or otherwise, the board shall issue a concise statement of its principal reasons for adoption of the rule; all persons heard or represented at any hearing, or who submit any writing to be considered in connection with the proposed rule, shall promptly be given a copy of the rule, by mail or otherwise, if such persons so request in writing.

B. If the board finds that immediate adoption, amendment or suspension of a rule is necessary for the preservation of the soundness of the fund or general welfare of the association, or if the board for good cause finds that observance of the requirements of notice and public hearing would be contrary to the interests of the association, board may dispense with such requirements and adopt, amend or suspend the rule as an emergency. The board's finding and a brief statement of the reasons for its finding shall be incorporated in the emergency rule, amendment or suspension. No emergency rule, amendment or suspension shall remain in effect for longer than sixty days, unless notice shall be given within ten days of the adoption of the emergency rule and a hearing held as provided in this section within ninety days of the notice.

[10-15-97; 2.83.200.10 NMAC - Rn & A, 2 NMAC 83.200.10, 12-28-00]

#### **2.83.200.11-19 [RESERVED]**

#### **2.83.200.20 EXPENSES OF ADMINISTRATION:**

Expenses related to the investment of the judicial retirement fund and administration of the Judicial Retirement Act shall be paid from the fund. Such expenses shall include:

A. the cost of annual and special actuarial valuations necessary to determine the contribution rate required to support plan benefits in accordance with the plan's funding objectives; special actuarial valuations may also be necessary to measure the impact of proposed legislation;

B. the cost of an annual independent audit of the fund's financial statements;

C. the cost of investment management services as determined by the board;

D. the cost of administration of benefit provisions in the same proportion as the proportion of JRA members to members of the association; and

E. any other expenses associated with the administration of the fund as determined by the board.

[10-15-97; 2.83.200.20 NMAC - Rn, 2 NMAC 83.200.20, 12-28-00]

#### **2.83.200.21-29 [RESERVED]**

#### **2.83.200.30 [RESERVED]**

[10-15-97; 11-15-97; 2.83.200.30 NMAC - Repealed, 12-28-00]

#### **2.83.200.31-39 [RESERVED]**

#### **2.83.200.40 OVERPAYMENT OF PENSION:**

The board directs the executive director to make all reasonable efforts to collect any pension overpayment made for any reason.

[10-15-97; 11-15-97; 2.83.200.40 NMAC - Rn, 2 NMAC 83.200.40, 12-28-00]

### **PART 201-299: [RESERVED]**

### **PART 300: MEMBERSHIP**

#### **2.83.300.1 ISSUING AGENCY:**

Public Employees Retirement Association (PERA), P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[2.83.300.1 NMAC - Rp, 2.83.300.1 NMAC, 7/1/15]

#### **2.83.300.2 SCOPE:**

This rule affects judges or justices in office on or after July 1, 1992, judicial agencies and the association under the Judicial Retirement Act.

[2.83.300.2 NMAC - Rp, 2.83.300.2 NMAC, 7/1/15]

#### **2.83.300.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-12B-3 and 10-12B-4 NMSA, 1978, as amended.

[2.83.300.3 NMAC - Rp, 2.83.300.3 NMAC, 7/1/15]

#### **2.83.300.4 DURATION:**

Permanent.

[2.83.300.4 NMAC - Rp, 2.83.300.4 NMAC, 7/1/15]

#### **2.83.300.5 EFFECTIVE DATE:**

July 1, 2015, unless a later date is cited at the end of a section.

[2.83.300.5 NMAC - Rp, 2.83.300.5 NMAC, 7/1/15]

#### **2.83.300.6 OBJECTIVE:**

The objective of this rule is to establish procedures for obtaining membership applications and applications for exemption from membership under the Judicial Retirement Act.

[2.83.300.6 NMAC - Rp, 2.83.300.6 NMAC, 7/1/15]

#### **2.83.300.7 DEFINITIONS: [RESERVED]**

#### **2.83.300.8-2.83.300.9 [RESERVED]**

#### **2.83.300.10 MEMBERSHIP APPLICATIONS:**

Judges or justices in office on or after July 1, 1992 shall be members.

**A.** Each judicial agency must provide to PERA a membership application, in the form prescribed by PERA, completed by each member within 30 days after the member takes office.

**B.** The member is responsible for providing to the association any change of the member's address.

[2.83.300.10 NMAC - Rp, 2.83.300.10 NMAC, 7/1/15]

### **PART 301-399: [RESERVED]**

### **PART 400: SERVICE CREDIT**

#### **2.83.400.1 ISSUING AGENCY:**

Public Employees Retirement Association (PERA), P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[2.83.400.1 NMAC - Rp, 2.83.400.1 NMAC, 7/1/15]

**2.83.400.2 SCOPE:**

This rule affects the members, former members, judicial agencies, the administrative office of the courts, retirement board and the association under the Judicial Retirement Act.

[2.83.400.2 NMAC - Rp, 2.83.400.2 NMAC, 7/1/15]

**2.83.400.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-12B-3 and 10-12B-5 NMSA 1978, as amended.

[2.83.400.3 NMAC - Rp, 2.83.400.3 NMAC, 7/1/15]

**2.83.400.4 DURATION:**

Permanent.

[2.83.400.4 NMAC - Rp, 2.83.400.4 NMAC, 7/1/15]

**2.83.400.5 EFFECTIVE DATE:**

July 1, 2015, unless a later date is cited at the end of a section.

[2.83.400.5 NMAC - Rp, 2.83.400.5 NMAC, 7/1/15]

**2.83.400.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for awarding and reinstating service credit under the Judicial Retirement Act.

[2.83.400.6 NMAC - Rp, 2.83.400.6 NMAC, 7/1/15]

**2.83.400.7 DEFINITIONS:**

**[RESERVED]**

[2.83.400.7 NMAC - Rp, 2.83.400.7 NMAC, 7/1/15]

**2.83.400.8 GENERAL PROVISIONS:**

**A.** Members may receive one month of service credit for any calendar month in which the member becomes a member on or before the sixteenth day of that month, or

for any calendar month in which the member leaves office on or after the fifteenth day of the month, provided that all other requirements for awarding service credit are met.

**B.** Service credit that was forfeited when a member left office and withdrew his or her accumulated member contributions may be reinstated by repayment of withdrawn member contributions, together with interest from the date of withdrawal to the date of repayment at the rate or rates set by the board under the following conditions.

**(1)** Service credit may be reinstated in one-year increments, beginning with the most recently forfeited service credit. A one-year increment is 12 consecutive, but not necessarily continuous, months of service credit. For the purpose of eligibility to retire only, less than one year of service credit may be purchased. After reinstatement of all 12-month "years" as defined herein, any remaining service credit that totals less than 12 months may be reinstated by payment in one lump sum as provided herein.

**(2)** All forfeited service credit may also be reinstated by repayment of the total amount of all member contributions withdrawn from each period of service together with interest from the date of withdrawal to the date of repayment at the rate set by the board.

**(3)** The rate or rates of interest for the purchase or reinstatement of service credit shall be set annually by the board at a July meeting and shall be effective beginning the next succeeding January 1.

**(4)** A former member who is employed by an employer covered under the Educational Retirement Act must provide evidence of current contributing membership in the educational retirement association; such evidence shall be either certification by the employer, in the form prescribed by the association, or certification by the educational retirement association (ERA).

**(5)** Payment for reinstated service credit must be received by the association prior to the member's effective date of retirement.

**(6)** Interest received to reinstate forfeited service credit under this subsection shall not be refunded to the member. The purchase cost received to reinstate forfeited service credit, which is determined to be unnecessary to provide the maximum pension applicable to the member and which is purchased in reliance on information provided by PERA shall be refunded to the member.

**C.** Service credit that a member would have earned if the member had not elected to be excluded from membership prior to July 1, 2014 may be purchased under the following conditions:

**(1)** the member first reinstates all previously withdrawn JRA service credit;

(2) the member may purchase service credit in increments of not less than one year except where the total excluded service credit is less than one year;

(3) the member pays the full cost as determined under Section 10-12B-5(F) NMSA 1978, within 60 days of the notification of that amount.

**D.** Military service credit is free in some cases and may be purchased in other cases as provided by statute.

(1) Where a member wishes to claim service credit pursuant to Section 10-12B-5 NMSA 1978, the association shall, upon the member's request, furnish that member a form of affidavit for completion and certification of such service. The affidavit shall be accompanied by documentary evidence of the member's entry and discharge from service in a uniformed service of the United States.

(2) The administrative office of the courts shall certify in writing the date the member left office to enter a uniformed service of the United States. This requirement may be waived if PERA records contain sufficient documentation of the date of termination.

(3) The administrative office of the courts shall certify in writing to the association the member's date of return to office within 30 days of reemployment. This requirement may be waived if PERA records contain sufficient documentation of the date of return, to office. Members who do not return, to office within 90 days following termination of the period of intervening service but who nevertheless claim reemployment rights under federal law shall provide to the association written certification from the administrative office of the courts that the member is entitled to reemployment rights under the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended.

(4) The affidavit, employer certifications, and documentary evidence of uniformed service shall be presented to the association for approval.

(5) Service credit for periods of intervening service in the uniformed services following voluntary enlistment, reenlistment or appointment shall be awarded only upon compliance by the member and the administrative office of the courts with the provisions of Section 10-12B-5 NMSA 1978, as amended, and the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, including but not limited to the payment to the association of contributions required from the member and the employer.

(6) JRA members who are also members of the military service reserve components who are activated pursuant to a federal call to duty, deployment or peacekeeping mission or other declared national emergency may receive free credit service subject to the conditions of this section. The member must provide a form DD

214 and other documentation as required by PERA to support an award of free service credit.

**(7)** Payment for military service credit must be received by the association prior to the member's effective date of retirement.

**E.** No installment payment contracts may be used for the purchase of any service credit. A member may purchase a total of five years of permissive service credit as allowed under the Judicial Retirement Act in one lump-sum or in one-year increments.

**F.** A member may rollover funds from an Internal Revenue Code Section 457, 403(b), 401(k), IRA or another 401(a) qualified account to pay for forfeited or permissive service credit allowed by the Judicial Retirement Act. The rollover of funds must be made by a trustee-to-trustee transfer and the account from which the funds come must be in the name of the member requesting the transfer.

[2.83.400.8 NMAC - Rp, 2.83.400.8 NMAC, 7/1/15]

## **PART 401-499: [RESERVED]**

## **PART 500: MEMBER CONTRIBUTIONS**

### **2.83.500.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.83.500.1 NMAC - Rn, 2 NMAC 83.500.1, 12-28-00]

### **2.83.500.2 SCOPE:**

This rule affects the members, judicial agencies, the retirement board and the association under the Judicial Retirement Act.

[10-15-97; 2.83.500.2 NMAC - Rn, 2 NMAC 83.500.2, 12-28-00; A, 9-30-03]

### **2.83.500.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-12B-3 and 10-12B-6, as amended.

[10-15-97; 2.83.500.3 NMAC - Rn, 2 NMAC 83.500.3, 12-28-00]

### **2.83.500.4 DURATION:**

Permanent.

[10-15-97; 2.83.500.4 NMAC - Rn, 2 NMAC 83.500.4, 12-28-00]

**2.83.500.5 EFFECTIVE DATE:**

November 1, 1994, unless a different date is cited at the end of a section.

[10-15-97; 2.83.500.5 NMAC - Rn & A, 2 NMAC 83.500.5, 12-28-00]

**2.83.500.6 OBJECTIVE:**

The objective of this rule is to establish procedures and requirements for the remittance of contributions under the Judicial Retirement Act.

[10-15-97; 2.83.500.6 NMAC - Rn, 2 NMAC 83.500.6, 12-28-00]

**2.83.500.7 DEFINITIONS:**

**A.** "Another qualified plan," for the purposes of the direct rollover provisions in Section 10-11-124 (C) NMSA 1978, means an eligible retirement plan, including:

**(1)** an individual retirement account described in Internal Revenue Code Section 408(a);

**(2)** an individual retirement annuity described in Internal Revenue Code Section 408(b);

**(3)** a qualified trust described in Internal Revenue Code Section 401(a) that accepts the distributee's eligible rollover distribution,

**(4)** an annuity plan described in Internal Revenue Code Section 403(a);

**(5)** effective January 1, 2002, an annuity contract described in Internal Revenue Code Section 403(b);

**(6)** effective January 1, 2002, a plan eligible under Internal Revenue Code Section 457(b) that is maintained by a state, political subdivision of a state or any agency or instrumentality of a state or political subdivision of a state that agrees to separately account for amounts transferred into the plan; or

**(7)** effective January 1, 2008, a Roth IRA described in Internal Revenue Code Section 408A.

**B.** "Direct rollover" means a payment by the retirement system to the eligible retirement plan specified by the distributee.

**C.** "Distributee" means:

- (1) an employee or a former employee;
- (2) an employee's or former employee's surviving spouse;
- (3) an employee's or former employee's spouse or former spouse who is the alternate payee under a qualified domestic relations order, as defined in Internal Revenue Code Section 414(p);
- (4) effective January 1, 2007, a non-spouse beneficiary who is a designated beneficiary as defined by Internal Revenue Code Section 401(a)(9)(E); or
- (5) effective January 1, 2002, a surviving spouse, as defined by federal law, or a spouse or former spouse who is an alternate payee under a domestic relations order dividing PERA benefits, as defined in Internal Revenue Code Section 414(p).

**D. "Eligible rollover distribution" means:**

- (1) any distribution of all or any portion of the balance to the credit of the distributee, except that an eligible rollover distribution does not include: any distribution that is one of a series of substantially equal periodic payments, not less frequently than annually, made for the life, or the life expectancy, of the distributee or the joint lives, or joint life expectancies, of the distributee and the distributee's designated beneficiary, or for a specified period of ten years or more;
- (2) any distribution to the extent such distribution is required under Internal Revenue Code Section 401(a)(9);
- (3) the portion of any distribution that is not includible in gross income; or
- (4) any other distribution that is reasonably expected to total less than \$200 during the year.

[2.83.500.7 NMAC - Rn, 2 NMAC 83.500.7, 12-28-00; A, 12-15-09]

**2.83.500.8 GENERAL PROVISIONS:**

**A.** A member who leaves office for reasons other than retirement may request a refund of his or her total accumulated member contributions. Refunds shall include interest as provided in Subsection D of this section.

**B.** No partial refund of a member's contributions is permitted.

**C.** Requests for refunds of member contributions shall be made on forms provided by the association.

**(1)** The member or the member's legal representative, or the member's designated refund beneficiary or the beneficiary's legal representative, if the member is deceased, must complete and sign the request for refund.

**(2)** If the member is deceased, the applicant for refund must provide PERA with a copy of the member's death certificate. If the deceased member has no living beneficiary, then the personal representative of the estate must provide PERA with a copy of the letters of administration or order of appointment of personal representative, signed and filed in court; or must comply with NMSA 1978, Section 45-3-1201.

**(3)** The member's judicial agency must certify that the member has left office before a refund may be made.

**(4)** If the member has been divorced, the member shall provide the association with complete endorsed copies of all court documents the association deems necessary to ascertain the current marital status of the member and whether any ex-spouse of the member is entitled to any portion of the member's contributions. Such documents shall include the final decrees and marital property settlements for all marriages during the member's employment as a judge or justice. If the member's only divorce was prior to becoming a member, then the final divorce decree is required, but no marital property settlement is required. If the member was divorced more than once before becoming a member, then only the most recent final decree is required. If the member's former spouse is entitled to a portion of a refund of member contributions pursuant to a court order entered pursuant to NMSA 1978, Section 10-12B-7, as amended, the member's former spouse may request, on a form prescribed by the association that his or her share of a refund of member contributions be transferred directly to another qualified plan as allowed by the Internal Revenue Code, as specified under Subsection H of 2.83.500.8 NMAC.

**(5)** After tax employee contributions that are not includible in gross income may be directly refunded to the member.

**D.** Interest on member contributions shall be posted annually effective June 30 at the rate of two percent (2%).

**E.** Members may designate only one refund beneficiary. Such designation shall be in writing in the form prescribed by the association. If the refund beneficiary is other than a natural person, the member shall provide documentation as required by the association. The member shall be responsible for updating the beneficiary designation form with current information, including but not limited to the beneficiary's name and address. If a warrant for a refund to the most recent beneficiary on file with the association is returned as undeliverable because of incorrect name or address, the money will remain with the association until it is furnished with the correct information.

**F.** Forfeitures arising from severance of employment, death, or any other reason, must not be applied to increase the benefits any judge would otherwise receive under

the plan. PERA shall make all reasonable efforts to refund contributions or to pay pensions as required by the plan.

**G.** The maximum annual contribution limits contained in Internal Revenue Code Section 415(c), as amended and adjusted, are incorporated herein by reference.

**H.** For distributions made on or after January 1, 1993, notwithstanding any contrary provision or retirement law that would otherwise limit a distributee's election under this rule, a distributee may elect, at the time and in the manner prescribed by the PERA, to have any portion of an eligible rollover distribution paid directly to an eligible retirement plan specified by the distributee in a direct rollover.

**(1)** A non-spouse beneficiary may only rollover the distribution to an individual retirement account or individual retirement annuity established for the purpose of receiving the distribution and the account or annuity will be treated as an inherited individual retirement account or annuity.

**(2)** Effective January 1, 2002, a portion of a distribution will not fail to be an eligible rollover distribution merely because the portion consists of after-tax employee contributions that are not includible in gross income. However, such portion may be transferred only to an individual retirement account or annuity described in Internal Revenue Code Section 408(a) or (b), or to a qualified defined contribution plan described in Internal Revenue Code Section 401(a), or on or after January 1, 2007, to a qualified defined benefit plan described in Internal Revenue Code Section 401(a) or to an annuity contract described in Internal Revenue Code Section 403(b), that agrees to separately account for amounts so transferred, and earnings thereon, including separately accounting for the portion of the distribution that is includible in gross income and the portion of the distribution that is not so includible.

[10-15-97; 11-15-97; 2.83.500.8 NMAC - Rn & A, 2 NMAC 83.500.8, 12-28-00; A, 12-28-01; A, 9-30-03; A, 12-15-09; A, 07-01-15]

## **PART 501-599: [RESERVED]**

## **PART 600: INTERCEPTION OR DIVISION OF PAYMENTS**

### **2.83.600.1 ISSUING AGENCY:**

Public Employees Retirement Association (PERA), P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[2.83.600.1 NMAC - Rp, 2.83.600.1 NMAC, 7/1/15]

### **2.83.600.2 SCOPE:**

This rule affects members, former members, retirees, beneficiaries, and the association under the Judicial Retirement Act. This rule also affects the spouses and ex-spouses of members, former members and retirees under the act.

[2.83.600.2 NMAC - Rp, 2.83.600.2 NMAC, 7/1/15]

**2.83.600.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-12B-3 and 10-12B-7 NMSA 1978, as amended.

[2.83.600.3 NMAC - Rp, 2.83.600.3 NMAC, 7/1/15]

**2.83.600.4 DURATION:**

Permanent.

[2.83.600.4 NMAC - Rp, 2.83.600.4 NMAC, 7/1/15]

**2.83.600.5 EFFECTIVE DATE:**

July 1, 2015, unless a later date is cited at the end of a section.

[2.83.600.5 NMAC - Rp, 2.83.600.5 NMAC, 7/1/15]

**2.83.600.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for dividing the community interest in retirement pensions or contributions and for withholding from retirement pensions/contributions the amounts due pursuant to a child support enforcement order.

[2.83.600.6 NMAC - Rp, 2.83.600.6 NMAC, 7/1/15]

**2.83.600.7 DEFINITIONS:**

[RESERVED]

**2.83.600.8-2.83.600.9 [RESERVED]**

**2.83.600.10 DIVORCE DECREE OR ORDER:**

**A.** The following information must be contained in a divorce decree or order which divides the community interest in Judicial Retirement Act (JRA) retirement pensions or contributions:

(1) specific information identifying the parties, i.e., full names, addresses, social security numbers, retirement numbers if any;

(2) a declaration that there is a community interest in a member's pension or member contributions;

(3) the percentage or dollar amount of each party's interest in the gross pension as calculated at the time of retirement;

(4) the percentage or dollar amount of each party's interest in member contributions;

(5) a direct order to PERA restraining refund of member contributions except according to the provisions of the decree or order, if such a restraint is desired;

(6) liability for and payment of federal and state income taxes;

(7) a direct order to PERA to issue separate warrants to each party.

**B.** A separate account may not be created for a member's former spouse who has a court-determined interest in a member's account.

**C.** A model order or decree containing provisions for the determination and division of the community interest in a JRA member's account shall be available on request from PERA's office of general counsel.

**D.** Payments made pursuant to such orders shall only be made when member contributions are refunded or a pension is payable in accordance with the provisions of the Judicial Retirement Act. PERA shall not be obligated to administer pension benefits in accordance with such orders until the first of the month following written approval by the office of general counsel.

**E.** Member files must contain current names and addresses for persons having a court-determined interest in member retirement accounts. Any person with such an interest must provide PERA with a written statement of change of name or address. If a warrant is returned as undeliverable because of incorrect name or address, the money due the person will accumulate in the fund until PERA is furnished with the correct information. No interest shall be paid on any monies so accumulated.

**F.** Each party must submit a completed W-4 to PERA when applying for a retirement pension.

**G.** A court order requiring an election of a particular form of payment at retirement or the designation of one or more beneficiaries shall be addressed to the member, and the member shall be responsible for executing the proper PERA forms and providing the

documentation necessary to effectuate the election or designation(s). A member who violates such an order may be in contempt of court.

[2.83.600.10 NMAC - Rp, 2.83.600.10 NMAC, 7/1/15]

**2.83.600.11-2.83.600.19 [RESERVED]**

**2.83.600.20 CHILD SUPPORT OBLIGATION ENFORCEMENT ORDER:**

**A.** The following information must be contained in an order to withhold amounts due in satisfaction of current or delinquent child support obligations.

(1) specific information identifying the member or retired member, i.e., full name, address, social security number, retirement number, if any;

(2) specific information identifying the third party payee, i.e., full name, address, social security number, if any, or account code for child support enforcement bureau;

(3) dollar amount to be withheld from the monthly pension payment or a refund of member contributions;

(4) a direct order to PERA to issue separate warrants to each party.

**B.** A model order or decree containing provisions for the withholding of retirement pensions or contributions pursuant to a child support obligation enforcement order shall be available on request from PERA's office of general counsel.

**C.** Payments made pursuant to such orders shall only be made when member contributions are refunded or a pension is payable in accordance with the provisions of the JRA.

**D.** Member files must contain current names and addresses for persons having a court-determined interest in member retirement accounts. Any person with such an interest must provide PERA with a written statement of any change of name or address. If a warrant is returned as undeliverable because of incorrect name or address, the money due the person will accumulate in the fund until PERA is furnished with the correct information. No interest shall be paid on any monies so accumulated.

[2.83.600.20 NMAC - Rp, 2.83.600.20 NMAC, 7/1/15]

**2.83.600.21-2.83.600.29 [RESERVED]**

**2.83.600.30 FEDERAL PREEMPTIVE ORDERS:**

Pursuant to Section 10-12B-7 NMSA 1978, JRA retirement accounts are not subject to legal process under other state laws, except for division of a community interest in such accounts or in enforcement of child support obligations, both as provided in Section 10-12B-7 NMSA 1978. In the following instances, however, federal laws pre-empt the provisions of Section 10-12B-7 NMSA 1978.

**A.** IRS notices of levy for unpaid taxes will be honored if the account is in pay status, i.e., if the member has terminated employment and requested a refund of contributions, or if a pension is payable. If the levy is applied against a refund of member contributions, non-tax deferred contributions shall be paid before tax-deferred contributions.

**B.** Orders issued by a U.S. bankruptcy court will be honored if the account is in pay status, i.e., if the member has terminated employment and requested a refund of contributions, or if a pension is payable. If the order is applied against a refund of member contributions, non-tax deferred contributions shall be paid before tax-deferred contributions.

**C.** Orders of garnishment for fines or restitution by a federal court in a criminal case will be honored if the account is in pay status, i.e. if the member has terminated employment and requested a refund of contributions, or if a pension is payable. If the order is applied against a refund of member contributions, non-tax deferred contributions shall be paid before tax-deferred contributions.

[2.83.600.30 NMAC - Rp, 2.83.600.30 NMAC, 7/1/15]

## **PART 601-699: [RESERVED]**

## **PART 700: RETIREMENT**

### **2.83.700.1 ISSUING AGENCY:**

Public Employees Retirement Association, 33 Plaza La Prensa, Santa Fe, NM, 87507.

[2.83.700.1 NMAC – Rp, 2.83.700.1, 10/10/2023]

### **2.83.700.2 SCOPE:**

This rule affects retirees, beneficiaries, judicial agencies and the association under the Judicial Retirement Act.

[2.83.700.2 NMAC – Rp, 2.83.700.2, 10/10/2023]

### **2.83.700.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-12B-3 and 10-12B-8 NMSA 1978.

[2.83.700.3 NMAC – Rp, 2.83.700.3, 10/10/2023]

**2.83.700.4 DURATION:**

Permanent.

[2.83.700.4 NMAC – Rp, 2.83.700.4, 10/10/2023]

**2.83.700.5 EFFECTIVE DATE:**

October 10, 2023, unless a different date is cited at the end of a section.

[2.83.700.5 NMAC – Rp, 2.83.700.5, 10/10/2023]

**2.83.700.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for the payment, of pensions of retired members.

[2.83.700.6 NMAC – Rp, 2.83.700.6, 10/10/2023]

**2.83.700.7 DEFINITIONS:**

**[RESERVED]**

[2.83.700.7 NMAC – Rp, 2.83.700.7, 10/10/2023]

**2.83.700.8-9 [RESERVED]**

**2.83.700.10 PROCEDURE FOR RETIREMENT:**

**A.** The following procedure governs the process for retirement:

(1) The member shall request an application for retirement from PERA. To ensure that the member may retire on the date the member has chosen, the completed application should be returned to PERA, with the required documents described in Subsection B below, at least 60 days prior to the selected date of retirement. The completed application and all supporting documentation must be filed with PERA no later than the close of business on the last working day of the month prior to the selected date of retirement.

(2) PERA shall furnish the member an estimate of retirement pension payable within a reasonable time of receipt of the properly completed application and required documents.

(3) When the application is filed, PERA shall furnish the member's last judicial agency with an employer's certification of earnings form to be completed and returned to PERA. The final calculation of pension cannot be processed until PERA receives the properly completed employer's certification form.

(4) PERA will furnish the member a final calculation of retirement pension based on the information provided by the judicial agency.

(5) The completed application form must either include or be accompanied by a signed notarized statement of consent by the member's spouse to the survivor beneficiary elected by the member or an affidavit that the member is not married. An affidavit naming all former spouses must also accompany the final application form.

(6) Retirement will be effective on the first day of the month following: a) the filing with PERA of the completed, signed application with all required documentation; b) the member's qualifying for retirement based on service credit and age; and c) the member's leaving office. An application will be deemed to be "filed" when received by PERA as evidenced by a writing on the application indicating the date of receipt by PERA.

(7) The retirement of the judge shall be submitted to the board for ratification at the next regular meeting following the effective date of retirement.

**B. Documentation:** The retiring member shall furnish the following documents to PERA:

(1) Proof of age of the member and any designated beneficiary or beneficiaries or the proof of age for a beneficiary to a supplemental needs trust. Acceptable documents are a birth certificate, a baptismal certificate, or religious record of birth established before age 5 years, or any two of the following documents showing the date of birth of the member or designated beneficiary or beneficiaries:

- (a) copy of a life insurance policy;
- (b) certified copy of voter registration issued over 10 years prior;
- (c) tribal census record;
- (d) childhood immunization record made prior to age 18 years;
- (e) military record;
- (f) birth certificate of child showing age of parent;
- (g) physician's or midwife's record of birth;

- (h) passport;
- (i) immigration record;
- (j) naturalization record.

(2) A copy of a marriage certificate or other proof of marital status acceptable in a court of law for any designated survivor beneficiary to be identified as a spouse.

(3) For any designated beneficiary to be identified as a supplemental needs trust, a copy of the documents related to the formation of the trust and an affidavit from the trustee that the trust is formed as a supplemental needs trust as authorized by the federal Social Security Act. Additional information may be required by the association to ascertain the purpose and function of the trust to ensure compliance with the Judicial Retirement Act.

(4) Complete endorsed copies of all court documents the association deems necessary to ascertain the current marital status of the member and whether any ex-spouse of the member is entitled to any portion of the member's benefits. Such documents shall include the final decrees and marital property settlements for all marriages during the member's employment as a judge or justice. If the member's only divorce was prior to becoming a member, then the final divorce decree is required, but no marital property settlement is required. If the member was divorced more than once before becoming a member, then only the most recent final decree is required.

(5) Any member with an effective retirement date on or after January 1, 2014 shall provide authorization to the association for the electronic transfer of pension payments to the retiree's banking institution. Such authorization shall be executed, in writing, in the form prescribed by the association.

**C.** No adjustments to the pension based on failure to claim free or any other service credit may be made after the first pension payment.

**D.** Under the provisions of Section 10-12B-12 NMSA 1978, the Public Employees Retirement Reciprocity Act applies to members covered under the Judicial Retirement Act early retirement.

**E.** In addition to any other vesting provided by state law, a judge's normal retirement benefit is non-forfeitable when the judge reaches normal retirement age, which is age 65, with five or more years of credited service, whichever is later for an individual who initially became a judge prior to July 1, 2014 and age 65 with eight or more years of credited service whichever is later for an individual who initially became a judge on or after July 1, 2014. A judge is also vested in his or her accrued benefits when the judge reaches such lesser age and specified years of credited service as provided under the plan. If there is a termination of the judicial retirement system, or if employer contributions to the judicial retirement plan are completely discontinued, the rights of

each affected member to the benefits accrued at the date of termination or discontinuance, to the extent then funded, are non-forfeitable.

[2.83.700.10 NMAC – Rp, 2.83.700.10, 10/10/2023]

#### **2.83.700.11 DISABILITY RETIREMENT:**

A judge who becomes disabled prior to retirement can make application for benefits in accordance with 2.80.1000 NMAC.

[2.83.700.11 NMAC – Rp, 2.83.700.11, 10/10/2023]

#### **2.83.700.12-19 [RESERVED]**

#### **2.83.700.20 BENEFIT PAYMENT:**

The maximum annual benefit limits contained in Internal Revenue Code Section 415(b), as amended and adjusted, are incorporated herein by reference. Notwithstanding any other provision of the Judicial Retirement Act and regulations, all benefits paid from the Judicial Retirement trust fund shall be distributed in accordance with the requirements of Internal Revenue Code Section 401(a)(9) and the regulations under that section. In order to meet these requirements, the trust fund must be administered in accordance with the following provisions:

**A.** The entire interest of the judge shall:

(1) be completely distributed to the judge not later than the required beginning date; or

(2) shall be distributed, beginning not later than the required beginning date, in accordance with internal revenue service regulations, over a period not extending beyond the life expectancy of the judge or the life expectancy of the judge and a designated beneficiary.

**B.** For the purposes of this section, "required beginning date" shall be defined in the same manner as the term "required beginning date" is defined in the Internal Revenue Code Section 401 (a)(9) and the regulations under that section.

**C.** The life expectancy of the judge or the judge's beneficiary may not be recalculated after the benefits commence.

**D.** If a judge dies before the distribution of the judge's benefits has begun, distribution to beneficiaries must begin no later than December 31 of the calendar year immediately following the calendar year in which the judge died.

**E.** The amounts payable to a judge's beneficiary may not exceed the maximum determined under the incidental death benefit requirements of the Internal Revenue Code Section 401(a)(9)(G) and regulations thereunder. PERA shall adjust the percentage of the judge's pension payable to a non-spouse survivor beneficiary who is more than 10 years younger than the judge at the time of the judge's retirement as required by 26 C.F.R. Section 1.401(a)(9)-6.

[2.83.700.20 NMAC – Rp, 2.83.700.20, 10/10/2023]

## **2.83.700.21-29 [RESERVED]**

### **2.83.700.30 ANNUAL COMPENSATION:**

Notwithstanding any provision of the of the Judicial Retirement Act and regulations, the annual compensation of each judge that is taken into account under the plan, including for benefit calculation purposes, for any year does not exceed the limit specified in Internal Revenue Code Section 401(a)(17).

[2.83.700.30 NMAC – Rp, 2.83.700.30, 10/10/2023]

## **PART 701-799: [RESERVED]**

## **PART 800: SURVIVOR PENSION**

### **2.83.800.1 ISSUING AGENCY:**

Public Employees Retirement Association, 33 Plaza La Prensa, Santa Fe, NM, 87507.

[2.83.800.1 NMAC – Rp, 2.83.800.1, 10/10/2023]

### **2.83.800.2 SCOPE:**

This rule affects members, former members, retirees, beneficiaries, and the association under the Judicial Retirement Act.

[2.83.800.2 NMAC – Rp, 2.83.800.2, 10/10/2023]

### **2.83.800.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-12B-3 and 10-12B-14 NMSA 1978.

[2.83.800.3 NMAC – Rp, 2.83.800.3, 10/10/2023]

### **2.83.800.4 DURATION:**

Permanent.

[2.83.800.4 NMAC – Rp, 2.83.800.4, 10/10/2023]

**2.83.800.5 EFFECTIVE DATE:**

October 10, 2023, unless a different date is cited at the end of a section.

[2.83.800.5 NMAC – Rp, 2.83.800.5, 10/10/2023]

**2.83.800.6 OBJECTIVE:**

The objective of this rule is to establish the procedure for the payment of a survivor pension under the Judicial Retirement Act.

[2.83.800.6 NMAC – Rp, 2.83.800.6, 10/10/2023]

**2.83.800.7 DEFINITIONS:**

**[RESERVED]**

**2.83.800.8-9 [RESERVED]**

**2.83.800.10 PROCEDURE:**

The procedure for payment of a survivor pension is:

**A.** Applicants for pre-retirement survivor pensions shall notify PERA of the death of the member and complete an application for benefits.

**B.** The completed application shall be returned to PERA along with the following documents:

(1) A certified copy of the death certificate or other proof of death acceptable in a court of law.

(2) If the application is for a surviving spouse: copy of the marriage license or other proof of marital status acceptable in a court of law, and an affidavit of the surviving spouse that he or she and the deceased member were married at the time of death and stating whether there are any surviving minor children of the deceased.

(3) Proof of age of the surviving spouse, surviving minor children or other designated beneficiary or the proof of age for a beneficiary to a supplemental needs trust. Acceptable documents for proof of age shall be a birth certificate, a baptismal certificate, a copy of a life insurance policy, a certified copy of a voter registration issued over 10 years prior, or proof of age meeting a standard at least equivalent to that applied by the social security administration.

(4) Documents required under the Probate Code for payments to a minor if the application is on behalf of minor and dependent children.

(5) Affidavit that the applicant or beneficiary of a special needs trust is not married or otherwise emancipated if the applicant is a child of the deceased member or a supplemental needs trust formed for the benefit of a child of the deceased member.

(6) Copies of social security cards for all prospective payees.

(7) If the member has been divorced, the applicant shall provide PERA with complete endorsed copies of all court documents the association deems necessary to ascertain the marital status of the member at the time of death and whether any ex-spouse of the member is entitled to any portion of any benefits payable. Such documents shall include the final decrees and marital property settlements for all marriages during the member's covered employment as a judge or justice. If the member's only divorce was prior to becoming a member, then the final divorce decree is required, but no marital property settlement is required. If the member was divorced more than once before becoming a member, then only the most recent final decree is required.

(8) a copy of the documents related to the formation of the supplemental needs trust, an affidavit from the trustee that the trust is formed as a supplemental needs trust as authorized by the federal Social Security Act and any additional information requested by the association if the application is on behalf of a supplemental needs trust.

**C.** The application shall be considered to be "filed" when PERA receives the completed application as evidenced by a writing on the application indicating the date of receipt by PERA. Upon filing of the application, and accompanying documentation as required in Subsection B above, PERA will calculate the pension payable and begin paying the pension effective the first day of the month following the date of the death resulting in the pension. The amount of survivor pension shall be submitted to the board for ratification at the next regular meeting following the date of the first payment of survivor pension to the applicant.

**D.** Military death. Effective with respect to deaths occurring on or after January 1, 2007, while a member is performing qualified military service, as defined in Chapter 43 of Title 38, United States Code, to the extent required by Internal Revenue Code Section 401(a)(37), survivors of such member are entitled to any additional benefits that the plan would provide if the member had resumed employment and then died, such as accelerated vesting or survivor benefits that are contingent on the member's death while employed. In any event, a deceased member's period of qualified military service must be counted for vesting purposes.

## **PART 801-899: [RESERVED]**

## **PART 900: GROUP INSURANCE CONTINUATION**

### **2.83.900.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.83.900.1 NMAC - Rn, 2 NMAC 83.900.1, 12-28-01]

### **2.83.900.2 SCOPE:**

This rule affects retired members who are not covered by the Retiree Health Care Act and the association under the Judicial Retirement Act.

[10-15-97; 2.83.900.2 NMAC - Rn, 2 NMAC 83.900.2, 12-28-01]

### **2.83.900.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-12B-3 and 10-12B-16, as amended.

[10-15-97; 2.83.900.3 NMAC - Rn, 2 NMAC 83.900.3, 12-28-01]

### **2.83.900.4 DURATION:**

Permanent.

[10-15-97; 2.83.900.4 NMAC - Rn, 2 NMAC 83.900.4, 12-28-01]

### **2.83.900.5 EFFECTIVE DATE:**

July 1, 1992 unless a different date is cited at the end of a section.

[10-15-97; 2.83.900.5 NMAC - Rn, 2 NMAC 83.900.5, 12-28-01]

### **2.83.900.6 OBJECTIVE:**

The objective of this rule is to establish a procedure for certain retired members to continue group insurance coverage.

[10-15-97; 2.83.900.6 NMAC - Rn, 2 NMAC 83.900.6, 12-28-01]

### **2.83.900.7 DEFINITIONS:**

**[RESERVED]**

## **2.83.900.8 GENERAL PROVISIONS:**

A. Each retired member who desires to continue insurance coverage under the provisions of any state group insurance plan in effect at the time of retirement, is required to file with the association the appropriate documentation.

B. In the event a retired member desires to terminate his or her insurance coverage, written notification shall be submitted to PERA. Notification received after the fifteenth day of a calendar month shall not result in termination of coverage until the first day of the following month.

[10-15-97; 2.83.900.8 NMAC - Rn, 2 NMAC 83.900.8, 12-28-01]

## **PART 901-999: [RESERVED]**

## **PART 1000: APPEAL OF DENIAL OF CLAIM OF BENEFITS**

### **2.83.1000.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.83.1000.1 NMAC - Rn, 2 NMAC 83.1000.1, 12-28-00]

### **2.83.1000.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, public employers, retirement board and the association under the Judicial Retirement Act.

[10-15-97; 2.83.1000.2 NMAC - Rn, 2 NMAC 83.1000.2, 12-28-00]

### **2.83.1000.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-12B-3.

[10-15-97; 2.83.1000.3 NMAC - Rn, 2 NMAC 83.1000.3, 12-28-00]

### **2.83.1000.4 DURATION:**

Permanent.

[10-15-97; 2.83.1000.4 NMAC - Rn, 2 NMAC 83.1000.4, 12-28-00]

### **2.83.1000.5 EFFECTIVE DATE:**

July 1, 1992 unless a different date is cited at the end of a section.

[10-15-97; 2.83.1000.5 NMAC - Rn & A, 2 NMAC 83.1000.5, 12-28-00]

**2.83.1000.6 OBJECTIVE:**

The objective of this rule is to establish procedures and requirements for appealing denials of claims for benefits.

[10-15-97; 2.83.1000.6 NMAC - Rn, 2 NMAC 83.1000.6, 12-28-00]

**2.83.1000.7 DEFINITIONS:**

**[RESERVED]**

[2.83.1000.7 NMAC - Rn, 2 NMAC 83.1000.7, 12-28-00]

**2.83.1000.8 GENERAL PROVISIONS:**

The provisions of 2.80.1500 NMAC shall govern the appeal of a denial of a claim for benefits by a judge, justice or retiree under the Judicial Retirement Act.

[10-15-97, 11-15-97; 2.83.1000.8 NMAC - Rn & A, 2 NMAC 83.1000.8, 12-28-00]

**PART 1001-1099: [RESERVED]**

**PART 1100: RETIRED MEMBERS**

**2.83.1100.1 ISSUING AGENCY:**

Public Employees Retirement Association (PERA), P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[2.83.1100.1 NMAC - 2.83.1100.1 NMAC, 7/1/15]

**2.83.1100.2 SCOPE:**

This rule affects members, retirees, beneficiaries, public employers, retirement board and the association under the Judicial Retirement Act.

[2.83.1100.2 NMAC - 2.83.1100.2 NMAC, 7/1/15]

**2.83.1100.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-12B-3 and 10-12B-17 NMSA 1978, as amended.

[2.83.1100.3 NMAC - 2.83.1100.3 NMAC, 7/1/15]

#### **2.83.1100.4 DURATION:**

Permanent.

[2.83.1100.4 NMAC - 2.83.1100.4 NMAC, 7/1/15]

#### **2.83.1100.5 EFFECTIVE DATE:**

July 1, 2015, unless a later date is cited at the end of a section.

[2.83.1100.5 NMAC - 2.83.1100.5 NMAC, 7/1/15]

#### **2.83.1100.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for the payment, suspension, and reinstatement of pensions of retired members; to establish notification and reporting requirements for post-retirement employment; and to establish conditions for retired members who work for affiliated public employers as independent contractors.

[2.83.1100.6 NMAC - 2.83.1100.6 NMAC, 7/1/15]

#### **2.83.1100.7 DEFINITIONS:**

**[RESERVED]**

[2.83.1100.7 NMAC - 2.83.1100.7 NMAC, 7/1/15]

#### **2.83.1100.8-2.83.1100.9 [RESERVED]**

#### **2.83.1100.10 PAYMENT OF PENSION:**

Pension payments will be processed or mailed monthly, not later than the last day of the month for which they are paid.

**A.** A retired member may have the pension warrant mailed directly to any location specified in writing by the retired member; provided, however, that after December 31, 1998, the provisions of Paragraph (4) of Subsection B of 2.83.700.10 NMAC shall apply. Arrangements providing for electronic transfer of pension payments to the retiree's banking institution are permitted so long as the retired member's right to receipt of the funds is not altered except as ordered by a court of competent jurisdiction.

**B.** In the event a retired member is incapacitated or unable to sign his or her pension warrant, proof that a guardian has been appointed for the retired member, or proof of appointment of a conservator for the estate, or a copy of a durable power of attorney for a third party shall be filed with PERA.

[2.83.1100.10 NMAC - 2.83.1100.10 NMAC, 7/1/15]

**2.83.1100.11-2.83.1100.19 [RESERVED]**

**2.83.1100.20 POST-RETIREMENT EMPLOYMENT:**

**A.** A member who retires must remain unemployed by an employer covered by any state system or the educational retirement system. This section does not apply to a retired member who:

(1) performs work for an employer covered by any state system or the educational retirement system as an independent contractor under a contract approved by PERA; or

(2) is appointed to serve as a judge pro tempore.

**B.** When a retired member is subsequently employed by an affiliated public employer or an employer covered by the educational retirement system, the retired member shall notify PERA immediately of the hire date, position and salary of the subsequently employed retired member.

**C.** The retired member's pension shall be suspended effective the first of the month following the month in which the subsequent employment begins.

**D.** If a retired member fails to report earnings from subsequent employment with an affiliated public employer or an employer covered by the educational retirement system, and consequently continues to receive pension payments after such payments should have been suspended pursuant to the requirements of Section 10-12B-17 NMSA 1978 and rules promulgated thereunder, the retired member will be required to repay to PERA any amounts erroneously received, plus interest at the rate set by the board for overpayments. If erroneously paid pension payments have not been repaid when the subsequent employment is terminated and the retired member has applied for reinstatement of the pension, the erroneously paid amount must be repaid in full before the pension may be reinstated or the subsequently employed retired member must make arrangements acceptable to PERA for the erroneously paid amount to be withheld from the reinstated pension until fully repaid.

[2.83.1100.20 NMAC - 2.83.1100.20 NMAC, 7/1/15]

**2.83.1100.21-2.83.1100.29 [RESERVED]**

**2.83.1100.30 REINSTATEMENT OF PENSION:**

When a retired member is subsequently employed by an affiliated public employer, causing suspension of pension and resulting in re-establishment of PERA membership,

that person will be eligible to reinstate his or her pension at the termination of the subsequent employment period under the following conditions:

**A.** the retired member's subsequent employer shall provide PERA with a certificate, in the form prescribed by PERA, of the date of termination of employment;

**B.** the pension shall be reinstated effective the first day of the month following the month of termination;

**C.** unless the Public Employees Retirement Reciprocity Act applies, the amount of the reinstated pension shall be the same amount as the suspended pension.

[2.83.1100.30 NMAC - 2.83.1100.30 NMAC, 7/1/15]

## **2.83.1100.31-2.83.1100.39 [RESERVED]**

## **2.83.1100.40 INDEPENDENT CONTRACTORS:**

If a retired member contracts to perform work for any public employer, the following conditions shall apply:

**A.** Post-retirement employment contracts with public employers must be submitted to PERA at least 15 working days prior to the effective date of the contract. PERA shall evaluate the contract to determine whether, under the terms of the contract, the retired member is an "employee" or an "independent contractor". In making this determination, PERA shall refer to the common-law control test guidelines as expressed in the Social Security Handbook published by the U.S. Department of Health and Human Services, as revised and amended. If PERA determines the retired member is actually an "employee" rather than an "independent contractor" under the terms of the contract, the retired member's pension will be suspended immediately. If the retired member disagrees with PERA's determination, the retired member may appeal PERA's decision pursuant to 2.83.1000 NMAC.

**B.** Renewals, amendments or modifications of previously approved post-retirement contracts shall also be submitted to PERA for evaluation 15 working days prior to their effective date. The provisions of this section will apply to such renewals, amendments or modifications.

[2.83.1100.40 NMAC - 2.83.1100.40 NMAC, 7/1/15]

## **PART 1200: REMITTANCE OF CONTRIBUTIONS**

### **2.83.1200.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.83.1200.1 NMAC - Rn, 2 NMAC 83.1200.1, 12-28-00]

**2.83.1200.2 SCOPE:**

This rule affects members, judicial agencies, the retirement board and the association under the Judicial Retirement Act.

[10-15-97; 2.83.1200.2 NMAC - Rn, 2 NMAC 83.1200.2, 12-28-00]

**2.83.1200.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Section 10-12B-3, 10-12B-10, and 10-12B-11, as amended.

[10-15-97; 2.83.1200.3 NMAC - Rn, 2 NMAC 83.1200.3, 12-28-00]

**2.83.1200.4 DURATION:**

Permanent.

[10-15-97; 2.83.1200.4 NMAC - Rn, 2 NMAC 83.1200.4, 12-28-00]

**2.83.1200.5 EFFECTIVE DATE:**

November 1, 1994 unless a different date is cited at the end of a section.

[10-15-97; 2.83.1200.5 NMAC - Rn & A, 2 NMAC 83.1200.5, 12-28-00]

**2.83.1200.6 OBJECTIVE:**

The objective of this rule is to establish procedures and requirements for the remittance of contributions.

[10-15-97; 2.83.1200.6 NMAC - Rn, 2 NMAC 83.1200.6, 12-28-00]

**2.83.1200.7 DEFINITIONS:**

**[RESERVED]**

[2.83.1200.7 NMAC - Rn, 2 NMAC 83.1200.7, 12-28-00]

**2.83.1200.8 GENERAL PROVISIONS**

A. In accordance with the Judicial Retirement Act each judicial agency, as employer, shall be responsible for deducting the applicable contribution from the salary or wages paid to each member for each payroll period.

B. The employer shall transmit to PERA the member and employer contributions for every member in its employ for each pay period on or before the fifth working day following the payday applicable to the pay period. The contributions shall be accompanied by a transmittal report in a format designated by PERA, which shall clearly set forth the amount of employer and member contributions, and adjustments for prior pay periods if applicable, transmitted.

C. Except as provided in Subsection G below, interest will be assessed on any remittance of employer and employee contributions not made by the due date of the remittance. The rate of interest shall be set annually by the board at a July meeting and shall be effective beginning the next succeeding January 1st. Any interest paid on unremitted contributions shall not be posted to the member's account or refunded to the member or the employer.

D. Except as provided in Subsection G below, a penalty of fifty dollars (\$50) per day shall be assessed for any employee and employer contribution transmittal report that is untimely. For purposes of this subsection, "untimely" is defined as fifteen (15) days after the end of the month in which the transmittal report was due.

E. In the event the judicial agency fails to make the necessary deductions, the judicial agency shall be responsible to remit to PERA the total amount due for both the member and employer contributions plus interest as provided in subsection C above.

F. Current employer contributions may not be made by members except as authorized by law.

G. If a judicial agency, for good cause, is unable to timely transmit employee and employer contributions or transmittal report, the employer shall notify PERA in writing at least twenty-four hours prior to the due date, and may request waiver of the interest or penalty that would otherwise be assessed. The executive director may waive interest or penalty for up to thirty-one calendar days. Interest shall thereafter be charged at the rate set in subsection C above.

H. Member contributions picked-up by the employer under NMSA 1978, Section 10-12B-10 are not considered compensation for purposes of Internal Revenue Code Section 415(c).

I. Beginning January 1, 2009, to the extent required by Internal Revenue Code Section 414(u)(2), an individual receiving differential wage payments (as defined under Internal Revenue Code Section 3401(h)(2)) from an affiliated public employer shall be treated as employed by that employer and the differential wage payment shall be treated as compensation for purposes of applying the limits on annual additions under Internal Revenue Code Section 415(c). This provision shall be applied to all similarly situated individuals in a reasonably equivalent manner.

[10-15-97; 11-15-97; 2.83.1200.8 NMAC - Rn & A, 2 NMAC 83.1200.8, 12-28-00; A, 12-28-01; A, 12-15-09; A, 12-30-13]

## **PART 1201-1299: [RESERVED]**

## **PART 1300: CORRECTION OF ERRORS AND OMISSIONS**

### **2.83.1300.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.83.1300.1 NMAC - Rn, 2 NMAC 83.1300.1, 12-28-01]

### **2.83.1300.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, public employers, retirement board, and the association under the Judicial Retirement Act.

[10-15-97; 2.83.1300.2 NMAC - Rn, 2 NMAC 83.1300.2, 12-28-01]

### **2.83.1300.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-12B-3 and 10-12B-19, as amended.

[10-15-97; 2.83.1300.3 NMAC - Rn, 2 NMAC 83.1300.3, 12-28-01]

### **2.83.1300.4 DURATION:**

Permanent.

[10-15-97; 2.83.1300.4 NMAC - Rn, 2 NMAC 83.1300.4, 12-28-01]

### **2.83.1300.5 EFFECTIVE DATE:**

December 15, 1995 unless a different date is cited at the end of a section.

[10-15-97; 2.83.1300.5 NMAC - Rn, 2 NMAC 83.1300.5, 12-28-01]

### **2.83.1300.6 OBJECTIVE:**

The objective of this rule is to establish procedures for collecting pensions overpayments.

[10-15-97; 2.83.1300.6 NMAC - Rn, 2 NMAC 83.1300.6, 12-28-01]

### **2.83.1300.7 DEFINITIONS:**

**[RESERVED]**

**2.83.1300.8 GENERAL PROVISIONS:**

The board directs the executive director to make all reasonable efforts to collect any pension overpayment made for any reason.

[10-15-97; 11-15-97; 2.83.1300.8 NMAC - Rn, 2 NMAC 83.1300.8, 12-28-01]

## **CHAPTER 84: MAGISTRATE RETIREMENT**

**PART 1-99: [RESERVED]**

**PART 100: GENERAL PROVISIONS**

**2.84.100.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.84.100.1 NMAC - Rn, 2 NMAC 84.100.1, 12-28-00]

**2.84.100.2 SCOPE:**

This rule affects the members, former member, retirees, beneficiaries, public employers, the retirement board and the association under the Magistrate Retirement Act.

[10-15-97; 2.84.100.2 NMAC - Rn, 2 NMAC 84.100.2, 12-28-00; A, 9-30-03]

**2.84.100.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Section 10-12C-3, as amended.

[10-15-97; 2.84.100.3 NMAC - Rn, 2 NMAC 84.100.3, 12-28-00]

**2.84.100.4 DURATION:**

Permanent.

[10-15-97; 2.84.100.4 NMAC - Rn, 2 NMAC 84.100.4, 12-28-00]

**2.84.100.5 EFFECTIVE DATE:**

November 1, 1994 unless a different date is cited at the end of a section.

[10-15-97; 2.84.100.5 NMAC - Rn & A, 2 NMAC 84.100.5, 12-28-00]

#### **2.84.100.6 OBJECTIVE:**

The objective of this rule is to define terms used in the Magistrate Retirement Act and its rules and regulations.

[10-15-97; 2.84.100.6 NMAC - Rn, 2 NMAC 84.100.6, 12-28-00]

#### **2.84.100.7 DEFINITIONS:**

A. "Magistrate" or magistrate judge" has the meaning used throughout Chapter 35 of the New Mexico Statutes Annotated, as amended and excludes judges of the metropolitan court, district court or court of appeals and justices of the supreme court.

B. "Magistrate court" has the meaning used throughout Chapter 35 of the New Mexico Statutes Annotated, as amended.

C. "Judicial agency" means the magistrate court or the administrative office of the courts, or the employer that pays the member's salary.

D. "Public employer" means any employer covered under any state system or the Educational Retirement Act.

E. "Legal representative" means "personal representative" as defined in the Probate Code of New Mexico which includes executor, administrator, successor personal representative, special administrator and persons who perform substantially the same functions under the law governing their status, or an attorney or a person acting pursuant to a power of attorney for a member, retired member or beneficiary.

F. "State system" means a retirement program provided for in the Public Employees Retirement Act, Magistrate Retirement Act, or Judicial Retirement Act.

[10-15-97; 2.84.100.7 NMAC - Rn & A, 2 NMAC 84.100.7, 12-28-00; A, 9-30-03]

### **PART 101-199: [RESERVED]**

### **PART 200: ADMINISTRATION**

#### **2.84.200.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.84.200.1 NMAC - Rn, 2 NMAC 84.200.1, 12-28-00]

#### **2.84.200.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, public employers, retirement board and the association under the Magistrate Retirement Act.

[10-15-97; 2.84.200.2 NMAC - Rn, 2 NMAC 84.200.2, 12-28-00]

**2.84.200.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Section 10-12C-3, as amended.

[10-15-97; 2.84.200.3 NMAC - Rn, 2 NMAC 84.200.3, 12-28-00]

**2.84.200.4 DURATION:**

Permanent.

[10-15-97; 2.84.200.4 NMAC - Rn, 2 NMAC 84.200.4, 12-28-00]

**2.84.200.5 EFFECTIVE DATE:**

July 1, 1992 unless a different date is cited at the end of a section.

[10-15-97; 2.84.200.5 NMAC - Rn & A, 2 NMAC 84.200.5, 12-28-00]

**2.84.200.6 OBJECTIVE:**

The objective of this rule is to establish procedures for rulemaking, to provide for payment of expenses for investing and administering the magistrate retirement fund, to establish procedures and requirements for remittance of contributions, and to establish procedures for collecting pension overpayments.

[10-15-97; 2.84.200.6 NMAC - Rn, 2 NMAC 84.200.6, 12-28-00]

**2.84.200.7 DEFINITIONS:**

**[RESERVED]**

[2.84.200.7 NMAC - Rn, 2 NMAC 84.200.7, 12-28-00]

**2.84.200.8-2.84.200.9 [RESERVED]**

**2.84.200.10 RULEMAKING:**

A. Prior to the adoption, amendment or repeal of any rule, the board shall, at least thirty days prior to its proposed action:

(1) publish notice of its proposed action in a newspaper with a general statewide circulation. The notice shall:

(a) give the time and place of any public hearing and state the manner in which data, views or arguments may be submitted to the board by any interested person;

(b) describe the substance of the proposed action, or state the subjects and issues involved;

(c) include any additional matter required by any law, together with specific reference to the statutory authority under which the rule is proposed; and

(2) afford all interested persons reasonable opportunity to submit data, views or arguments orally or in writing; if the board finds that oral presentation is unnecessary or impracticable, it may require that presentation be made in writing; the board shall consider fully all written and oral submissions addressing the proposed rule; upon adoption of a rule contested at hearing or otherwise, the board shall issue a concise statement of its principal reasons for adoption of the rule; all persons heard or represented at any hearing, or who submit any writing to be considered in connection with the proposed rule, shall promptly be given a copy of the rule, by mail or otherwise, if such persons so request in writing.

B. If the board finds that immediate adoption, amendment or suspension of a rule is necessary for the preservation of the soundness of the fund or general welfare of the association, or if the board for good cause finds that observance of the requirements of notice and public hearing would be contrary to the interests of the association, the board may dispense with such requirements and adopt, amend or suspend the rule as an emergency. The board's finding and a brief statement of the reasons for its finding shall be incorporated in the emergency rule, amendment or suspension. No emergency rule, amendment or suspension shall remain in effect for longer than sixty days, unless notice shall be given within ten days of the adoption of the emergency rule and a hearing held as provided in this section within ninety days of the notice.

[10-15-97; 2.84.200.10 NMAC - Rn & A, 2 NMAC 84.200.10, 12-28-00]

#### **2.84.200.11-19 [RESERVED]**

#### **2.84.200.20 EXPENSES OF ADMINISTRATION:**

Expenses related to the investment of the magistrate retirement fund and administration of the Magistrate Retirement Act shall be paid from the fund. Such expenses shall include:

A. the cost of annual and special actuarial valuations necessary to determine the contribution rate required to support plan benefits in accordance with the plan's funding

objectives; special actuarial valuations may also be necessary to measure the impact of proposed legislation;

B. the cost of an annual independent audit of the fund's financial statements;

C. the cost of investment management services as determined by the board;

D. the cost of administration of benefit provisions in the same proportion as the proportion of MRA members to members of the association; and

E. Any other expenses associated with the administration of the fund as determined by the board.

[10-15-97; 2.84.200.20 NMAC - Rn, 2 NMAC 84.200.20, 12-28-00]

#### **2.84.200.21-29 [RESERVED]**

#### **2.84.200.30 [RESERVED]**

[10-15-97; 11-15-97; 2.84.200.30 NMAC - Repealed, 12-28-00]

#### **2.84.200.31-39 [RESERVED]**

#### **2.84.200.40 OVERPAYMENT OF PENSION:**

The board directs the executive director to make all reasonable efforts to collect any pension overpayment made for any reason.

[10-15-97; 11-15-97; 2.84.200.40 NMAC - Rn, 2 NMAC 84.200.40, 12-28-00]

### **PART 201-299: [RESERVED]**

### **PART 300: MEMBERSHIP**

#### **2.84.300.1 ISSUING AGENCY:**

Public Employees Retirement Association (PERA), P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[2.84.300.1 NMAC - Rp, 2.84.300.1 NMAC, 7/1/15]

#### **2.84.300.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, public employers, the retirement board and the association under the Magistrate Retirement Act.

[2.84.300.2 NMAC - Rp, 2.84.300.2 NMAC, 7/1/15]

**2.84.300.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-12C-3 and 10-12C-4 NMSA 1978, as amended.

[2.84.300.3 NMAC - Rp, 2.84.300.3 NMAC, 7/1/15]

**2.84.300.4 DURATION:**

Permanent.

[2.84.300.4 NMAC - Rp, 2.84.300.4 NMAC, 7/1/15]

**2.84.300.5 EFFECTIVE DATE:**

July 1, 2015, unless a later date is cited at the end of a section.

[2.84.300.5 NMAC - Rp, 2.84.300.5 NMAC, 7/1/15]

**2.84.300.6 OBJECTIVE:**

The objective of this rule is to establish procedures for obtaining membership applications and application for exemption from membership under the Magistrate Retirement Act.

[2.84.300.6 NMAC - Rp, 2.84.300.6 NMAC, 7/1/15]

**2.84.300.7 DEFINITIONS:**

**[RESERVED]**

**2.84.300.8 [RESERVED]**

**2.84.300.9 MEMBERS:**

Magistrates in office on or after July 1, 1992, shall be members unless they have previously excluded themselves from membership under the provisions of prior law.

[2.84.300.9 NMAC - Rp, 2.84.300.9 NMAC, 7/1/15]

**2.84.300.10 MEMBERSHIP APPLICATIONS:**

**A.** Each judicial agency must provide to PERA a membership application, in the form prescribed by PERA, completed by each member within 30 days after the member takes office.

**B.** The member is responsible for providing to the association any change of the member's address.

[2.84.300.10 NMAC - Rp, 2.84.300.10 NMAC, 7/1/15]

## **PART 301-399: [RESERVED]**

## **PART 400: SERVICE CREDIT**

### **2.84.400.1 ISSUING AGENCY:**

Public Employees Retirement Association (PERA), P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[2.84.400.1 NMAC - Rp, 2.84.400.1 NMAC, 7/1/15]

### **2.84.400.2 SCOPE:**

This rule affects the members, retirees, beneficiaries, public employers, the retirement board and the association under the Magistrate Retirement Act (MRA).

[2.84.400.2 NMAC - Rp, 2.84.400.2 NMAC, 7/1/15]

### **2.84.400.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-12C-3 and 10-12C-5 NMSA 1978.

[2.84.400.3 NMAC - Rp, 2.84.400.3 NMAC, 7/1/15]

### **2.84.400.4 DURATION:**

Permanent.

[2.84.400.4 NMAC - Rp, 2.84.400.4 NMAC, 7/1/15]

### **2.84.400.5 EFFECTIVE DATE:**

July 1, 2015, unless a later date is cited at the end of a section.

[2.84.400.5 NMAC - Rp, 2.84.400.5 NMAC, 7/1/15]

### **2.84.400.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for awarding and reinstating service credit under the Magistrate Retirement Act.

[2.84.400.6 NMAC - Rp, 2.84.400.6 NMAC, 7/1/15]

**2.84.400.7 DEFINITIONS:**

**[RESERVED]**

**2.84.400.8 GENERAL PROVISIONS:**

**A.** Members may receive one month of service credit for any calendar month in which the member becomes a member on or before the sixteenth day of that month, or for any calendar month in which the member leaves office on or after the fifteenth day of the month, provided that all other requirements for awarding service credit are met.

**B.** Service credit that was forfeited when a member left office and withdrew his or her accumulated member contributions may be reinstated by repayment of withdrawn member contributions, together with interest from the date of withdrawal to the date of repayment at the rate or rates set by the board under the following conditions:

**(1)** Service credit may be reinstated in one-year increments, beginning with the most recently forfeited service credit. A one-year increment is 12 consecutive, but not necessarily continuous, months of service credit. For the purpose of eligibility to retire only, less than one year of service credit may be purchased. After reinstatement of all 12-month "years" as defined herein, any remaining service credit that totals less than 12 months may be reinstated by payment in one lump sum as provided herein.

**(2)** All forfeited service credit may also be reinstated by repayment of the total amount of all member contributions withdrawn from each period of service together with interest from the date of withdrawal to the date of repayment at the rate set by the board.

**(3)** The rate or rates of interest for the purchase or reinstatement of service credit shall be set annually by the board at a July meeting and shall be effective beginning the next succeeding January 1.

**(4)** A former member who is employed by an employer covered under the Educational Retirement Act must provide evidence of current contributing membership in the educational retirement association; such evidence shall be either certification by the employer, in the form prescribed by the association, or certification by the educational retirement association (ERA).

**(5)** Payment for reinstated service credit must be received by the association prior to the member's effective date of retirement.

**(6)** Interest received to reinstate forfeited service credit under this subsection shall not be refunded to the member. The purchase cost received to reinstate forfeited service credit, which is determined to be unnecessary to provide the maximum pension

applicable to the member and which is purchased in reliance on information provided by PERA shall be refunded to the member.

**C.** Service credit that a member would have earned if the member had not elected to be excluded from membership prior to July 1, 2014 may be purchased under the following conditions:

- (1) the member first reinstates all previously withdrawn MRA service credit;
- (2) the member may purchase service credit in increments of not less than one year except where the total excluded service credit is less than one year;
- (3) the member pays the full cost as determined under Section 10-12C-5(F) NMSA 1978 within 60 days of the notification of that amount.

**D.** Military service credit is free in some cases and may be purchased in other cases as provided by statute.

(1) Where a member wishes to claim service credit pursuant to Section 10-12C-5 NMSA 1978 the association shall, upon the member's request, furnish that member a form of affidavit for completion and certification of such service. The affidavit shall be accompanied by documentary evidence of the member's entry and discharge from service in a uniformed service of the United States.

(2) The judicial agency shall certify in writing the date the member left office to enter a uniformed service of the United States. This requirement may be waived if PERA records contain sufficient documentation of the date of termination.

(3) The judicial agency shall certify in writing to the association the member's date of return to office within 30 days of reemployment. This requirement may be waived if PERA records contain sufficient documentation of the date of return, to office. Members who do not return, to office within 90 days following termination of the period of intervening service but who nevertheless claim reemployment rights under federal law shall provide to the association written certification from the judicial agency that the member is entitled to reemployment rights under the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended.

(4) The affidavit, employer certifications, and documentary evidence of uniformed service shall be presented to the association for approval.

(5) Service credit for periods of intervening service in the uniformed services following voluntary enlistment, reenlistment or appointment, shall be awarded only upon compliance by the member and the judicial agency with the provisions of Section 10-12C-5 NMSA 1978, as amended, and the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, including but not limited to the

payment to the association of contributions required from the member and the employer.

**(6)** MRA members who are also members of the military service reserve components who reactivated pursuant to a federal call to duty, deployment or peacekeeping mission or other declared national emergency may receive free credit service subject to the conditions of this section. The member must provide a form DD 214 and other documentation as required by PERA to support an award of free service credit.

**(7)** Payment for military service credit must be received by the association prior to the member's effective date of retirement.

**E.** No installment payment contracts may be used for the purchase of any service credit. A member may purchase a total of five years of permissive service credit as allowed by the Magistrate Retirement Act in one lump-sum or in one-year increments.

**F.** A member may rollover funds from an Internal Revenue Code Section 457, 403(b), 401(k), IRA or another 401(a) qualified account to pay for forfeited or permissive service credit allowed by the Magistrate Retirement Act. The rollover of funds must be made by a trustee-to-trustee transfer and the account from which the funds come must be in the name of the member requesting the transfer.

[2.84.400.8 NMAC - Rp, 2.84.400.8 NMAC, 7/1/15]

## **PART 401-499: [RESERVED]**

## **PART 500: MEMBER CONTRIBUTIONS**

### **2.84.500.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.84.500.1 NMAC - Rn, 2 NMAC 84.500.1, 12-28-00]

### **2.84.500.2 SCOPE:**

This rule affects the members former members, retirees, beneficiaries, public employers, the retirement board and the association under the Magistrate Retirement Act.

[10-15-97; 2.84.500.2 NMAC - Rn, 2 NMAC 84.500.2, 12-28-00; A, 9-30-03]

### **2.84.500.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-12C-3 and 10-12C-6, as amended.

[10-15-97; 2.84.500.3 NMAC - Rn, 2 NMAC 84.500.3, 12-28-00]

**2.84.500.4 DURATION:**

Permanent.

[10-15-97; 2.84.500.4 NMAC - Rn, 2 NMAC 84.500.4, 12-28-00]

**2.84.500.5 EFFECTIVE DATE:**

November 1, 1994, unless a different date is cited at the end of a section.

[10-15-97; 2.84.500.5 NMAC - Rn & A, 2 NMAC 84.500.5, 12-28-00]

**2.84.500.6 OBJECTIVE:**

The objective of this rule is to establish procedures and requirements for the refund of contributions under the Magistrate Retirement Act.

[10-15-97; 2.84.500.6 NMAC - Rn, 2 NMAC 84.500.6, 12-28-00]

**2.84.500.7 DEFINITIONS:**

**A.** "Another qualified plan," for the purposes of the direct rollover provisions in Section 10-11-124 (C) NMSA 1978, means an eligible retirement plan, including:

(1) an individual retirement account described in Internal Revenue Code Section 408(a);

(2) an individual retirement annuity described in Internal Revenue Code Section 408(b);

(3) a qualified trust described in Internal Revenue Code Section 401(a) that accepts the distributee's eligible rollover distribution,

(4) an annuity plan described in Internal Revenue Code Section 403(a);

(5) effective January 1, 2002, an annuity contract described in Internal Revenue Code Section 403(b);

(6) effective January 1, 2002, a plan eligible under Internal Revenue Code Section 457(b) that is maintained by a state, political subdivision of a state or any agency or instrumentality of a state or political subdivision of a state that agrees to separately account for amounts transferred into the plan; or

(7) effective January 1, 2008, a Roth IRA described in Internal Revenue Code Section 408A.

**B.** "Direct rollover" means a payment by the retirement system to the eligible retirement plan specified by the distributee.

**C.** "Distributee" means:

(1) an employee or a former employee;

(2) an employee's or former employee's surviving spouse;

(3) an employee's or former employee's spouse or former spouse who is the alternate payee under a qualified domestic relations order, as defined in Internal Revenue Code Section 414(p);

(4) effective January 1, 2007, a non-spouse beneficiary who is a designated beneficiary as defined by Internal Revenue Code Section 401(a)(9)(E); or

(5) effective January 1, 2002, a surviving spouse, as defined by federal law, or a spouse or former spouse who is an alternate payee under a domestic relations order dividing PERA benefits, as defined in Internal Revenue Code Section 414(p).

**D.** "Eligible rollover distribution" means:

(1) any distribution of all or any portion of the balance to the credit of the distributee, except that an eligible rollover distribution does not include: any distribution that is one of a series of substantially equal periodic payments, not less frequently than annually, made for the life, or the life expectancy, of the distributee or the joint lives, or joint life expectancies, of the distributee and the distributee's designated beneficiary, or for a specified period of ten years or more;

(2) any distribution to the extent such distribution is required under Internal Revenue Code Section 401(a)(9);

(3) the portion of any distribution that is not includible in gross income; or

(4) any other distribution that is reasonably expected to total less than \$200 during the year.

[2.84.500.7 NMAC - Rn, 2 NMAC 84.500.7, 12-28-00; A, 12-15-09]

## **2.84.500.8 GENERAL PROVISIONS:**

**A.** A member who leaves office for reasons other than retirement may request a refund of his or her total accumulated member contributions. Refunds shall include interest as provided in Subsection (D) of this section.

**B.** No partial refund of a member's contributions is permitted.

**C.** Requests for refunds of member contributions shall be made on forms provided by the association.

**(1)** The member or the member's legal representative, or the member's designated refund beneficiary or the beneficiary's legal representative, if the member is deceased, must complete and sign the request for refund.

**(2)** If the member is deceased, the applicant for refund must provide PERA with a copy of the member's death certificate. If the deceased member has no living beneficiary, then the personal representative of the estate must provide PERA with a copy of the letters of administration or order of appointment of personal representative, signed and filed in court; or must comply with NMSA 1978, Section 45-3-1201.

**(3)** The member's judicial agency must certify that the member has left office before a refund may be made.

**(4)** If the member has been divorced, the member shall provide the association with complete endorsed copies of all court documents the association deems necessary to ascertain the current marital status of the member and whether any ex-spouse of the member is entitled to any portion of the member's contributions. Such documentation shall include the final decrees and marital property settlements for all marriages during the member's employment as a magistrate. If the member's only divorce was prior to becoming a member, then the final divorce decree is required but no marital property settlement is required. If the member was divorced more than once before becoming a member, then only the most recent final decree is required. If the member's former spouse is entitled to a portion of a refund of member contributions pursuant to a court order entered pursuant to NMSA 1978, Section 10-12C-7, as amended, the member's former spouse may request, on a form prescribed by the association, that his or her share of a refund of member contributions be transferred directly to another qualified plan as allowed by the Internal Revenue Code as specified under Subsection H of 2.84.500.8 NMAC.

**(5)** After tax employee contributions that are not includible in gross income may be directly refunded to the member.

**D.** Interest on member contributions shall be posted annually effective June 30 at the rate of two percent (2%).

**E.** Members may designate only one refund beneficiary. Such designation shall be in writing in the form prescribed by the association. If the refund beneficiary is other than

a natural person, the member shall provide documentation as required by the association. The member shall be responsible for updating the beneficiary designation form with current information, including but not limited to the beneficiary's name and address. If a warrant for a refund to the most recent beneficiary on file with the association is returned as undeliverable because of incorrect name or address, the money will remain with the association until it is furnished with the correct information.

**F.** Forfeitures arising from severance of employment, death, or any other reason, must not be applied to increase the benefits any magistrate would otherwise receive under the plan. PERA shall make all reasonable efforts to refund contributions or to pay pensions as required by the plan.

**G.** The maximum annual contribution limits contained in Internal Revenue Code Section 415(c), as amended and adjusted, are incorporated herein by reference.

**H.** For distributions made on or after January 1, 1993, notwithstanding any contrary provision or retirement law that would otherwise limit a distributee's election under this rule, a distributee may elect, at the time and in the manner prescribed by the PERA, to have any portion of an eligible rollover distribution paid directly to an eligible retirement plan specified by the distributee in a direct rollover.

**(1)** A non-spouse beneficiary may only rollover the distribution to an individual retirement account or individual retirement annuity established for the purpose of receiving the distribution and the account or annuity will be treated as an inherited individual retirement account or annuity.

**(2)** Effective January 1, 2002, a portion of a distribution will not fail to be an eligible rollover distribution merely because the portion consists of after-tax employee contributions that are not includible in gross income. However, such portion may be transferred only to an individual retirement account or annuity described in Internal Revenue Code Section 408(a) or (b), or to a qualified defined contribution plan described in Internal Revenue Code Section 401(a), or on or after January 1, 2007, to a qualified defined benefit plan described in Internal Revenue Code Section 401(a) or to an annuity contract described in Internal Revenue Code Section 403(b), that agrees to separately account for amounts so transferred, and earnings thereon, including separately accounting for the portion of the distribution that is includible in gross income and the portion of the distribution that is not so includible.

[10-15-97; 11-15-97; 2.84.500.8 NMAC - Rn & A, 2 NMAC 84.500.8, 12-28-00; A, 12-28-01; A, 9-30-03; A, 12-15-09; A, 07-01-15]

## **PART 501-599: [RESERVED]**

## **PART 600: INTERCEPTION OR DIVISION OF PAYMENTS**

### **2.84.600.1 ISSUING AGENCY:**

Public Employees Retirement Association (PERA), P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[2.84.600.1 NMAC - Rp, 2.84.600.1 NMAC, 7/1/15]

**2.84.600.2 SCOPE:**

This rule affects members, former members, retirees, beneficiaries, and the association under the Magistrate Retirement Act (MRA). This rule also affects the spouses and ex-spouses of members, former members and retirees under the act.

[2.84.600.2 NMAC - Rp, 2.84.600.2 NMAC, 7/1/15]

**2.84.600.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-12C-3 and 10-12C-7 NMSA 1978, as amended.

[2.84.600.3 NMAC - Rp, 2.84.600.3 NMAC, 7/1/15]

**2.84.600.4 DURATION:**

Permanent.

[2.84.600.4 NMAC - Rp, 2.84.600.4 NMAC, 7/1/15]

**2.84.600.5 EFFECTIVE DATE:**

July 1, 2015, unless a later date is cited at the end of a section.

[2.84.600.5 NMAC - Rp, 2.84.600.5 NMAC, 7/1/15]

**2.84.600.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for dividing the community interest in retirement pensions or contributions and for withholding from retirement pensions/contributions the amounts due pursuant to a child support enforcement order.

[2.84.600.6 NMAC - Rp, 2.84.600.6 NMAC, 7/1/15]

**2.84.600.7 DEFINITIONS:**

[RESERVED]

**2.84.600.8-2.84.600.9 [RESERVED]**

#### **2.84.600.10 DIVORCE DECREE OR ORDER:**

**A.** The following information must be contained in a divorce decree or order which divides the community interest in MRA retirement pensions or contributions:

- (1)** specific information identifying the parties, i.e., full names, addresses, social security numbers, retirement numbers if any;
- (2)** a declaration that there is a community interest in a member's pension or member contributions;
- (3)** the percentage or dollar amount of each party's interest in the gross pension as calculated at the time of retirement;
- (4)** the percentage or dollar amount of each party's interest in member contributions;
- (5)** a direct order to PERA restraining refund of member contributions except according to the provisions of the decree or order, if such a restraint is desired;
- (6)** liability for and payment of federal and state income taxes;
- (7)** a direct order to PERA to issue separate warrants to each party.

**B.** A separate account may not be created for a member's former spouse who has a court-determined interest in a member's account.

**C.** A model order or decree containing provisions for the determination and division of the community interest in a MRA member's account shall be available on request from PERA's office of general counsel.

**D.** Payments made pursuant to such orders shall only be made when member contributions are refunded or a pension is payable in accordance with the provisions of the Magistrate Retirement Act. PERA shall not be obligated to administer pension benefits in accordance with such orders until the first of the month following written approval by the office of general counsel.

**E.** Member files must contain current names and addresses for persons having a court-determined interest in member retirement accounts. Any person with such an interest must provide PERA with a written statement of change of name or address. If a warrant is returned as undeliverable because of incorrect name or address, the money due the person will accumulate in the fund until PERA is furnished with the correct information. No interest shall be paid on any monies so accumulated.

**F.** Each party must submit a completed W-4 to PERA when applying for a retirement pension.

**G.** A court order requiring an election of a particular form of payment at retirement or the designation of one or more beneficiaries shall be addressed to the member, and the member shall be responsible for executing the proper PERA forms and providing the documentation necessary to effectuate the election or designation(s). A member who violates such an order may be in contempt of court.

[2.84.600.10 NMAC - Rp, 2.84.600.10 NMAC, 7/1/15]

**2.84.600.11-2.84.600.19 [RESERVED]**

**2.84.600.20 CHILD SUPPORT OBLIGATION ENFORCEMENT ORDER:**

**A.** The following information must be contained in an order to withhold amounts due in satisfaction of current or delinquent child support obligations.

**(1)** specific information identifying the member or retired member, i.e., full name, address, social security number, retirement number, if any;

**(2)** specific information identifying the third party payee, i.e., full name, address, social security number, if any, or account code for child support enforcement bureau;

**(3)** dollar amount to be withheld from the monthly pension payment or a refund of member contributions;

**(4)** a direct order to PERA to issue separate warrants to each party.

**B.** A model order or decree containing provisions for the withholding of retirement pensions or contributions pursuant to a child support obligation enforcement order shall be available on request from PERA's office of general counsel.

**C.** Payments made pursuant to such orders shall only be made when member contributions are refunded or a pension is payable in accordance with the provisions of the Magistrate Retirement Act.

**D.** Member files must contain current names and addresses for persons having a court-determined interest in member retirement accounts. Any person with such an interest must provide PERA with a written statement of any change of name or address. If a warrant is returned as undeliverable because of incorrect name or address, the money due the person will accumulate in the fund until PERA is furnished with the correct information. No interest shall be paid on any monies so accumulated.

[2.84.600.20 NMAC - Rp, 2.84.600.20 NMAC, 7/1/15]

**2.84.600.21-2.84.600.29 [RESERVED]**

### **2.84.600.30 FEDERAL PRE-EMPTIVE ORDERS:**

Pursuant to Section 10-12C-7 NMSA 1978, MRA retirement accounts are not subject to legal process under other state laws, except for division of a community interest in such accounts or in enforcement of child support obligations, both as provided in Section 10-12C-7 NMSA 1978. In the following instances, however, federal laws pre-empt the provisions of Section 10-12C-7 NMSA 1978.

**A.** IRS notices of levy for unpaid taxes will be honored if the account is in pay status, i.e., if the member has terminated employment and requested a refund of contributions, or if a pension is payable. If the levy is applied against a refund of member contributions, non-tax deferred contributions shall be paid before tax-deferred contributions.

**B.** Orders issued by a U.S. bankruptcy court will be honored if the account is in pay status, i.e., if the member has terminated employment and requested a refund of contributions, or if a pension is payable. If the order is applied against a refund of member contributions, non-tax deferred contributions shall be paid before tax-deferred contributions.

**C.** Orders of garnishment for fines or restitution by a federal court in a criminal case will be honored if the account is in pay status, i.e., if the member has terminated employment and requested a refund of contributions, or if a pension is payable. If the order is applied against a refund of member contributions, non-tax deferred contributions shall be paid before tax-deferred contributions.

[2.84.600.30 NMAC - Rp, 2.84.600.30 NMAC, 7/1/15]

## **PART 601-699: [RESERVED]**

## **PART 700: RETIREMENT**

### **2.84.700.1 ISSUING AGENCY:**

Public Employees Retirement Association, 33 Plaza La Prensa, Santa Fe, NM, 87507.

[2.84.700.1 NMAC – Rp, 2.84.700.1, 10/10/2023]

### **2.84.700.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, public employers, the retirement board and the association under the Magistrate Retirement Act.

[2.84.700.2 NMAC – Rp, 2.84.700.2, 10/10/2023]

### **2.84.700.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-12C-3, 10-12C-8, and 10-12C-9 NMSA 1978, as amended.

[2.84.700.3 NMAC – Rp, 2.84.700.3, 10/10/2023]

### **2.84.700.4 DURATION:**

Permanent.

[2.84.700.4 NMAC – Rp, 2.84.700.4, 10/10/2023]

### **2.84.700.5 EFFECTIVE DATE:**

October 10, 2023, unless a different date is cited as the end of a section.

[2.84.700.5 NMAC – Rp, 2.84.700.5, 10/10/2023]

### **2.84.700.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for the payment, of pensions of retired members.

[2.84.700.6 NMAC – Rp, 2.84.700.6, 10/10/2023]

### **2.84.700.7 DEFINITIONS:**

**[RESERVED]**

[2.84.700.7 NMAC – Rp, 2.84.700.7, 10/10/2023]

### **2.84.700.8-9 [RESERVED]**

### **2.84.700.10 PROCEDURE FOR RETIREMENT:**

**A.** The following procedure governs the process for retirement:

(1) The member shall request an application for retirement from PERA. To ensure that the member may retire on the date the member has chosen, the completed application should be returned to PERA, with the required documents described in Subsection B below, at least 60 days prior to the selected date of retirement. The completed application and all supporting documentation must be filed with PERA no later than the close of business on the last working day of the month prior to the selected date of retirement.

(2) PERA shall furnish the member an estimate of retirement pension payable within a reasonable time of receipt of the properly completed application and required documents.

(3) When the application is filed, PERA shall furnish the member's last judicial agency with an employer's certification of earnings form to be completed and returned to PERA. The final calculation of pension cannot be processed until PERA receives the properly completed employer's certification form.

(4) PERA will furnish the member a final calculation of retirement pension based on the information provided by the judicial agency.

(5) The completed application form must either include or be accompanied by a signed notarized statement of consent by the member's spouse to the survivor beneficiary elected by the member or an affidavit that the member is not married. An affidavit naming all former spouses must also accompany the final application form.

(6) Retirement will be effective on the first day of the month following: a) the filing with PERA of the completed, signed application with all required documentation; b) the member's qualifying for retirement based on service credit and age; and c) the member's leaving office. An application will be deemed to be "filed" when received by PERA as evidenced by a writing on the application indicating the date of receipt by PERA.

(7) The retirement of the member shall be submitted to the board for ratification at the next regular meeting following the effective date of retirement.

**B. Documentation:** The retiring member shall furnish the following documents to PERA:

(1) Proof of age of the member and any designated beneficiary or beneficiaries or the proof of age for a beneficiary to a supplemental needs trust. Acceptable documents are a birth certificate, a baptismal certificate, or religious record of birth established before age 5 years, or any two of the following documents showing the date of birth of the member or designated beneficiary or beneficiaries:

- (a) copy of a life insurance policy;
- (b) certified copy of voter registration issued over ten years prior;
- (c) tribal census record;
- (d) childhood immunization record made prior to age 18 years;
- (e) military record;

- (f) birth certificate of child showing age of parent;
- (g) physician's or midwife's record of birth;
- (h) passport;
- (i) immigration record;
- (j) naturalization record.

(2) A copy of a marriage certificate or other proof of marital status acceptable in a court of law for any designated survivor beneficiary to be identified as a spouse.

(3) For any designated beneficiary to be identified as a supplemental needs trust, a copy of the documents related to the formation of the trust and an affidavit from the trustee that the trust is formed as a supplemental needs trust as authorized by the federal Social Security Act. Additional information may be required by the association to ascertain the purpose and function of the trust to ensure compliance with the Magistrate Retirement Act.

(4) Complete endorsed copies of all court documents the association deems necessary to ascertain the current marital status of the member and whether any ex-spouse of the member is entitled to any portion of the member's benefits. Such documents shall include the final decrees and marital property settlements for all marriages during the member's employment as a magistrate. If the member's only divorce was prior to becoming a member, then the final decree is required, but no marital property settlement is required. If the member was divorced more than once prior to becoming a member, then only the most recent final decree is required.

(5) Any member with an effective retirement date on or after January 1, 2014 shall provide authorization to the association for the electronic transfer of pension payments to the retiree's banking institution. Such authorization shall be executed, in writing, in the form prescribed by the association.

**C.** No adjustments to the pension based on failure to claim free service credit may be made after the first pension payment.

**D.** In addition to any other vesting provided by state law, a magistrate's normal retirement benefit is non-forfeitable when the magistrate reaches normal retirement age, which is age 65, with five or more years of credited service, whichever is later for an individual who was a member on June 30, 2014 and age 65 with eight or more years of credited service, whichever is later for an individual who initially became a member on or after July 1, 2014. A magistrate is also vested in his or her accrued benefits when the magistrate reaches such lesser age and specified years of credited service as provided under the plan. If there is a termination of the magistrate retirement system, or if employer contributions to the magistrate retirement plan are completely discontinued,

the rights of each affected member to the benefits accrued at the date of termination or discontinuance, to the extent then funded, are non-forfeitable.

[2.84.700.10 NMAC – Rp, 2.84.700.10, 10/10/2023]

#### **2.84.700.11 DISABILITY RETIREMENT:**

A magistrate who becomes disabled prior to retirement can make application for benefits in accordance with 2.80.1000 NMAC.

[2.84.700.11 NMAC – Rp, 2.84.700.11, 10/10/2023]

#### **2.84.700.12-19 [RESERVED]**

#### **2.84.700.20 BENEFIT PAYMENT:**

The maximum annual benefit limits contained in Internal Revenue Code Section 415(b), as amended and adjusted, are incorporated herein by reference. Notwithstanding any other provision of the Magistrate Retirement Act and regulations, all benefits paid from the magistrate retirement trust fund shall be distributed in accordance with the requirements of Internal Revenue Code section 401(a)(9) and the regulations under that section. In order to meet these requirements, the trust fund must be administered in accordance with the following provisions:

**A.** The entire interest of the magistrate shall:

(1) be completely distributed to the magistrate not later than the required beginning date; or

(2) shall be distributed, beginning not later than the required beginning date, in accordance with internal revenue service regulations, over a period not extending beyond the life expectancy of the magistrate or the life expectancy of the magistrate and a designated beneficiary.

**B.** For the purposes of this section, "required beginning date" shall be defined in the same manner as the term "required beginning date" is defined in the Internal Revenue Code Section 401 (a)(9) and the regulations under that section.

**C.** The life expectancy of the magistrate or the magistrate's beneficiary may not be recalculated after the benefits commence.

**D.** If a magistrate dies before the distribution of the magistrate's benefits has begun, distribution to beneficiaries must begin no later than December 31 of the calendar year immediately following the calendar year in which the magistrate died.

E. The amounts payable to a magistrate's beneficiary may not exceed the maximum determined under the incidental death benefit requirements of the Internal Revenue Code Section 401(a)(9)(G) and regulations thereunder. PERA shall adjust the percentage of the magistrate's pension payable to a non-spouse survivor beneficiary who is more than 10 years younger than the magistrate at the time of the magistrate's retirement as required by 26 C.F.R. Section 1.401(a)(9)-6.

[2.84.700.20 NMAC – Rp, 2.84.700.20, 10/10/2023]

#### **2.84.700.21-29 [RESERVED]**

#### **2.84.700.30 ANNUAL COMPENSATION:**

Notwithstanding any provision of the of the Magistrate Retirement Act and regulations, the annual compensation of each magistrate that is taken into account under the plan, including for benefit calculation purposes, for any year does not exceed the limit specified in Internal Revenue Code Section 401(a)(17).

[2.84.700.30 NMAC – Rp, 2.84.700.30, 10/10/2023]

#### **PART 701-799: [RESERVED]**

#### **PART 800: SURVIVOR PENSION**

##### **2.84.800.1 ISSUING AGENCY:**

Public Employees Retirement Association, 33 Plaza La Prensa, Santa Fe, NM, 87507.

[2.84.800.1 NMAC – Rp, 2.84.800.1, 10/10/2023]

##### **2.84.800.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, public employers, retirement board and the association under the Magistrate Retirement Act.

[2.84.800.2 NMAC – Rp, 2.84.800.2, 10/10/2023]

##### **2.84.800.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-12C-3 and 10-12C-13 NMSA 1978, as amended.

[2.84.800.3 NMAC – Rp, 2.84.800.3, 10/10/2023]

##### **2.84.800.4 DURATION:**

Permanent.

[2.84.800.4 NMAC – Rp, 2.84.800.4, 10/10/2023]

**2.84.800.5 EFFECTIVE DATE:**

October 10, 2023, unless a different date is cited at the end of a section.

[2.84.800.5 NMAC – Rp, 2.84.800.5, 10/10/2023]

**2.84.800.6 OBJECTIVE:**

The objective of this rule is to establish the procedure for the payment of a survivor pension under the Magistrate Retirement Act.

[2.84.800.6 NMAC – Rp, 2.84.800.6, 10/10/2023]

**2.84.800.7 DEFINITIONS:**

**[RESERVED]**

**2.84.800.8 PROCEDURE:**

The procedure for payment of a survivor pension is:

**A.** Applicants for pre-retirement survivor pensions shall notify PERA of the death of the member and complete an application for benefits.

**B.** The completed application shall be returned to PERA along with the following documents:

(1) A certified copy of the death certificate or other proof of death acceptable in a court of law;

(2) If the application is for a surviving spouse: copy of the marriage license or other proof of marital status acceptable in a court of law, and an affidavit of the surviving spouse that he or she and the deceased member were married at the time of death and stating whether there are any surviving minor children of the deceased;

(3) Proof of age of the surviving spouse, surviving minor children or other designated beneficiary or the proof of age for a beneficiary to a supplemental needs trust. Acceptable documents for proof of age shall be a birth certificate, a baptismal certificate, a copy of a life insurance policy, a certified copy of a voter registration issued over 10 years prior, or proof of age meeting a standard at least equivalent to that applied by the social security administration.

(4) Documents required under the Probate Code for payments to a minor if the application is on behalf of minor and dependent children.

(5) Affidavit that the applicant or beneficiary of a special needs trust is not married or otherwise emancipated if the applicant is a child of the deceased member or a supplemental needs trust formed for the benefit of a child of the deceased member.

(6) Copies of social security cards for all prospective payees.

(7) If the member has been divorced, the applicant shall provide PERA with complete endorsed copies of all court documents the association deems necessary to ascertain the marital status of the member at the time of death and whether any ex-spouse of the member is entitled to any portion of any benefits payable. Such documents shall include the final decrees and marital property settlements of all marriages during the member's covered employment as a magistrate. If the member's only divorce was prior to becoming a member, then the final divorce decree is required, but no marital property settlement is required. If the member was divorced more than once before becoming a member, then only the most recent final decree is required.

(8) a copy of the documents related to the formation of the supplemental needs trust, an affidavit from the trustee that the trust is formed as a supplemental needs trust as authorized by the federal Social Security Act and any additional information requested by the association if the application is on behalf of a supplemental needs trust.

**C.** The application shall be considered to be "filed" when PERA receives the completed application as evidenced by a writing on the application indicating the date of receipt by PERA. Upon filing of the application, and accompanying documentation as required in Subsection B above, PERA will calculate the pension payable and begin paying the pension effective the first day of the month following the date of the death resulting in the pension. The amount of the survivor pension shall be submitted to the board for ratification at the next regular meeting following the date of the first payment of survivor pension to the applicant.

**D.** Military death. Effective with respect to deaths occurring on or after January 1, 2007, while a member is performing qualified military service, as defined in Chapter 43 of Title 38, United States Code, to the extent required by Internal Revenue Code Section 401(a)(37), survivors of such member are entitled to any additional benefits that the plan would provide if the member had resumed employment and then died, such as accelerated vesting or survivor benefits that are contingent on the member's death while employed. In any event, a deceased member's period of qualified military service must be counted for vesting purposes.

[2.84.800.8 NMAC – Rp, 2.84.800.8, 10/10/2023]

**PART 801-899: [RESERVED]**

**PART 900: GROUP INSURANCE CONTINUATION**

**2.84.900.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.84.900.1 NMAC – Rn, 2 NMAC 84.900.1, 12-28-01]

**2.84.900.2 SCOPE:**

This rule affects retired members who are not covered by the Retiree Health Care Act and the association under the Magistrate Retirement Act.

[10-15-97; 2.84.900.2 NMAC – Rn, 2 NMAC 84.900.2, 12-28-01]

**2.84.900.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-12C-3 and 10-12C-15, as amended.

[10-15-97; 2.84.900.3 NMAC – Rn, 2 NMAC 84.900.3, 12-28-01]

**2.84.900.4 DURATION:**

Permanent.

[10-15-97; 2.84.900.4 NMAC – Rn, 2 NMAC 84.900.4, 12-28-01]

**2.84.900.5 EFFECTIVE DATE:**

July 1, 1992 unless a different date is cited at the end of a Section.

[10-15-97; 2.84.900.5 NMAC – Rn, 2 NMAC 84.900.5, 12-28-01]

**2.84.900.6 OBJECTIVE:**

The objective of this rule is to establish a procedure for certain members to continue group insurance coverage.

[10-15-97; 2.84.900.6 NMAC – Rn, 2 NMAC 84.900.6, 12-28-01]

**2.84.900.7 DEFINITIONS:**

[RESERVED]

**2.84.900.8 GENERAL PROVISIONS:**

A. Each retired member who desires to continue insurance coverage under the provisions of any state group insurance plan in effect at the time of retirement, is required to file with the association the appropriate documentation.

B. In the event a retired member desires to terminate his or her insurance coverage, written notification shall be submitted to PERA. Notification received after the fifteenth day of a calendar month shall not result in termination of coverage until the first day of the following month.

[10-15-97; 2.84.900.8 NMAC – Rn, 2 NMAC 84.900.8, 12-28-01]

## **PART 901-999: [RESERVED]**

## **PART 1000: APPEAL OF DENIAL OF CLAIM OF BENEFITS**

### **2.84.1000.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.84.1000.1 NMAC - Rn, 2 NMAC 84.1000.1, 12-28-00]

### **2.84.1000.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, public employers, retirement board and the association under the Magistrate Retirement Act.

[10-15-97; 2.84.1000.2 NMAC - Rn, 2 NMAC 84.1000.2, 12-28-00]

### **2.84.1000.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Section 10-12C-3, as amended.

[10-15-97; 2.84.1000.3 NMAC - Rn, 2 NMAC 84.1000.3, 12-28-00]

### **2.84.1000.4 DURATION:**

Permanent.

[10-15-97; 2.84.1000.4 NMAC - Rn, 2 NMAC 84.1000.4, 12-28-00]

### **2.84.1000.5 EFFECTIVE DATE:**

July 1, 1992 unless a different date is cited at the end of a section.

[10-15-97; 2.84.1000.5 NMAC - Rn & A, 2 NMAC 84.1000.5, 12-28-00]

#### **2.84.1000.6 OBJECTIVE:**

The objective of this rule is to establish procedures and requirements for appealing denials of claims for benefits.

[10-15-97; 2.84.1000.6 NMAC - Rn, 2 NMAC 84.1000.6, 12-28-00]

#### **2.84.1000.7 DEFINITIONS:**

**[RESERVED]**

[2.84.1000.7 NMAC - Rn, 2 NMAC 84.1000.7, 12-28-00]

#### **2.84.1000.8 GENERAL PROVISIONS:**

The provisions of 2.80.1500 NMAC shall govern the appeal of a denial of a claim for benefits by a magistrate or retiree under the Magistrate Retirement Act.

[10-15-97; 11-15-97; 2.84.1000.8 NMAC - Rn & A, 2 NMAC 84.1000.8, 12-28-00]

### **PART 1001-1099: [RESERVED]**

### **PART 1100: RETIRED MEMBERS**

#### **2.84.1100.1 ISSUING AGENCY:**

Public Employees Retirement Association (PERA), P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[2.84.1100.1 NMAC - Rp, 2.84.1100.1 NMAC, 7/1/15]

#### **2.84.1100.2 SCOPE:**

This rule affects the members, retirees, beneficiaries, public employers, retirement board and the association under the Magistrate Retirement Act (MRA).

[2.84.1100.2 NMAC - Rp, 2.84.1100.2 NMAC, 7/1/15]

#### **2.84.1100.3 STATUTORY AUTHORITY:**

This rule is authorized by Sections 10-12C-3 and 10-12C-17 NMSA 1978, as amended.

[2.84.1100.3 NMAC - Rp, 2.84.1100.3 NMAC, 7/1/15]

#### **2.84.1100.4 DURATION:**

Permanent.

[2.84.1100.4 NMAC - Rp, 2.84.1100.4 NMAC, 7/1/15]

**2.84.1100.5 EFFECTIVE DATE:**

July 1, 2015, unless a later date is cited at the end of a section.

[2.84.1100.5 NMAC - Rp, 2.84.1100.5 NMAC, 7/1/15]

**2.84.1100.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for the payment, suspension, and reinstatement of pensions of retired members; to establish notification and reporting requirements for post-retirement employment; and to establish conditions for retired members who work for affiliated public employers as independent contractors.

[2.84.1100.6 NMAC - Rp, 2.84.1100.6 NMAC, 7/1/15]

**2.84.1100.7 DEFINITIONS:**

**[RESERVED]**

[2.84.1100.7 NMAC - Rp, 2.84.1100.7 NMAC, 7/1/15]

**2.84.1100.8-2.84.1100.9 [RESERVED]**

**2.84.1100.10 PAYMENT OF PENSION:**

Pension payments will be processed or mailed monthly, not later than the last day of the month for which they are paid.

**A.** A retired member may have the pension warrant mailed directly to any location specified in writing by the retired member; provided however, that after December 31, 1998, the provisions of Paragraph (4) of Subsection B of 2.84.700.10 NMAC shall apply. Arrangements providing for electronic transfer of pension payments to the retiree's banking institution are permitted so long as the retired member's right to receipt of the funds is not altered except as ordered by a court of competent jurisdiction.

**B.** In the event a retired member is incapacitated or unable to sign his or her pension warrant, proof that a guardian has been appointed for the retired member, or proof of appointment of a conservator for the estate, or a copy of a durable power of attorney for a third party shall be filed with PERA.

[2.84.1100.10 NMAC - Rp, 2.84.1100.10 NMAC, 7/1/15]

**2.84.1100.11-2.84.1100.19 [RESERVED]**

**2.84.1100.20 POST-RETIREMENT EMPLOYMENT:**

**A.** A member who retires must remain unemployed by an employer covered by any state system or the educational retirement system. This section does not apply to a retired member who:

**(1)** performs work for an employer covered by any state system or the educational retirement system as an independent contractor under a contract approved by PERA;

**(2)** is elected to serve a term as an elected official and filed an irrevocable exemption from membership in any state system with PERA within 30 days of taking office; or

**(3)** is appointed to serve as a magistrate judge pro tempore.

**B.** When a retired member is subsequently employed by an affiliated public employer or an employer covered by the educational retirement system, the retired member shall notify PERA immediately of the hire date, position and salary of the subsequently employed retired member.

**C.** The retired member's pension shall be suspended effective the first of the month following the month in which the subsequent employment begins.

**D.** If a retired member fails to report earnings from subsequent employment with an affiliated public employer or an employer covered by the educational retirement system, and consequently continues to receive pension payments after such payments should have been suspended pursuant to the requirements of Section 10-12C-16 NMSA 1978 and rules promulgated thereunder, the retired member will be required to repay to PERA any amounts erroneously received, plus interest at the rate set by the board for overpayments. If erroneously paid pension payments have not been repaid when the subsequent employment is terminated and the retired member has applied for reinstatement of the pension, the erroneously paid amount must be repaid in full before the pension may be reinstated or the subsequently employed retired member must make arrangements acceptable to PERA for the erroneously paid amount to be withheld from the reinstated pension until fully repaid.

[2.84.1100.20 NMAC - Rp, 2.84.1100.20 NMAC, 7/1/15]

**2.84.1100.21-2.84.1100.29 [RESERVED]**

**2.84.1100.30 REINSTATEMENT OF PENSION:**

When a retired member is subsequently employed by an affiliated public employer, causing suspension of pension and resulting in re-establishment of PERA membership, that person will be eligible to reinstate his or her pension at the termination of the subsequent employment period under the following conditions:

**A.** the retired member's subsequent employer shall provide PERA with a certificate, in the form prescribed by PERA, of the date of termination of employment;

**B.** the pension shall be reinstated effective the first day of the month following the month of termination;

**C.** unless the Public Employees Retirement Reciprocity Act applies, the amount of the reinstated pension shall be the same amount as the suspended pension.

[2.84.1100.30 NMAC - Rp, 2.84.1100.30 NMAC, 7/1/15]

**2.84.1100.31-2.84.1100.39 [RESERVED]**

#### **2.84.1100.40 INDEPENDENT CONTRACTORS:**

If a retired member contracts to perform work for any public employer, the following conditions shall apply:

**A.** Post-retirement employment contracts with public employers must be submitted to PERA at least 15 working days prior to the effective date of the contract. PERA shall evaluate the contract to determine whether, under the terms of the contract, the retired member is an "employee" or an "independent contractor". In making this determination, PERA shall refer to the common-law control test guidelines as expressed in the social security handbook published by the U.S. department of health and human services, as revised and amended. If PERA determines the retired member is actually an "employee" rather than an "independent contractor" under the terms of the contract, the retired member's pension will be suspended immediately. If the retired member disagrees with PERA's determination, the retired member may appeal PERA's decision pursuant to 2.84.1000 NMAC.

**B.** Renewals, amendments or modifications of previously approved post-retirement contracts shall also be submitted to PERA for evaluation 15 working days prior to their effective date. The provisions of this section will apply to such renewals, amendments or modifications.

[2.84.1100.40 NMAC - Rp, 2.84.1100.40 NMAC, 7/1/15]

**PART 1101-1199: [RESERVED]**

**PART 1200 REMITTANCE OF CONTRIBUTIONS**

#### **2.84.1200.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.84.1200.1 NMAC - Rn, 2 NMAC 84.1200.1, 12-28-00]

#### **2.84.1200.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, public employers, the retirement board and the association under the Magistrate Retirement Act.

[10-15-97; 2.84.1200.2 NMAC - Rn, 2 NMAC 84.1200.2, 12-28-00; A, 9-30-03]

#### **2.84.1200.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Section 10-12C-3, as amended.

[10-15-97; 2.84.1200.3 NMAC - Rn, 2 NMAC 84.1200.3, 12-28-00]

#### **2.84.1200.4 DURATION:**

Permanent.

[10-15-97; 2.84.1200.4 NMAC - Rn, 2 NMAC 84.1200.4, 12-28-00]

#### **2.84.1200.5 EFFECTIVE DATE:**

November 1, 1994 unless a different date is cited at the end of a section.

[10-15-97; 2.84.1200.5 NMAC - Rn & A, 2 NMAC 84.1200.5, 12-28-00]

#### **2.84.1200.6 OBJECTIVE:**

The objective of this rule is to establish procedures and requirements for the remittance of contributions.

[10-15-97; 2.84.1200.6 NMAC - Rn, 2 NMAC 84.1200.6, 12-28-00]

#### **2.84.1200.7 DEFINITIONS:**

**[RESERVED]**

[2.84.1200.7 NMAC - Rn, 2 NMAC 84.1200.7, 12-28-00]

#### **2.84.1200.8 GENERAL PROVISIONS:**

A. In accordance with the Magistrate Retirement Act each judicial agency, as employer, shall be responsible for deducting the applicable contribution from the salary or wages paid to each member for each payroll period.

B. The employer shall transmit to PERA the member and employer contributions for every member in its employ for each pay period on or before the fifth working day following the payday applicable to the pay period. The contributions shall be accompanied by a transmittal report in a format designated by PERA, which shall clearly set forth the amount of employer and member contributions, and adjustments for prior pay periods if applicable, transmitted.

C. Except as provided in Subsection G below, interest will be assessed on any remittance of employer and employee contributions not made by the due date of the remittance. The rate of interest shall be set annually by the board at a July meeting and shall be effective beginning the next succeeding January 1st. Any interest paid on unremitted contributions shall not be posted to the member's account or refunded to the member or the employer.

D. Except as provided in Subsection G below, a penalty of fifty dollars (\$50) per day shall be assessed for any employee and employer contribution transmittal report that is untimely. For purposes of this subsection, "untimely" is defined as fifteen (15) days after the end of the month in which the transmittal report was due.

E. In the event the judicial agency fails to make the necessary deductions, the judicial agency shall be responsible to remit to PERA the total amount due for both the member and employer contributions plus interest as provided in subsection C above.

F. Current employer contributions may not be made by members except as authorized by law.

G. If a judicial agency, for good cause, is unable to timely transmit employee and employer contributions or transmittal report, the employer shall notify PERA in writing at least twenty-four hours prior to the due date, and may request waiver of the interest or penalty that would otherwise be assessed. The executive director may waive interest or penalty for up to thirty-one calendar days. Interest shall thereafter be charged at the rate set in subsection C above.

H. Member contributions picked-up by the employer under NMSA 1978, Section 10-12C-10 are not considered compensation for purposes of Internal Revenue Code Section 415(c).

I. Beginning January 1, 2009, to the extent required by Internal Revenue Code Section 414(u)(2), an individual receiving differential wage payments (as defined under Internal Revenue Code Section 3401(h)(2)) from an affiliated public employer shall be treated as employed by that employer and the differential wage payment shall be treated as compensation for purposes of applying the limits on annual additions under

Internal Revenue Code Section 415(c). This provision shall be applied to all similarly situated individuals in a reasonably equivalent manner.

[10-15-97; 11-15-97; 2.84.1200.8 NMAC - Rn & A, 2 NMAC 84.1200.8, 12-28-00; A, 12-28-01; A, 12-15-09; A, 12-30-13]

## **PART 1201-1299: [RESERVED]**

## **PART 1300: CORRECTION OF ERRORS AND OMISSIONS**

### **2.84.1300.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.84.1300.1 NMAC - Rn, 2 NMAC 84.1300.1, 12-28-01]

### **2.84.1300.2 SCOPE:**

This rule affects the members, former members, retirees, beneficiaries, public employers, retirement board, and the association under the Magistrate Retirement Act.

[10-15-97; 2.84.1300.2 NMAC - Rn, 2 NMAC 84.1300.2, 12-28-01]

### **2.84.1300.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-12C-3 and 10-12C-18, as amended.

[10-15-97; 2.84.1300.3 NMAC - Rn, 2 NMAC 84.1300.3, 12-28-01]

### **2.84.1300.4 DURATION:**

Permanent.

[10-15-97; 2.84.1300.4 NMAC - Rn, 2 NMAC 84.1300.4, 12-28-01]

### **2.84.1300.5 EFFECTIVE DATE:**

December 15, 1995 unless a different date is cited at the end of a section.

[10-15-97; 2.84.1300.5 NMAC - Rn, 2 NMAC 84.1300.5, 12-28-01]

### **2.84.1300.6 OBJECTIVE:**

The objective of this rule is to establish procedures for collecting pensions overpayments.

[10-15-97; 2.84.1300.6 NMAC - Rn, 2 NMAC 84.1300.6, 12-28-01]

**2.84.1300.7 DEFINITIONS:**

**[RESERVED]**

**2.84.1300.8 GENERAL PROVISIONS:**

The board directs the executive director to make all reasonable efforts to collect any pension overpayment made for any reason.

[10-15-97; 11-15-97; 2.84.1300.8 NMAC - Rn, 2 NMAC 84.1300.8, 12-28-01]

## **CHAPTER 85: DEFERRED COMPENSATION**

**PART 1-99: [RESERVED]**

**PART 100: GENERAL PROVISIONS**

**2.85.100.1 ISSUING AGENCY:**

Public Employees Retirement Association.

[10-15-97; 2.85.100.1 NMAC - Rn, 2 NMAC 85-100.1, 12-28-00]

**2.85.100.2 SCOPE:**

This rule affects participants and the deferred compensation third party administrator under the Deferred Compensation Act.

[10-15-97; 2.85.100.2 NMAC - Rn, 2 NMAC 85-100.2, 12-28-00; A, 1-31-02]

**2.85.100.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Section 10-7A-11.

[10-15-97; 2.85.100.3 NMAC - Rn, 2 NMAC 85-100.3, 12-28-00]

**2.85.100.4 DURATION:**

Permanent.

[10-15-97; 2.85.100.4 NMAC - Rn, 2 NMAC 85-100.4, 12-28-00]

**2.85.100.5 EFFECTIVE DATE:**

December 29, 1989 unless a different date is cited at the end of a section.

[10-15-97; 2.85.100.5 NMAC - Rn, 2 NMAC 85-100.5, 12-28-00]

#### **2.85.100.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for handling withdrawal applications for financial hardship.

[10-15-97; 2.85.100.6 NMAC - Rn, 2 NMAC 85-100.6, 12-28-00]

#### **2.85.100.7 DEFINITIONS:**

**[RESERVED]**

[2.85.100.7 NMAC - Rn, 2 NMAC 85-100.7, 12-28-00]

#### **2.85.100.8 GENERAL PROVISIONS:**

A. Unforeseeable emergency withdrawal applications. The deferred compensation third party administrator shall handle the processing of unforeseeable emergency withdrawal applications including, but not limited to:

- (1) sending out withdrawal applications;
- (2) answering questions on the process and rules;
- (3) reviewing applications for completeness and compliance;
- (4) making decisions concerning whether or not withdrawal applications are approved;
- (5) sending appropriate notices to participants (approved or denied);
- (6) sending detailed denial letters explaining specific reason(s) why application was denied and instructions for reapplication and notice of the right to appeal, if any.

B. Appeals. Appeals of denials of applications for unforeseeable emergency withdrawals, if any, shall be handled by the deferred compensation third party administrator. The deferred compensation third party administrator shall also maintain files on approvals/denials and provide regular reports to the board on unforeseeable emergency activity.

C. Unforeseeable emergency. In the event of an unforeseeable emergency, a participant may request that benefits be paid to him or her immediately, provided,

however, that payment of any such benefits after the elected or mandatory commencement date shall be subject to any limitations specified by an investment carrier. Such request shall be filed with the third party administrator. If the third party administrator determines that the application for unforeseeable emergency meets the standards of the internal revenue service guidelines and the plan document, payment will be made within twenty-four (24) hours of such approval. Benefits to be paid shall not exceed the lesser of (i) the amount reasonably needed to satisfy the emergency need, which may include any amounts necessary to pay any federal, state, or local taxes, or (ii) an amount which, together with any prior distribution or withdrawal, does not exceed the value of the participant's plan benefit determined as of the most recent valuation date. An amount will not be considered to be reasonably needed to meet the financial need created by an unforeseeable emergency to the extent that such need is or may be relieved:

- (1) through reimbursement or compensation by insurance or otherwise;
- (2) by liquidation of the participant's assets, to the extent the liquidation of such assets would not itself cause financial hardship; or
- (3) by cessation of deferrals under the plan.

D. Matters not constituting unforeseeable emergencies. Divorce or foreseeable personal expenditures normally budgetable, such as a down payment on a home, the purchase of an automobile, college or other educational expenses, etc., will not constitute an unforeseeable emergency.

[10-15-97; 2.85.100.8 NMAC - Rn, 2 NMAC 85.100.8, 12-28-00; A, 8-15-01; A, 1-31-02; A, 9-30-03]

#### **2.85.100.9 ADOPTION OF PLAN:**

In accordance with the Deferred Compensation Act, the board shall adopt and amend a deferred compensation plan. The plan shall comply with the requirements of Internal Revenue Code Section 457, as amended, and may be amended to include provisions that allow for trustee-to-trustee transfers and rollovers into and out of the plan.

[2.85.100.9 NMAC - N, 12-28-01]

#### **PART 101-199: [RESERVED]**

#### **PART 200: DIVISION OF DEFERRED COMPENSATION ACCOUNTS AT DIVORCE**

##### **2.85.200.1 ISSUING AGENCY:**

Public Employees Retirement Association, P.O. Box 2123, Santa Fe, New Mexico 87503-2123.

[10-15-97; 2.85.200.1 NMAC - Rn, 2 NMAC 85.200.1, 8-15-01]

**2.85.200.2 SCOPE:**

This rule affects participants, ex-spouses of participants, former participants, ex-spouses of former participants, and the deferred compensation third party administrator under the Deferred Compensation Act.

[10-15-97; 2.85.200.2 NMAC - Rn, 2 NMAC 85.200.2, 8-15-01; A, 1-31-02]

**2.85.200.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-7A-11 and 10-7A-12.

[10-15-97; 2.85.200.3 NMAC - Rn, 2 NMAC 85.200.3, 8-15-01]

**2.85.200.4 DURATION:**

Permanent.

[10-15-97; 2.85.200.4 NMAC - Rn, 2 NMAC 85.200.4, 8-15-01]

**2.85.200.5 EFFECTIVE DATE:**

July 1, 1991 unless a different date is cited at the end of a section.

[10-15-97; 2.85.200.5 NMAC - Rn, 2 NMAC 85.200.5, 8-15-01]

**2.85.200.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for dividing the community interest in deferred compensation plans.

[10-15-97; 2.85.200.6 NMAC - Rn, 2 NMAC 85.200.6, 8-15-01]

**2.85.200.7 DEFINITIONS:**

**[RESERVED]**

[2.85.200.7 NMAC - Rn, 2 NMAC 85.200.7, 8-15-01]

**2.85.200.8 GENERAL PROVISIONS:**

A. Funds from a deferred compensation account may be paid to an alternate payee upon submission of a domestic relations order that conforms to the requirements of this rule and the deferred compensation plan. Funds may also be paid as a result of an approved unforeseen emergency as defined in 26 C.F.R. Section 1.457-2(h)(4). Divorce is not an unforeseeable emergency.

B. A conformed copy of a plan-approved domestic relations court order which determines the community interest in or child support obligation from a participating employee's state of New Mexico deferred compensation plan ["plan"] and assigns a separate interest to the participating employee's spouse, former spouse, child or other dependent shall be provided to the deferred compensation third party administrator ["administrator"] within a reasonable time after entry of the order.

C. The following information must be contained in the domestic relations order:

(1) the name, social security number and last known mailing address of the participating employee and the alternate payee;

(2) the amount or percentage of the participating employee's benefit to be paid to the alternate payee, or the manner in which such amount is to be determined;

(3) the relationship of the alternate payee to the participating employee;

(4) the number of payments or the period to which the domestic relations order applies;

(5) the specific name of each plan covered by the domestic relations order;

(6) all required signatures must be signed by the court.

D. Upon receipt of an appropriate court order, the administrator will provide notice by certified mail, return receipt requested, to a spouse, former spouse or child or other dependent who has a court determined interest in a participating public employee's plan when an application from the participating employee requesting disbursement is received by the administrator.

E. The administrator's files must contain current names and addresses for persons having an interest in plan accounts. Any person who has an interest in a plan account must provide the administrator with a written, notarized statement of any change of name or address made after entry of the court order. If a notice is returned as undeliverable because of incorrect name or address, the administrator will not be responsible for further attempts at notification.

[10-15-97; 2.85.200.8 NMAC - Rn & A, 2 NMAC 85.200.8, 8-15-01; A, 12-28-01]

**PART 201-299: [RESERVED]**

## **PART 300: DISTRIBUTION**

### **2.85.300.1 ISSUING AGENCY:**

Public Employees Retirement Association, P.O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.85.300.1 NMAC - Rn, 2 NMAC 85.300.1, 8-15-01]

### **2.85.300.2 SCOPE:**

This rule affects participants, former participants, beneficiaries, and the deferred compensation third party administrator under the Deferred Compensation Act.

[10-15-97; 2.85.300.2 NMAC - Rn, 2 NMAC 85.300.2, 8-15-01; A, 12-28-01]

### **2.85.300.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Section 10-7A-11.

[10-15-97; 2.85.300.3 NMAC - Rn, 2 NMAC 85.300.3, 8-15-01]

### **2.85.300.4 DURATION:**

Permanent.

[10-15-97; 2.85.300.4 NMAC - Rn, 2 NMAC 85.300.4, 8-15-01]

### **2.85.300.5 EFFECTIVE DATE:**

December 29, 1989 unless a different date is cited at the end of a section.

[10-15-97; 2.85.300.5 NMAC - Rn, 2 NMAC 85.300.5, 8-15-01]

### **2.85.300.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for distribution after the participant terminates employment.

[10-15-97; 2.85.300.6 NMAC - Rn, 2 NMAC 85.300.6, 8-15-01; A, 12-28-01]

### **2.85.300.7 DEFINITIONS:**

**[RESERVED]**

[2.85.300.7 NMAC - Rn, 2 NMAC 85.300.7, 8-15-01]

#### **2.85.300.8 GENERAL PROVISIONS:**

A participant shall make a distribution election or determination as provided for in the deferred compensation plan and as allowed by in the Internal Revenue Code, Section 457, as amended. The election shall be filed with the deferred compensation third party administrator by the participant.

[10-15-97; 2.85.300.8 NMAC - Rn & A, 2 NMAC 85.300.8, 8-15-01; A, 12-28-01]

#### **PART 301-399: [RESERVED]**

#### **PART 400: PARTICIPATION**

##### **2.85.400.1 ISSUING AGENCY:**

Public Employees Retirement Association, P.O. Box 2123, Santa Fe, New Mexico 87504-2123.

[11-15-97; 2.85.400.1 NMAC - Rn, 2 NMAC 85.400.1, 8-15-01]

##### **2.85.400.2 SCOPE:**

This rule affects participants, former participants, local public bodies, the retirement board and the deferred compensation administrator under the Deferred Compensation Act.

[11-15-97; 2.85.400.2 NMAC - Rn, 2 NMAC 85.400.2, 8-15-01]

##### **2.85.400.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Sections 10-7A-8 and 10-7A-11, as amended.

[11-15-97; 2.85.400.3 NMAC - Rn, 2 NMAC 85.400.3, 8-15-01]

##### **2.85.400.4 DURATION:**

Permanent.

[11-15-97; 2.85.400.4 NMAC - Rn, 2 NMAC 85.400.4, 8-15-01]

##### **2.85.400.5 EFFECTIVE DATE:**

November 15, 1997 unless a different date is cited at the end of a section.

[11-15-97; 2.85.400.5 NMAC - Rn, 2 NMAC 85.400.5, 8-15-01]

#### **2.85.400.6 OBJECTIVE:**

The objective of this rule is to set forth standards and procedures for establishing and terminating local public employee participation in the deferred compensation plan.

[11-15-97; 2.85.400.6 NMAC - Rn, 2 NMAC 85.400.6, 8-15-01]

#### **2.85.400.7 DEFINITIONS:**

**[RESERVED]**

[2.85.400.7 NMAC - Rn, 2 NMAC 85.400.7, 8-15-01]

#### **2.85.400.8 GENERAL PROVISIONS**

A. A local public body electing to participate in the deferred compensation plan shall file an agreement, in a form acceptable to the board, with the deferred compensation administrator and the board within fifteen (15) working days of approval by the governing authority of the local public body. Such agreement shall state the local public body agrees to be bound by the association's deferred compensation rules and regulations and that it shall remain in effect not less than two years from its effective date participation. A model notice of participation shall be available upon request from the deferred compensation administrator.

B. A local public body electing to terminate participation in the deferred compensation plan shall file a certified copy of its written notice of termination with the deferred compensation administrator and the board within fifteen (15) working days of approval by the governing body of the local public body. A model notice of termination shall be available upon request from the deferred compensation administrator. A local body may terminate its participation in the deferred compensation plan not less than two years after the date its participation became effective.

C. A local public body electing to participate in the deferred compensation plan shall submit payment data and contributions electronically. The third party administrator shall assist the local public body on the selection of a method for electronic submission for the local public body and provide specific submission requirements.

[11-15-97; 2.85.400.8 NMAC - Rn & A, 2 NMAC 85.400.8, 8-15-01]

## **CHAPTER 86: PUBLIC EMPLOYEES RETIREMENT RECIPROCITY**

**PART 1-99: [RESERVED]**

**PART 100: GENERAL PROVISIONS [RESERVED]**

## **PART 101-199: [RESERVED]**

## **PART 200: SERVICE CREDIT**

### **2.86.200.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.86.200.1 NMAC - Rn, 2 NMAC 86.200.1, 12-28-01]

### **2.86.200.2 SCOPE:**

This rule affects the affiliated public employers and employees under the coverage plans of the Public Employees Retirement Act, the educational retirement association, the educational retirement board and the public employees retirement board.

[10-15-97; 2.86.200.2 NMAC - Rn, 2 NMAC 86.200.2, 12-28-01]

### **2.86.200.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Section 10-13A-3, as amended.

[10-15-97; 2.86.200.3 NMAC - Rn, 2 NMAC 86.200.3, 12-28-01]

### **2.86.200.4 DURATION:**

Permanent.

[10-15-97; 2.86.200.4 NMAC - Rn, 2 NMAC 86.200.4, 12-28-01]

### **2.86.200.5 EFFECTIVE DATE:**

July 1, 1992 unless a different date is cited at the end of a section.

[10-15-97; 2.86.200.5 NMAC - Rn, 2 NMAC 86.200.5, 12-28-01]

### **2.86.200.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures to reinstate forfeited service credit by repayment of withdrawn member contributions.

[10-15-97; 2.86.200.6 NMAC - Rn, 2 NMAC 86.200.6, 12-28-01]

### **2.86.200.7 DEFINITIONS:**

**[RESERVED]**

**2.86.200.8 GENERAL PROVISION:**

A. Forfeited service credit may be reinstated by repayment of withdrawn member contributions, together with interest at the rate set by the board from the date of withdrawal to the date of repayment, under the following conditions:

(1) Service credit may be reinstated in one-year increments, beginning with the most recently forfeited service credit. A one-year increment is 12 consecutive but not necessarily continuous months of service credit. After reinstatement of all 12-month "years" as defined herein, any remaining service credit that totals less than 12 months may be reinstated by payment in one lump sum as provided herein.

(2) All forfeited service credit may also be reinstated by repayment of the total amount of all member contributions withdrawn from each period of service together with interest at the rate set by the board from the date of withdrawal to the date of repayment.

(3) A former member who is employed by an employer covered under the Educational Retirement Act must provide evidence of current contributing membership in the educational retirement association; such evidence may include a current pay stub, certification by the employer, in the form prescribed by the association, or certification by the educational retirement association (ERA).

B. One month of service credit shall be accrued for every month in which the member is employed for a total of 15 or more days by any combination of employers covered under any state system.

[10-15-97; 2.86.200.8 NMAC - Rn, 2 NMAC 86.200.8, 12-28-01]

**PART 201-299: [RESERVED]**

**PART 300: NORMAL RETIREMENT**

**2.86.300.1 ISSUING AGENCY:**

Public Employees Retirement Association, P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[10-15-97; 2.86.300.1 NMAC - Rn, 2 NMAC 86.300.1, 12-28-01]

**2.86.300.2 SCOPE:**

This rule affects the affiliated public employers and employees under the coverage plans of the Public Employees Retirement Act, the educational retirement association, the educational retirement board and the public employees retirement board.

[10-15-97; 2.86.300.2 NMAC - Rn, 2 NMAC 86.300.2, 12-28-01]

**2.86.300.3 STATUTORY AUTHORITY:**

This rule is authorized by NMSA 1978, Section 10-13A-4, as amended.

[10-15-97; 2.86.300.3 NMAC - Rn, 2 NMAC 86.300.3, 12-28-01]

**2.86.300.4 DURATION:**

Permanent.

[10-15-97; 2.86.300.4 NMAC - Rn, 2 NMAC 86.300.4, 12-28-01]

**2.86.300.5 EFFECTIVE DATE:**

July 1, 1992 unless a different date is cited at the end of a section.

[10-15-97; 2.86.300.5 NMAC - Rn, 2 NMAC 86.300.5, 12-28-01]

**2.86.300.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures to allow members who have accrued eligible reciprocal service credit to retire and obtain the aggregate of all pension components.

[10-15-97; 2.86.300.6 NMAC - Rn, 2 NMAC 86.300.6, 12-28-01]

**2.86.300.7 DEFINITIONS:**

[RESERVED]

**2.86.300.8 GENERAL PROVISIONS**

A. The Public Employees Retirement Reciprocity Act applies only to normal retirement pensions, and not to disability retirement or survivor pensions.

B. Members with eligible reciprocal service credit shall retire according to the provisions of the state system retirement act under which the member's last employer is covered, and rules promulgated thereunder.

C. For the purpose of compliance with NMSA 1978, Section 10-13A-4(D) (1) (C), the PERA final average salary shall be the amount of pension calculated under form of payment A.

D. If the total amount of the pension calculated under the provisions of the Public Employees Retirement Reciprocity Act exceeds the amount allowed under NMSA 1978, Section 10-13A-4(D)(1), each component of the pension shall be reduced by the same percentage as the ratio of that component to the total amount of the pension.

E. Pursuant to NMSA 1978, Section 10-13A-4(E), the payor fund shall be reimbursed on a monthly basis by any or all state systems under which the member has accrued eligible reciprocal service credit. If a state system must reimburse a payor fund on behalf of more than one member, the amount of reimbursement shall be the aggregate of all pension components attributable to eligible reciprocal service credit accrued by each member under that state system. Payment shall be made in the form authorized by the department of finance and administration.

[10-15-97; 2.86.300.8 NMAC - Rn, 2 NMAC 86.300.8, 12-28-01]

## **CHAPTER 87: VOLUNTEER FIREFIGHTERS**

### **PART 1-99: [RESERVED]**

### **PART 100: GENERAL PROVISIONS**

#### **2.87.100.1 ISSUING AGENCY:**

Public Employees Retirement Association (PERA), P. O. Box 2123, Santa Fe, New Mexico 87504-2123.

[2.87.100.1 NMAC - Rp, 2.87.100.1 NMAC, 7/1/15]

#### **2.87.100.2 SCOPE:**

This rule affects members, affiliated public employers, the retirement board and the association.

[2.87.100.2 NMAC - Rp, 2.87.100.2 NMAC, 7/1/15]

#### **2.87.100.3 STATUTORY AUTHORITY:**

This rule is authorized by Section 10-11A-6 NMSA 1978, as amended.

[2.87.100.3 NMAC - Rp, 2.87.100.3 NMAC, 7/1/15]

#### **2.87.100.4 DURATION:**

Permanent.

[2.87.100.4 NMAC - Rp, 2.87.100.4 NMAC, 7/1/15]

#### **2.87.100.5 EFFECTIVE DATE:**

July 1, 2015, unless a later date is cited at the end of a section.

[2.87.100.5 NMAC - Rp, 2.87.100.5 NMAC, 7/1/15]

#### **2.87.100.6 OBJECTIVE:**

The objective of this rule is to establish standards and procedures for awarding and reinstating service credit under the Volunteer Firefighters Retirement Act.

[2.87.100.6 NMAC - Rp, 2.87.100.6 NMAC, 7/1/15]

#### **2.87.100.7 DEFINITIONS:**

[RESERVED]

#### **2.87.100.8-2.87.100.9 [RESERVED]**

#### **2.87.100.10 GENERAL PROVISIONS:**

**A.** The chief of each fire department shall file an executed member enrollment form for each new volunteer firefighter member within 30 days after the firefighter joins the department.

**B.** Service shall be credited by calendar year.

**C.** In order to post service credit for any member, the chief of each fire department shall electronically report those members who met and those who did not meet the minimum qualifications for service credit through the PERA website, and shall submit an annual reporting form, as prescribed by the association, which acknowledges the truth of the reporting under oath before a notary public no later than March 31 of the year following the year for which service credit is to be credited.

**D.** The failure to timely provide these records to PERA shall result in the loss of the member's service credit for the preceding calendar year.

[2.87.100.1 NMAC - Rp, 2.87.100.1 NMAC, 7/1/15]

#### **2.87.100.11 APPEAL OF DENIAL OF CLAIM OF BENEFITS:**

The denial of any claim for volunteer firefighters retirement benefits may be appealed by a claimant. Appeals shall follow the procedures set forth in 2.80.1500 NMAC.

[2.87.100.11 NMAC - Rp, 2.87.100.11 NMAC, 7/1/15]

#### **2.87.100.12-2.87.100.19 [RESERVED]**

#### **2.87.100.20 SERVICE CREDIT FOR PRIOR CALENDAR YEARS:**

**A.** Service shall be credited by calendar year.

**B.** In order to post or adjust service credit for any member for not more than the two preceding calendar years the member must file with the association the following completed records:

- (1)** membership enrollment form;
- (2)** "corrected qualification record" or "adjusted qualification record" as prescribed by the association;
- (3)** adjusted qualification record executed under oath before a notary public.

[2.87.100.20 NMAC - Rp, 2.87.100.20 NMAC, 7/1/15]

#### **2.87.100.21-2.87.100.29 [RESERVED]**

#### **2.87.100.30 ADDRESS UPDATE:**

The member is responsible for providing to the association any change of the member's address.

[2.87.100.30 NMAC - Rp, 2.87.100.30 NMAC, 7/1/15]

## **CHAPTER 89-90: [RESERVED]**

## **CHAPTER 91: GRANTS**

### **PART 1: GENERAL PROVISIONS [RESERVED]**

### **PART 2: REVIEW AND SELECTION OF COLONIAS INFRASTRUCTURE PROJECTS**

#### **2.91.2.1 ISSUING AGENCY:**

New Mexico Colonias Infrastructure Board.

[2.91.2.1 NMAC – N, 2/15/12]

**2.91.2.2 SCOPE:**

All persons or entities applying for financial assistance under the colonias infrastructure project fund administered by the New Mexico finance authority, NMSA 1978, 6-30-6 and NMSA 1978, 6-30-8.

[2.91.2.2 NMAC – N, 2/15/12]

**2.91.2.3 STATUTORY AUTHORITY:**

NMSA 1978, 6-30-6 and NMSA 1978, 6-30-8.

[2.91.2.3 NMAC – N, 2/15/12]

**2.91.2.4 DURATION:**

Permanent.

[2.91.2.4 NMAC – N, 2/15/12]

**2.91.2.5 EFFECTIVE DATE:**

February 15, 2012, unless a later date is cited at the end of a section.

[2.91.2.5 NMAC – N, 2/15/12]

**2.91.2.6 OBJECTIVE:**

**A.** Section 6-30-5, NMSA 1978 provides that the New Mexico colonias infrastructure board is required to adopt rules governing the acceptance, evaluation and prioritization of applications by qualified entities for financial assistance from the colonias infrastructure project fund; authorizes the board to prioritize the qualified projects for financial assistance; and authorizes the board to recommend the prioritized qualified projects to the New Mexico finance authority for financial assistance.

**B.** Section 6-30-3, NMSA 1978, provides that a qualified project eligible for consideration for financial assistance by the board shall be a capital outlay project which may include a water system, a wastewater system, solid waste disposal facilities, flood and drainage control, roads or housing infrastructure, but does not include general operation and maintenance, equipment, housing allowance payments or mortgage subsidies. The purpose of these rules is to set forth the intent of the board and to outline, in general terms, the criteria and procedures to be used in evaluating, prioritizing and funding qualified projects from the colonias infrastructure project fund.

**C.** Section 6-30-6, NMSA 1978, provides that the authority shall provide staff support for the colonias infrastructure board; administer the colonias infrastructure project fund; at the direction of the board, process, review and evaluate applications for financial assistance received from qualified entities; and at the direction of the board, administer qualified projects that receive financial assistance.

**D.** Section 6-30-8, NMSA 1978, provides that the authority may adopt separate procedures and rules to administer the colonias infrastructure project fund, originate grants or loans for qualified projects recommended by the board; recover from the colonias infrastructure project fund the costs of administering the fund and originating the grants and loans; and govern the process through which qualified entities may apply for financial assistance from the colonias infrastructure project fund.

[2.91.2.6 NMAC – N, 2/15/12]

#### **2.91.2.7 DEFINITIONS:**

**A.** "Act" means the Colonias Infrastructure Act, Sections 6-30-1 through 6-30-8, NMSA 1978, as the same may be amended and supplemented.

**B.** "Agreement" means the document or documents signed by the board and a qualified entity which specify the terms and conditions of obtaining financial assistance from the colonias infrastructure project fund.

**C.** "Applicant" means a qualified entity which has filed a colonias infrastructure project proposal with the authority for initial review and referral to the board, or to the board's project review committee.

**D.** "Authority" means the New Mexico finance authority.

**E.** "Authorized representative" means one or more individuals duly authorized to act on behalf of the qualified entity in connection with its financial application, colonias infrastructure project proposal or agreement.

**F.** "Board" means the New Mexico colonias infrastructure board created by the act.

**G.** "Bylaws" means the bylaws of the board adopted on October 7, 2011, as amended and supplemented from time to time.

**H.** "Colonia" means a rural community with a population of 25,000 persons or less located within 150 miles of the United States-Mexico border that (1) has been designated as a colonia by the municipality or county in which it is located because of a lack of potable water supply, a lack of adequate sewage systems, or a lack of decent, safe and sanitary housing; (2) has been in existence as a colonia prior to November 1990; and (3) has submitted appropriate documentation to the board to substantiate the conditions under (1) and (2) of this definition.

**I.** "Colonias infrastructure project account" means a fund designated by a qualified entity exclusively for receipt of financial assistance for a qualified project.

**J.** "Colonias infrastructure project fund" means the fund of that name created in the authority by Section 6-30-8, NMSA 1978.

**K.** "Colonias infrastructure project proposal" means a written project proposal submitted by a qualified entity for review by the project review committee and consideration by the board.

**L.** "Colonias infrastructure trust fund" means the fund of that name created in the state treasury by Section 6-30-7, NMSA 1978.

**M.** "Financial application" means a written document filed with the authority by an applicant for the purpose of evaluating the applicant's qualifications and proposed project or projects for types of financial assistance which may be provided by the board under the act.

**N.** "Financial assistance" means loans, grants and any other type of assistance authorized by the act, or a combination thereof, provided from the colonias infrastructure project fund to a qualified entity for the financing of a qualified project.

**O.** "Political subdivision of the state" means a municipality, a county, a water and sanitation district, an association organized and existing pursuant to the Sanitary Projects Act, Chapter 3, Article 29 NMSA 1978, or any other entity recognized by statute as a political subdivision of the state.

**P.** "Project review committee" means a standing committee, appointed by the chairman of the board from the members of the board pursuant to the bylaws to review proposed colonias infrastructure projects to be recommended for funding from the colonias infrastructure project fund.

**Q.** "Qualified entity" means a county, municipality or other entity recognized as a political subdivision of the state.

**R.** "Qualified project" means a capital outlay project selected by the board for financial assistance that is primarily intended to develop colonias infrastructure, and may include a water system, a wastewater system, solid waste disposal facilities, flood and drainage control, roads or housing infrastructure, but does not include general operation and maintenance, equipment, housing allowance payments or mortgage subsidies.

**S.** "State" means the state of New Mexico.

#### **2.91.2.8 ELIGIBILITY: PRIORITIZATION OF COLONIAS INFRASTRUCTURE PROJECTS:**

The board will develop and consider a variety of factors in reviewing and evaluating colonias infrastructure project proposals to determine which colonias infrastructure projects to recommend to the authority as qualified projects for financial assistance from the colonias infrastructure project fund. The board shall give priority to projects that have urgent needs that ensure adequate financial resources for infrastructure development for colonia recognized communities, that provide for the planning and development of infrastructure in an efficient and cost-effective manner, and that develop infrastructure projects to improve quality of life and encourage economic development. The board shall seek to identify opportunities to leverage federal and other funding. The board shall establish policies for prioritization of colonias infrastructure projects.

[2.91.2.8 NMAC – N, 2/15/12]

#### **2.91.2.9 COLONIAS INFRASTRUCTURE PROJECT PROPOSAL, REVIEW, PRIORITIZATION AND APPROVAL PROCESS:**

**A.** The board and the authority will administer an outreach program to notify qualified entities that colonias infrastructure project proposals are being accepted to identify colonias infrastructure projects for review by the project review committee and the board for prioritization and recommendation for funding to the authority as qualified projects.

**B.** The authority will provide forms and guidelines for colonias infrastructure project proposals and applications for financial assistance.

**C.** The authority staff will complete an initial evaluation of the application for financial assistance and colonias infrastructure project proposals promptly following receipt. Such evaluation will include, to the extent applicable, an evaluation of colonias infrastructure project feasibility, administrative capacity of the qualified entity, financial position, debt management and economic and demographic factors. The authority may rely upon the advice of an interdisciplinary team in evaluating colonias infrastructure project proposals and applications for financial assistance.

**D.** The authority staff will forward all completed colonias infrastructure project proposals and the initial evaluation of applications for financial assistance and colonias infrastructure project proposals to the project review committee. The project review committee will consider the proposed colonias infrastructure project and may confer with outside parties, including any local interdisciplinary teams familiar with the proposed colonias infrastructure project, as necessary to obtain more information on the feasibility, merit, and cost of the proposed colonias infrastructure project. The project review committee will make a recommendation to the board on each colonias infrastructure project proposal.

**E.** Upon the recommendation of the project review committee, the board will prioritize the proposed colonias infrastructure projects for recommendation to the authority for funding.

**F.** After completion of the review process by the project review committee and the board and receipt of a favorable recommendation on the colonias infrastructure project proposal, the prioritized colonias infrastructure projects will be recommended by the board to the authority for funding as qualified projects to the extent of the available moneys in the colonias infrastructure project fund.

**G.** At least annually, the board will recommend to the authority a list of qualified projects recommended for funding. The authority will provide financial assistance for qualified projects as recommended by the board under policies jointly established by the board and authority.

[2.91.2.9 NMAC – N, 2/15/12]

#### **2.91.2.10 COLONIAS INFRASTRUCTURE QUALIFIED PROJECTS AND ELIGIBLE COSTS:**

**A.** The board may authorize the authority to provide financial assistance from the colonias infrastructure project fund to qualified entities only for qualified colonias infrastructure projects as provided by Section 6-30-3 and Section 6-30-5, NMSA 1978.

**B.** Financial assistance from the colonias infrastructure project fund shall be made only for eligible items, which include:

- (1) planning, designing, construction, improving or expanding a qualified project;
- (2) developing engineering feasibility reports for qualified projects;
- (3) inspecting construction of qualified projects;
- (4) providing professional services;
- (5) completing environmental assessments or archeological clearances and other surveys for qualified projects;
- (6) acquiring land, water rights, easements or rights of way; and
- (7) paying legal costs and fiscal agent fees associated with development of qualified projects, within limits set by the board.

**C.** A qualified entity which has had financial assistance approved by the board for financing a qualified project may apply to the board to redirect the financial assistance

to a different colonias infrastructure project made necessary by unanticipated events. The decision to redirect the financial assistance to a different qualified project will be at the sole discretion of the board upon the advice of the authority staff.

[2.91.2.10 NMAC – N, 2/15/12]

#### **2.91.2.11 QUALIFIED PROJECT FINANCING:**

The authority may recommend structured financial assistance packages that include loans, grants and any other type of assistance authorized by the authority. The structure, terms and conditions of the financial assistance will be determined by the authority in accordance with the policies jointly established by the board and the authority. Any variance from the policies in connection with financial assistance for any qualified project shall be approved by the authority. Financial assistance for qualified projects may be pooled, at the sole discretion of the authority, under policies jointly established by the board and authority.

[2.91.2.11 NMAC – N, 2/15/2012; A, 4/06/2021]

#### **2.91.2.12 FINANCING APPROVAL REQUIREMENTS:**

Based on the priority and evaluation factors set forth in Sections 8, 9, and 10, the board may recommend to the authority approval of the qualified project for financial assistance.

[2.91.2.12 NMAC – N, 2/15/12]

#### **2.91.2.13 RECONSIDERATION OF BOARD DECISIONS:**

Any applicant or qualified entity affected by a decision of the board may request reconsideration of the decision of the board by notifying the board in writing within 15 days following the meeting at which the decision was made. Notice of a decision made in an open meeting of the board is deemed to be given on the date of the meeting, and the time for notification of a request for reconsideration shall run from that date, regardless whether any written notice of the decision is given by the board. A request for reconsideration shall state with particularity the grounds for reconsideration, including any factual or legal matter on which the applicant or qualified entity believes that there was an error by the board. Upon receiving a timely and proper request for reconsideration, the chairman of the board will set the matter for reconsideration at the board's next regularly scheduled meeting or at a special meeting called for the purpose, at the chairman's discretion. Upon reconsideration by the board, the board will notify the applicant or qualified entity of the board's decision, in writing, within five working days of the decision. The decision of the board on reconsideration is final. A request for reconsideration not timely or properly made will not be considered by the board.

[2.91.2.13 NMAC – N, 2/15/12]

#### **2.91.2.14 FINANCIAL ASSISTANCE AGREEMENT:**

**A.** The authority and the qualified entity will enter into an agreement to establish the terms and conditions of financial assistance from the authority. The agreement will include the terms of repayment and remedies available to the authority in the event of a default. The authority will monitor terms of the agreement and enforce or cause to be enforced all terms and conditions thereof, including prompt notice and collection.

**B.** The interest rate on any financial assistance extended shall be determined by the authority based on the cost of funds and ability of a qualified entity to repay a loan, and in accordance with the policies jointly established by the board and the authority. The interest rate shall not change during the term of the financial assistance unless refinanced or unless the financial assistance is structured as a variable rate obligation.

**C.** The agreement will contain provisions which require financial assistance recipients to comply with all applicable federal, state and local laws and regulations.

**D.** In the event of default under a financial assistance agreement by a qualified entity, the authority may enforce its rights by suit or mandamus and may utilize all other available remedies under state and applicable federal law.

[2.91.2.14 NMAC – N, 2/15/2012; A, 4/06/2021]

#### **2.91.2.15 ADMINISTRATIVE COSTS:**

**A.** The authority may impose and collect reasonable fees and costs in connection with the filing of a colonias infrastructure project proposal or an application for financial assistance seeking approval of a colonias infrastructure project, and for financial assistance from the board and the authority. The authority also may impose and collect an administrative fee from each qualified entity that receives financial assistance from the colonias infrastructure project fund. If an administrative fee is assessed, the administrative fee will be a percentage of the principal amount of the financial assistance provided to a qualified entity. The administrative fee may be withheld from the principal amount of the financial assistance and will be retained in the colonias infrastructure project fund. Alternatively, the authority may levy an annual fee equal to a percentage of the outstanding principal amount of a loan. Specific percentages will be based on, among other things, the volume of financial assistance being provided to qualified entities, the administrative costs of the board and the authority, and the availability of other revenue sources to cover the board's and the authority's administrative costs. The filing and administrative fee or fees may be used for, among other purposes, reimbursing the board or the authority for all or part of the costs of issuing bonds and other administrative costs, including any audits of the colonias infrastructure project fund and the colonias infrastructure trust fund.

**B.** The authority may establish such other charges, premiums, fees and penalties deemed necessary for the administration of the colonias infrastructure project fund and the colonias infrastructure trust fund.

[2.91.2.15 NMAC – N, 2/15/12]

**2.91.2.16 ADMINISTRATION OF THE COLONIAS INFRASTRUCTURE TRUST FUND:**

**A.** Pursuant to Section 6-30-7, NMSA 1978, the colonias infrastructure trust fund shall be administered by the state treasurer's office and shall be invested by the state investment officer in the same manner as land grant permanent funds are invested under state law. All investment earnings on the colonias infrastructure trust fund shall be credited to the colonias infrastructure trust fund. The colonias infrastructure trust fund shall not be expended for any purpose, but an annual distribution from the trust fund shall be made to the project fund pursuant to Section 6-30-7, NMSA 1978.

**B.** Annual distributions to the colonias infrastructure project fund from the colonias infrastructure trust fund shall be made as required by the authority.

[2.91.2.16 NMAC – N, 2/15/12]

**2.91.2.17 ADMINISTRATION OF THE COLONIAS INFRASTRUCTURE PROJECT FUND:**

**A.** The colonias infrastructure project fund shall be administered by the authority as a separate account, but may consist of such subaccounts as the authority deems necessary to carry out the purposes of the fund.

**B.** Money from repayments of loans made by the board for qualified projects shall be deposited in the colonias infrastructure project fund. The colonias infrastructure project fund shall also consist of any other money appropriated, distributed or otherwise allocated to the colonias infrastructure project fund for the purpose of financing qualified projects under the act.

**C.** The authority shall adopt a uniform accounting system for the colonias infrastructure project fund and each account and subaccount established by the authority, based on generally accepted accounting principles.

**D.** The authority may establish procedures and adopt rules as required to administer the colonias infrastructure project fund and to recover from the colonias infrastructure project fund costs of administering the fund and originating grants and loans.

[2.91.2.17 NMAC – N, 2/15/12]

**2.91.2.18 AMENDMENT OF RULES:**

This rule may be amended or repealed at any time by a majority vote of a quorum of the board.

[2.91.2.18 NMAC – N, 2/15/12]

## **CHAPTER 92**

### **PART 1: GENERAL PROVISIONS**

#### **2.92.1.1 ISSUING AGENCY:**

Economic development department.

[2.92.1.1 NMAC – N, 11/30/2021]

#### **2.92.1.2 SCOPE:**

All persons or entities applying for grants for the reimbursement of rent, lease or mortgage payments pursuant to House Bill 11 of 1st Session of the 55th Legislature (hereafter, the "LEDA Recovery Grants Legislation").

[2.92.1.2 NMAC - N, 11/30/2021]

#### **2.92.1.3 STATUTORY AUTHORITY:**

Section 5-10-16 NMSA 1978 (hereafter, the "LEDA Recovery Grants Legislation").

[2.92.1.3 NMAC - N, 11/30/2021]

#### **2.92.1.4 DURATION:**

Permanent.

[2.92.1.4 NMAC - N, 11/30/2021]

#### **2.92.1.5 EFFECTIVE DATE:**

November 30, 2021, unless a later date is cited at the end of a section.

[2.92.1.5 NMAC - N, 11/30/2021]

#### **2.92.1.6 OBJECTIVE:**

Explanatory note: On March 11, 2020, in response to the presence in New Mexico of a highly contagious respiratory novel coronavirus disease known as COVID-19, Governor Michelle Lujan Grisham declared that a public health emergency exists in New Mexico under the Public Health Emergency Response Act, and invoked all power and authority

under the All Hazards Emergency Management Act. On March 23, 2020, the New Mexico department of health, pursuant to the All Hazards Emergency Management Act, issued a public health emergency order to close all businesses and non-profit entities except for those deemed essential, while also limiting mass gatherings due to COVID-19. Since March 23, 2020, the Public Health Emergency Order has been extended and modified to address the ongoing threat of COVID-19. On February 26, 2021, during the 1st Session of the 55th Legislature, the Governor signed into law House Bill 11 (hereafter, the "LEDA Recovery Grants Legislation"), whereby two hundred million dollars (\$200,000,000) was appropriated from the state of New Mexico general fund to the New Mexico economic development department ("department" or "NMEDD") for expenditure in fiscal years 2021 through 2023 ("LEDA Grant Funds") to provide grants, through the NMFA, for the reimbursement of rent, lease or mortgage payments. These rules govern the implementation and administration of the LEDA Recovery Grant Fund enacted under the LEDA Recovery Grants Legislation, and do not apply to other programs established by the economic development department.

[2.92.1.6 NMAC – N, 11/30/2021]

#### **2.92.1.7 DEFINITIONS:**

**A. "Full-time-equivalent employee or FTE"** is defined as an employee who works an average of 40 hours or more per week from their qualifying date of hire throughout the quarterly qualification period. The hours of employees who work fewer than 40 hours are calculated as proportions of a single FTE and aggregated. An FTE must be paid wages that are reported to the department of workforce solutions quarterly and subject to unemployment taxes. To qualify, the FTE must be "net new", representing:

(1) a growth of FTE beyond the "baseline" FTE count, with "baseline" defined as the number of FTE reported on December 31, 2020 or any subsequent quarterly ES903A filed with the department of workforce solutions prior to application whichever is lower;

(2) a growth of FTE beyond the number for which the recovery entity received total or partial grant payments in prior quarters; and

(3) a growth of FTE beyond the number in the quarter immediately preceding the request for a subsequent quarterly payment and for which a quarterly unemployment insurance report was filed with the department of workforce solutions.

**B. "Qualifying date of hire"** is a date on or after April 1, 2021 and falling within a quarterly department of workforce solutions reporting period prior to application for a quarterly payment subsequent to the initial payment.

**C. "Loss in revenue"** is defined as a decline in revenue for one or more quarters in 2020 compared with the same quarter or quarters in 2019. If the recovery entity is required to submit gross receipts taxes for these revenues, the recovery entity must

provide the tax documentation supplied to the taxation and revenue department demonstrating this decline. If the recovery entity is not subject to gross receipts taxes, the decline must be demonstrated through other documentation as provided through rule by the New Mexico finance authority.

[2.92.1.7 NMAC - N, 11/30/2021]

#### **2.92.1.8 MAXIMUM EMPLOYEE COUNT:**

The maximum employee count in House Bill 11 of "fewer than 75 people employed at any of the business's business locations" for a business to qualify as a recovery entity includes all employees, both full- and part-time employees.

[2.92.1.8 NMAC - N, 11/30/2021]

#### **2.92.1.9 PER JOB CALCULATION:**

Pursuant to the Local Economic Development Act, the recovery grant shall be accompanied by net new FTE job creation. As part of the initial application, the recovery entity shall estimate the net new FTE to be created from the initial qualifying date of hire through March 31, 2022 and provide the job titles for those positions, the FTE calculations and the total average hourly wages. The maximum amount of the recovery grant to be provisionally awarded and set aside for disbursement shall be determined by the following calculation of funds per net new FTE job created:

- A.** The base amount of the grant per net new FTE job created: \$10,000;
- B.** If the recovery entity has a loss in revenue of at least twenty percent and less than forty percent: \$12,000;
- C.** If the recovery entity has a loss in revenue of at least forty percent and less than sixty percent: \$14,000;
- D.** If the recovery entity has a loss in revenue of at least sixty percent and less than eighty percent: \$16,000; or
- E.** If the recovery entity has a loss in revenue equal to or in excess of eighty percent: \$18,000.
- F.** Wage bonus:
  - (1)** If the average wage of all the recovery entity's net new FTE is over \$13 per hour, the recovery entity may receive a bonus of \$1,000 per net new FTE for which a base payment is calculated.

(2) If the average wage of the recovery entity's net new FTE is over \$17 per hour, the recovery entity may receive an additional \$1,000 per net new FTE for which a base payment is calculated.

**G.** The maximum grant amount per net new FTE job created is \$20,000.

**H.** The maximum number of FTE that may be included in the recovery entity's estimates in the application is equal to the maximum number of FTE employed by the recovery entity in any quarterly period from January 1, 2019 to the date of application and documented through the ES903A filed with the department of workforce solutions.

[2.92.1.9 NMAC - N, 11/30/2021]

#### **2.92.1.10 QUARTERLY PAYMENTS:**

Quarterly payments to recovery entities shall be determined by taking the initial per job calculation above and multiplying it by the number of FTE being claimed by the recovery entity for a given quarterly period. The per job amount may be reduced if the New Mexico finance authority and the economic development department determine the actual average wages paid fall below the thresholds for either or both of the \$1,000 bonuses to a degree that indicates a reasonable attempt was not made to pay the wages estimated by the recovery entity in its grant application.

[2.92.1.10 NMAC - N, 11/30/2021]

#### **2.92.1.11 QUARTERLY PAYMENT LIMIT:**

Quarterly payments to recovery entities are limited to the lesser of twenty-five percent of the provisional grant award or the eligible amount under the requirements and calculations set forth in this rule. The maximum amount that may be distributed in total to a recovery entity under the LEDA Recovery Grant project is \$100,000.

[2.92.1.11 NMAC - N, 11/30/2021]

#### **2.92.1.12 DOCUMENTATION REQUIRED FOR PROOF OF QUALIFYING NET NEW FTE JOBS CREATED:**

**A.** A recovery entity must provide its quarterly unemployment insurance filings with the department of workforce solutions (ES903A) at time of application for the quarter ending March 31, 2021 and, if applicable, the most recent quarterly ES903A filed with the department of workforces solutions available at the time of application.

**B.** A recovery entity provided an initial quarterly payment must provide the most recent quarterly filing of the ES903A prior to additional funds being released for a subsequent quarterly payment. The recovery entity must also provide documentation, in a form and manner to be prescribed by the New Mexico finance authority, to list the

net new FTE requested to qualify for additional funds with the associated average hourly wage, hours worked per week and the total average wage for all net new FTE.

**C.** Upon request, the recovery entity shall submit to the New Mexico finance authority and the economic development department additional payroll documentation to validate the calculations and request.

[2.92.1.12 NMAC - N, 11/30/2021]

#### **2.92.1.13 DOCUMENTATION REQUIRED FOR PROOF OF PAYMENT OF RENT, LEASE OR MORTGAGE:**

To prove payment of rent, mortgage or lease, a recovery entity must complete the affirmation provided by the economic development department to the New Mexico finance authority for distribution to recovery entities, along with proof of payment including a bank statement, canceled check, credit card receipt, ACH transaction or other forms of proof generally accepted. The rent, lease or mortgage payments must be for the recovery entity's place of business within New Mexico and must be payments related to land or buildings. Equipment rentals or leases do not qualify under the Local Economic Development Act.

[2.92.1.13 NMAC - N, 11/30/2021]

## **CHAPTER 93: OPPORTUNITY ENTERPRISE ACT ENTERPRISE ASSISTANCE**

### **PART 1: GENERAL PROVISIONS**

#### **2.93.1.1 ISSUING AGENCY:**

New Mexico Opportunity Enterprise and Housing Development Review Board.

[2.93.1.1 NMAC – N, 4/25/2023; A, 7/30/2024]

#### **2.93.1.2 SCOPE:**

All persons or entities applying for enterprise assistance under the opportunity enterprise revolving fund and housing development assistance under the housing development revolving fund administered by the New Mexico finance authority, Sections 6-34-8, 6-34-12, 6-34-13.1 and 6-34-13.3 NMSA 1978.

[2.93.1.2 NMAC – N, 4/25/2023; A, 7/30/2024]

#### **2.93.1.3 STATUTORY AUTHORITY:**

Sections 6-34-6 and 6-34-7 NMSA 1978.

[2.93.1.3 NMAC – N, 4/25/2023]

**2.93.1.4 DURATION:**

Permanent.

[2.93.1.4 NMAC – N, 4/25/2023]

**2.93.1.5 EFFECTIVE DATE:**

April 25, 2023, unless a later date is cited at the end of a section.

[2.93.1.5 NMAC – N, 4/25/2023]

**2.93.1.6 OBJECTIVE:**

**A.** Section 6-34-3, NMSA 1978, provides that the authority may adopt separate rules to administer the opportunity enterprise revolving fund and the housing development revolving fund to originate enterprise assistance and housing development assistance for projects recommended by the board, govern the process through which applicants may apply for enterprise assistance and housing development assistance, and collect fees and costs related to providing financing.

**B.** Section 6-34-5, NMSA 1978 provides that the authority shall provide staff support for necessary administrative services of the board.

**C.** Section 6-34-6, NMSA 1978 provides that the authority shall upon the recommendation of the board, process, review and evaluate applications for enterprise assistance and housing development assistance received from applicants.

**D.** Section 6-34-7, NMSA 1978 provides that the opportunity enterprise and housing development review board is required to adopt rules necessary to carry out the provisions of the act and allowing the authority to establish procedures for applying and qualifying for enterprise assistance and housing development assistance, establishing economic development goals for the state in consultation with the department, governing the application procedures and requirements for enterprise assistance and housing development assistance, determining how to select and prioritize applications for enterprise assistance and housing development assistance to be funded by the authority, prioritizing projects that are in political subdivisions that are implementing zoning reforms that support housing development projects, and providing safeguards to protect public money and other public resources.

**E.** Sections 6-34-12 and 6-34-13.3, NMSA 1978 provide that the authority shall administer the opportunity enterprise revolving fund and the housing development revolving fund and recover from the funds the costs of administering the funds and originating enterprise and housing development assistance.

F. Subsection K of Section 6-21-5, NMSA 1978 provides that the authority may fix charges and collect fees and other charges in connection with the making of loans, leases and any other services rendered by the authority.

[2.93.1.6 NMAC – N, 4/25/2023; A, 7/30/2024]

#### **2.93.1.7 DEFINITIONS:**

A. "**Act**" means the Opportunity Enterprise and Housing Development Act, Sections 6-34-1 through 6-34-15, NMSA 1978, as the same may be amended and supplemented.

B. "**Affordable housing infrastructure project**" means infrastructure projects needed to support housing for low- or moderate-income residents.

C. "**Application**" means a written document made publicly available by the authority and filed with the authority for the purpose of evaluating the applicant's qualifications and proposed projects for types of assistance which may be provided by the authority under the act.

D. "**Authority**" means the New Mexico finance authority.

E. "**Board**" means the opportunity enterprise and housing development review board created by the act.

F. "**Bylaws**" means the amended and restated bylaws of the board adopted on May 2, 2024, as amended and supplemented from time to time.

G. "**Commercial development committee**" means a standing committee, appointed by the chairman of the board from members of the board pursuant to the bylaws to review proposed enterprise development projects to be recommended for funding from the opportunity enterprise revolving fund.

H. "**Department**" means the economic development department.

I. "**Economic development opportunities**" means the advancement of an environmentally sustainable economic development goal of the state as determined by the authority, in coordination with the department, and includes the creation of jobs, the provision of needed services and commodities to diverse communities across the state and the increase of tax and other revenue collections resulting from the enterprise development project.

J. "**Enterprise assistance**" means opportunity enterprise financing, an opportunity enterprise lease or an opportunity enterprise loan.

**K. "Enterprise development project"** means a commercial real estate development project primarily occupied by businesses unrelated to the opportunity enterprise partner that involves the purchase, planning, designing, building, surveying, improving, operating, furnishing, equipping or maintaining of land, buildings or infrastructure to create or expand economic development opportunities within the state.

**L. "Housing development assistance"** means a loan for workforce development housing projects or affordable housing infrastructure projects.

**M. "Housing development committee"** means a standing committee, appointed by the chairman of the board from the members of the board pursuant to the bylaws to review proposed housing development projects to be recommended for funding from the housing development revolving fund.

**N. "Housing development partner"** means a domestic corporation, a general partnership, a limited liability company, a limited partnership, a public benefit corporation, a nonprofit entity or any other private business entity or combination thereof that the authority determines is or will be engaged in a project that creates or expands housing within the state and is eligible for housing development assistance pursuant to the act.

**O. "Housing development project"** means an affordable housing infrastructure project or a workforce development housing project.

**P. "Middle income workers"** means families with incomes that fall between the lesser of a local jurisdiction's upper limit for housing assistance by relevant housing type or by the New Mexico mortgage finance authority's upper limit for housing development assistance, and three hundred percent of the US housing and urban development area median income for the county.

**Q. "Opportunity enterprise partner"** means a domestic corporation, a general partnership, a limited liability company, a limited partnership, a public benefit corporation, a nonprofit entity or other private business entity or combination thereof that the authority determines is or will be engaged in an enterprise that creates or expands economic development opportunities within the state and is eligible for enterprise assistance pursuant to the act.

**R. "State"** means the state of New Mexico.

**S. "Workforce development housing"** means below-market housing addressing demand for workforce housing for middle income workers in proximity to employment centers as determined by board policy.

**T. "Workforce development housing project"** means a residential real estate development project that involves the purchase, planning, designing, building, surveying, improving, operating, furnishing, equipping or maintaining of land, buildings

or infrastructure that provides housing, including housing that provides the option of home ownership.

**U. "Zoning reforms"** means policies, procedures and regulations implemented by political subdivisions intended to decrease the costs and timing of constructing affordable housing and workforce housing, including expedited permitting, high density zoning, and other criteria as determined by policies of the board.

[2.93.1.7 NMAC – N, 4/25/2023; A, 7/30/2024]

#### **2.93.1.8 ELIGIBILITY AND PRIORITIZATION POLICIES FOR ENTERPRISE DEVELOPMENT PROJECTS:**

The board will develop and consider a variety of factors in reviewing and evaluating enterprise development project proposals to determine which enterprise development projects to recommend to the authority for enterprise assistance from the fund. Board policies shall give priority to projects that:

- A.** demonstrate local support and financial need,
- B.** create or expand economic development opportunities within the state,
- C.** contribute to diversification of the state's economy,
- D.** advance environmentally sustainable economic development goals of the state, and
- E.** other means of financing a proposed enterprise development project are unavailable or insufficient. The board shall establish policies to consider in prioritizing enterprise development projects.

[2.93.1.8 NMAC – N, 4/25/2023]

#### **2.93.1.9 ENTERPRISE DEVELOPMENT PROJECT PROPOSAL, REVIEW, PRIORITIZATION AND APPROVAL PROCESS:**

- A.** The board and the department will administer an outreach program to local governments and potential opportunity enterprise partners for the purpose of making recommendations to the authority regarding enterprise assistance, and to notify applicants that enterprise development project proposals are being accepted for review by the project review committee and the board for prioritization and recommendation for funding to the authority.
- B.** The authority will provide forms and guidelines for enterprise development project proposals and applications for enterprise assistance. The authority may consider the recommendations and priorities of the board.

**C.** Applications for enterprise assistance shall describe the scope and plans of the enterprise development project or proposed use of leased property, demonstrate that the enterprise development project or lease will create or expand economic development opportunities within the state, demonstrate that the enterprise project or lease will contribute to the diversification of the state's economy, demonstrate that the enterprise development project or lease will comply with all applicable state and federal law, provide sufficient evidence that other means of financing a proposed enterprise development project are unavailable or insufficient, and include any other documentation or certifications that the authority deems necessary.

**D.** Department staff will complete an initial evaluation of the application for enterprise assistance and enterprise development project proposals promptly following receipt in consideration of information provided by applicants according to the factors listed in Subsection C of 2.93.1.9.NMAC. Such evaluation will include recommendations regarding suitability for enterprise assistance. The department may obtain input and information relevant to carrying out the purposes of the act from outside consultants in evaluating enterprise development project proposals and applications for enterprise assistance. The department will then forward to the commercial development committee for review, the relevant application and the corresponding recommendation of the department, along with all third-party input and information compiled by the department.

**E.** The commercial development committee will consider the proposed enterprise development project and may confer with outside parties, including any person familiar with the proposed enterprise development project, as necessary to obtain more information on the feasibility, merit, and cost of the proposed enterprise development project. The commercial development committee will make a recommendation to the board on each enterprise development project proposal.

**F.** Upon the recommendation of the commercial development committee, the board will prioritize the proposed enterprise development projects for recommendation to the authority for consideration of enterprise assistance.

**G.** After completion of the review process by the commercial development committee and the board and receipt of a favorable recommendation on the enterprise development project proposal, the prioritized enterprise development projects will be recommended by the board to the authority for consideration of enterprise assistance.

**H.** NMFA may request an additional application from recommended enterprise assistance projects.

**I.** A member of the board or employee of the authority with an interest, either direct or indirect, in an application or contract relating to enterprise assistance, shall disclose his or her interest to the authority and the board in writing and shall not participate in actions by the board or the authority with respect to that conflict.

[2.93.1.9 NMAC – N, 4/25/2023; A, 7/30/2024]

#### **2.93.1.10 ENTERPRISE DEVELOPMENT PROJECTS AND ELIGIBLE COSTS:**

**A.** The board may recommend to the authority that enterprise assistance from the fund should be made available for enterprise development projects as provided by Section 6-34-6 NMSA 1978.

**B.** Enterprise assistance from the fund shall be made only for eligible items, a determined by the authority, which includes:

- (1) opportunity enterprise financing;
- (2) opportunity enterprise loans;
- (3) acquiring title or other interest in an enterprise development project;
- (4) paying the reasonably necessary administrative costs, payments in lieu of taxes and other costs and fees incurred by the authority in carrying out the provisions of the act.

[2.93.1.10 NMAC – N, 4/25/2023]

#### **2.93.1.11 ENTERPRISE DEVELOPMENT PROJECT FINANCING:**

The authority may recommend structured enterprise assistance packages that include opportunity enterprise financing, opportunity enterprise leases, opportunity enterprise loans, or other type of assistance authorized by the authority and the board, if applicable. The structure, terms and conditions of the financial assistance will be determined by the authority. Upon completion of an enterprise development project, the authority shall allow the opportunity enterprise partner responsible for the completion of that project an opportunity to obtain an opportunity enterprise lease for that property, provided that any breach of the terms of any enterprise assistance may preclude that opportunity enterprise partner from leasing the property, and in that event, the property shall be made available for lease to other opportunity enterprise partners.

[2.93.1.11 NMAC – N, 4/25/2023]

#### **2.93.1.12 FINANCING APPROVAL REQUIREMENTS:**

Based on the priority and evaluation factors set forth in Sections 8, 9, and 10 above, as well as the requirements of the Act, the board may recommend to the authority enterprise development projects for consideration of enterprise assistance. Board recommendations may be considered by the authority but shall not be binding on the authority. A member of the board or employee of the authority with an interest, either direct or indirect, in an application or contract relating to enterprise assistance, shall disclose his or her interest to the authority and the board in writing and shall not participate in actions by the board or the authority with respect to that conflict.

[2.93.1.12 NMAC – N, 4/25/2023]

**2.93.1.13 [RESERVED]**

[2.93.1.13 NMAC – N, 4/25/2023; Rn. 2.93.1.20 NMAC, 7/30/2024]

**2.93.1.14 ENTERPRISE ASSISTANCE CONTRACT:**

**A.** The authority and opportunity enterprise partner awarded enterprise assistance will enter into a contract to establish the terms and conditions of enterprise assistance from the authority. The contract to provide enterprise assistance shall:

(1) define the roles and responsibilities of the authority and the opportunity enterprise partner;

(2) provide clawback or recapture provisions, if applicable, that protect the public investment in the event of a default on the contract;

(3) provide a finance plan detailing the financial contributions and obligations of the authority and opportunity enterprise partner;

(4) require an opportunity enterprise partner to provide guarantees, letters of credit or other acceptable forms of security, as determined by the authority;

(5) specify how rents, if applicable, will be collected and accounted for;

(6) specify how debts incurred on behalf of the opportunity enterprise partner will be repaid; and

(7) provide that, in the event of a default, the authority may (a) elect to take possession of the property, including the succession of all right, title and interest in the enterprise development project; and (b) terminate the lease or cease any further funding and exercise any other rights and remedies that may be available.

**B.** The interest rate on any enterprise assistance extended, if applicable, shall be determined by the authority.

**C.** The contract will contain provisions which require enterprise assistance recipients to comply with all applicable federal, state and local laws and regulations.

**D.** The authority will monitor terms of the contract and enforce or cause to be enforced all terms and conditions thereof, including prompt notice and collection. In the event of default under an enterprise assistance contract by an applicant, the authority may enforce its rights by suit or mandamus and may utilize all other available remedies under state and applicable federal law.

**E.** A list of contracts for enterprise assistance shall be provided to the board by the authority no later than thirty days from the execution of that contract. The board shall review contracts from time to time and determine whether the use of enterprise assistance is a prudent expenditure of public funds and report to the legislature annually on that determination. The board may also make recommendations to the authority of potential rulemaking, application or lending changes to ensure transparent and efficient processes for carrying out the provisions of the act.

[2.93.1.14 NMAC – N, 4/25/2023; A, 7/30/2024]

#### **2.93.1.15 ELIGIBILITY AND PRIORITIZATION POLICIES FOR HOUSING DEVELOPMENT PROJECTS:**

The board will determine which housing development projects to recommend to the authority for housing development assistance from the housing development revolving fund. Board policies shall give priority to projects that:

- A.** demonstrate local support and need,
- B.** create or expand attainable housing units within the state,
- C.** are located in political subdivisions that have implemented zoning reforms, and
- D.** other means of financing a proposed housing development project are unavailable or insufficient. The board shall establish policies to consider in prioritizing housing development projects.

[2.93.1.15 NMAC – N, 7/30/2024]

#### **2.93.1.16 HOUSING DEVELOPMENT PROJECT PROPOSAL, REVIEW, PRIORITIZATION AND APPROVAL PROCESS:**

- A.** The board will administer an outreach program to local governments and potential housing development partners for the purpose of making recommendations to the authority regarding housing assistance, and to notify applicants that housing development project proposals are being accepted for review by the housing development committee and the board for prioritization and recommendation for funding to the authority.
- B.** The authority will provide forms and guidelines for housing development project proposals and applications for housing development assistance. The authority may consider the recommendations and priorities of the board.
- C.** Applications for housing development assistance shall describe the scope and plans of the housing development project, demonstrate that the housing development project will create or expand attainable housing within the state, and provide sufficient

evidence that other means of financing a proposed housing development project are unavailable or insufficient, and include any other documentation or certifications that the authority deems necessary.

**D.** Authority staff will complete an initial evaluation of the application for housing assistance and housing development project proposals promptly following receipt in consideration of information provided by applicants according to the factors listed in Subsection C of 2.93.1.16. Such evaluation will include recommendations regarding suitability for housing development assistance. The authority may obtain input and information relevant to carrying out the purposes of the act from outside consultants in evaluating housing development project proposals and applications for housing assistance. The department will then forward to the housing development committee for review, the relevant application, and the corresponding recommendation of the department, along with all third-party input and information compiled by the department.

**E.** The housing development committee will consider the proposed housing development project and may confer with outside parties, including any person familiar with the proposed housing development project, as necessary to obtain more information on the feasibility, merit, and cost of the proposed housing development project. The housing development committee will make a recommendation to the board on each housing development project proposal.

**F.** Upon the recommendation of the housing development committee, the board will prioritize the proposed housing development projects for recommendation to the authority for consideration of housing assistance.

**G.** After completion of the review process by the housing development committee and the board and receipt of a favorable recommendation on the housing development project proposal, the prioritized housing development projects will be recommended by the board to the authority for consideration of housing assistance.

**H.** NMFA may request an additional application from recommended housing development assistance projects.

**I.** A member of the board or employee of the authority with an interest, either direct or indirect, in an application or contract relating to housing development assistance, shall disclose his or her interest to the authority and the board in writing and shall not participate in actions by the board or the authority with respect to that conflict.

[2.93.1.16 NMAC – N, 7/30/2024]

#### **2.93.1.17 HOUSING DEVELOPMENT PROJECTS AND ELIGIBLE COSTS:**

**A.** The board may recommend to the authority that housing development assistance from the housing development revolving fund should be made available for housing development projects as provided by Section 6- 34-13.3, NMSA 1978.

**B.** Housing development assistance from the housing development revolving fund shall be made only for eligible items, as determined by the authority, which includes:

- (1) housing development assistance.
- (2) paying the reasonably necessary administrative costs and other costs and fees incurred by the authority in carrying out the provisions of the act.

[2.93.1.17 NMAC – N, 7/30/2024]

#### **2.93.1.18 HOUSING DEVELOPMENT PROJECT FINANCING:**

The authority may recommend structured housing development assistance packages that include housing development loans. The structure, terms and conditions will be determined by the authority.

[2.93.1.18 NMAC – N, 7/30/2024]

#### **2.93.1.19 FINANCING APPROVAL REQUIREMENTS:**

Based on the priority and evaluation factors set forth in Sections 15, 16, and 17 above, as well as the requirements of the act, the board may recommend to the authority housing development projects for consideration of housing development assistance. Board recommendations may be considered by the authority but shall not be binding on the authority. A member of the board or employee of the authority with an interest, either direct or indirect, in an application or contract relating to housing assistance, shall disclose his or her interest to the authority and the board in writing and shall not participate in actions by the board or the authority with respect to that conflict.

[2.93.1.19 NMAC – N, 7/30/2024]

#### **2.93.1.20 RECONSIDERATION OF BOARD DECISIONS:**

Any applicant affected by a decision of the board may request reconsideration of the decision of the board by notifying the board in writing within 15 days following the meeting at which the decision was made. Notice of a decision made in an open meeting of the board is deemed to be given on the date of the meeting, and the time for notification of a request for reconsideration shall run from that date, regardless of whether any written notice of the decision is given by the board. A request for reconsideration shall state with particularity the grounds for reconsideration, including any factual or legal matter on which the applicant believes that there was an error by the board. Upon receiving a timely and proper request for reconsideration, the chair of the board will set the matter for reconsideration at the board's next regularly scheduled meeting or at a special meeting called for the purpose, at the chairman's discretion. Upon reconsideration by the board, the board will notify the applicant of the board's decision, in writing, within five working days of the decision. The decision of the board

on reconsideration is final. A request for reconsideration not timely or properly made will not be considered by the board.

[2.93.1.20 NMAC – N, 7/30/2024]

## **CHAPTER 94      LOCAL ECONOMIC DEVELOPMENT ACT (LEDA)**

### **PART 1      GENERAL PROVISIONS**

#### **2.94.1.1      ISSUING AGENCY:**

Economic Development Department.

[2.94.1.1 NMAC – N, 06/27/2023]

#### **2.94.1.2      SCOPE:**

All persons or entities applying for Local Economic Development Act funds through the Economic Development Department.

[2.94.1.2 NMAC - N, 06/27/2023]

#### **2.94.1.3      STATUTORY AUTHORITY:**

The general management of the Local Economic Development Act (LEDA) program shall be the responsibility of the economic development department as prescribed by governing legislation, Section 5-10-1 NMSA 1978.

[2.94.1.3 NMAC - N, 06/27/2023]

#### **2.94.1.4      DURATION:**

Permanent.

[2.94.1.4 NMAC - N, 06/27/2023]

#### **2.94.1.5      EFFECTIVE DATE:**

June 27, 2023 unless a later date is cited at the end of the section.

[2.94.1.5 NMAC - N, 06/27/2023]

#### **2.94.1.6      OBJECTIVE:**

Under the Local Economic Development Act, Section 5-10-1 NMSA 1978, the New Mexico economic development department is granted authority to administer grants to local governments (municipality or county) to assist expanding or relocating companies that are qualified entities that will stimulate economic development and produce public benefits pursuant to LEDA.

[2.94.1.6 NMAC - N, 06/27/2023]

#### **2.94.1.7 DEFINITIONS:**

**A. "Qualifying entity"** is a corporation, limited liability company, partnership, joint venture, syndicate, or association that is an economic-base employer, also referred to as "company" as defined in Subsection L of Section 5-10-3 NMSA 1978.

**B. "Economic-base employer"** is an employer who is a manufacturer of a product, or a non-retail service provider who derives over fifty percent of their revenue outside of the borders of New Mexico.

**C. "Fiscal agent"** is a local or regional government entity who serves as the agent for receipt of initial investment and subsequent disbursement/reimbursement of funds based on the approval of the economic development department.

**D. "Security"** is a tradable financial asset, or collateral, pledged by the qualifying entity to guarantee the LEDA investment, and may be, but is not limited to, in the form of letter of credit, surety bond, mortgage security, security agreement-escrow or lien, security interest-equipment or lien, or uniform commercial code filing.

**E. "Project participation agreement (PPA)"** is the agreed upon scope of work between the fiscal agent and the qualifying entity.

**F. "Intergovernmental agreement (IGA)"** is the agreed upon scope of work between the fiscal agent and the economic development department.

**G. "Economic impact analysis (EIA)"** is an analysis that addresses the economic impact to the local and state tax base using the project information provided by the qualifying entity.

**H. "Project term sheet"** is a document which identifies security interest that is equal to the approved amount of LEDA investment, performance metrics, claw back provisions, expected project leverage (private investment versus public funds requested), a job creation timeline and a project starting head count.

**I. "LEDA summary"** is a document outlining the overall scope and terms of the LEDA project.

**J. "Project ordinance"** is legislation enacted by a local or regional government authority that outlines the project scope and includes a PPA and IGA.

[2.94.1.7 NMAC - N, 06/27/2023]

#### **2.94.1.8 QUALIFICATIONS AND REQUIREMENTS:**

**A. Company eligibility:** Companies that increase the economic base of New Mexico are eligible to be considered for LEDA funds. The company must manufacture a product in New Mexico or provide a non-retail service with at least fifty percent of total revenues generated from a client base outside of New Mexico. Eligible companies must also reside in New Mexico either through ownership or lease of a facility and be in good standing with the economic development department and all other state entities. The intent is to support companies expanding in or relocating to New Mexico.

**B. Project eligibility:** The project must have significant investment into permanent capital infrastructure (buildings, roads, utilities) and be an expansion or relocation that results in the creation of permanent full-time direct employment. The project must be sufficiently funded and ready to proceed. All projects funded are statutorily required to provide security equal to the LEDA public investment.

**C. Reimbursable costs:** Eligible costs may include, but are not limited to, the purchase, lease, grant, construction, reconstruction, improvement or other acquisition or conveyance of land, buildings or other infrastructure and public works improvements essential to the location or expansion of a company.

**D. LEDA investment/funding:** The level of public investment into any LEDA project is at the discretion of the executive branch and varies based on project quality and location. The main criterion of the evaluation includes total significant capital investment, total number of new job creation, and quality of new job wages. Additional consideration is given to projects that demonstrate location in rural and underserved areas of New Mexico, significant community impact and support, and environmentally sustainable outcomes. All funding decisions are made by the executive branch based upon recommendations by the secretary of the economic development department and are a formal offer to apply, go through due diligence and formal public process. All LEDA investments are funded on a strictly reimbursable basis after the company has incurred LEDA eligible expenses and met benchmarks provided in the PPA.

[2.94.1.8 NMAC - N, 06/27/2023]

#### **2.94.1.9 PROCEDURAL OVERVIEW:**

**A. Economic development department role:** The economic development department determines company and project eligibility through initial project data intake and vetting prior to invitation to formally apply for LEDA investment funds. Due diligence is conducted throughout the application process. The economic development

department works with the executive branch to determine an appropriate LEDA project investment based on capital expenditures, job creation, location of relocating or expanding company and other factors related to the public good.

(1) It is the responsibility of the economic development department to conduct due diligence, including a commercial credit check and fiscal analysis to determine the benefit of the LEDA project and potential investment of state funds to the local government and state.

(a) The Economic Development Department will collect qualifying entity and project information necessary to complete the Economic Impact Analysis (EIA) and an incentive analysis of all applicable incentives within New Mexico.

(b) The economic development department will confirm local government support for the project and identify any additional local incentives.

(c) The economic development department will prepare a LEDA summary which is provided to the executive branch for its consideration of LEDA investment funds.

(2) Upon the executive branch's provisional determination of the level of LEDA investment funding, the economic development department will issue an offer of LEDA investment and an invitation to formally apply for a LEDA grant to the qualifying entity. The provisional offer is subject to the formal application, additional due diligence, and local approval.

(3) The economic development department will provide access to the online application to the company representative designated to complete the LEDA application. Information collected in a LEDA application includes, but is not limited to, the following elements: company information and structure, project description, total capital investment, land, building, equipment, infrastructure, total number, and types of jobs to be created as well as projected job ramp, wages and benefits, up to three years of financial statements, proformas, and sources and uses of all funding. The economic development department reviews all LEDA applications and approves when deemed complete and ready for the public process.

**B. Community role:** The local government acts as the fiscal agent for the receipt of initial LEDA investment funds and subsequent disbursements/reimbursement of funds to the qualifying entity based on the economic development department's approval. The fiscal agent will keep all project funds in a separate account and obtain prior approval from the economic development department for all disbursements to the qualifying entity to ensure that all reimbursable expenses are eligible. The economic development department will work with the fiscal agent and the qualifying entity to ensure the qualifying entity maintains the performance benchmarks for the term of the PPA. The fiscal agent is responsible for tracking any outstanding LEDA project

balances. Any unused LEDA funds revert to the economic development department at the close of a project.

**C. Public process:** All LEDA projects are required to have a public hearing and the adoption of an ordinance by the fiscal agent's governing body. The project ordinance passed by the local community includes a PPA outlining the agreed upon scope of work between the fiscal agent and the qualifying entity, an IGA between the fiscal agent and the economic development department for the transfer and disbursement of public funds. The PPA will include job creation requirements, public investment distribution milestones (determined by established performance benchmarks) and claw back requirements.

(1) Upon adoption of the ordinance the economic development department will work with the qualifying entity and the fiscal agent to execute the PPA, IGA and security agreement.

(2) Once all LEDA project documents have been fully executed the economic development department will work with the fiscal agent to transfer LEDA investment money to the fiscal agent.

**D. Reporting:** All LEDA projects are required to submit quarterly job reports and annual economic impact data per the terms outlined in the PPA.

(1) The economic development department will work with the fiscal agent and the qualifying entity to ensure all reports are accurate and timely.

(2) The economic development department will provide the qualifying entity access to the online reporting system to create and submit quarterly job reports and actual annual economic impact data.

(3) The economic development department will create an annual EIA using the actual economic impact data provided by the qualifying entity to demonstrate return on investment.

**E. LEDA project closeout:** A LEDA project shall be closed out by passage by the fiscal agent governing body of a repealing ordinance unless the enabling ordinance includes a sunset provision.

(1) The economic development department will collect actual economic impact data from the qualifying entity to prepare a final EIA and demonstrate return on investment.

(2) The economic development department will assist the fiscal agent in closing out the LEDA project fund, returning any unexpended funds to the economic development department, and the release of any instrument of security for the LEDA project to the company.

(3) The fiscal agent is responsible for enacting an ordinance to repeal the enabling ordinance when the project is complete or all clawbacks have been received unless the enabling ordinance includes a sunset provision.

[2.94.1.9 NMAC - N, 06/27/2023]

## **CHAPTER 95-104: [RESERVED]**

## **CHAPTER 105: LOCAL GOVERNMENT EXPENDITURES**

### **PART 1: GENERAL PROVISIONS [RESERVED]**

### **PART 2: LODGERS' TAX QUARTERLY REPORT**

#### **2.105.2.1 ISSUING AGENCY:**

Department of Finance and Administration, Local Government Division, Bataan Memorial Building, Room 201, Santa Fe, NM 87503.

[9/30/96; Recompiled 10/01/01]

#### **2.105.2.2 SCOPE:**

Municipalities, counties and entities created by joint powers agreement which expend occupancy tax revenue. The purposes of these regulations are to establish guidelines for reporting occupancy tax collections and expenditures by municipalities and counties.

[9/30/96; Recompiled 10/01/01]

#### **2.105.2.3 STATUTORY AUTHORITY:**

Section 6-6-4.1 NMSA 1978 (1996 Supp.) requires the local government division to promulgate rules and regulations that require the governing body of any municipality or county imposing and collecting an occupancy tax pursuant to the Lodgers' Tax Act to report to the local government division on a quarterly basis any expenditure of occupancy tax funds pursuant to Sections 3-38-15 and 3-38-21 NMSA 1978. Section 3-38-17.2 NMSA 1978 (1996 Supp.) requires the governing body of any municipality or county imposing and collecting an occupancy tax to report to the local government division on a quarterly basis any expenditure of occupancy tax funds.

[9/30/96; Recompiled 10/01/01]

#### **2.105.2.4 DURATION:**

Permanent.

[9/30/96; Recompiled 10/01/01]

#### **2.105.2.5 EFFECTIVE DATE:**

September 30, 1996, [unless a later date is cited at the end of a section.]

[9/30/96; Recompiled 10/01/01]

#### **2.105.2.6 OBJECTIVE:**

The objective of Part 2 of Chapter 105 is to provide a uniform format for municipalities, counties and entities created by joint powers agreements to follow when reporting the expenditure of occupancy tax revenues to the local government division.

[9/30/96; Recompiled 10/01/01]

#### **2.105.2.7 DEFINITIONS:**

A. "Expenditure summary" means the amount of occupancy tax revenue expended by a reporting entity.

B. "Local government division" means the local government division of the department of finance and administration.

C. "Lodgers' tax quarterly report" means the form upon which reporting entities must provide revenue and expenditure information to the local government division.

D. "Non-promotional fund" means the fund containing occupancy tax proceeds which may be used for any purpose authorized by Section 3-38-21 NMSA 1978 (1996 Supp.).

E. "Percent imposed" means the percent of occupancy tax imposed by the reporting entity.

F. "Promotional fund" means the fund containing occupancy tax proceeds which must be used for advertising, publicizing and promoting tourist-related attractions, facilities and events.

G. "Quarterly" means September 30; December 31; March 31; and June 30.

H. "Reporting entity" means any municipality, county or entity created by joint powers agreement that receives occupancy revenue directly or via intergovernmental transfer.

I. "Revenue allocation" means the dedication of occupancy tax revenue to a particular fund or for a particular purpose.

J. "Revenue summary" means the amount of occupancy tax revenue received by a reporting entity.

[9/30/96; Recompiled 10/01/01]

#### **2.105.2.8 ELIGIBLE USES OF TAX PROCEEDS:**

A. Sections 3-38-13 to 3-38-24 NMSA 1978, the Lodgers' Tax Act, authorizes municipal and county governments to adopt ordinances imposing occupancy tax for revenues on lodging establishments within municipal boundaries or within that part of the county outside of municipal boundaries.

B. Proceeds may be used to defray the costs of:

- (1) collecting and otherwise administering the tax;
- (2) establishing, operating, purchasing, constructing, otherwise acquiring, reconstructing, extending, improving, equipping, furnishing or acquiring real property or any interest in real property for the site or grounds for tourist related facilities, attractions or transportation systems of the municipality, the county in which the municipality is located or the county;
- (3) advertising, publicizing and promoting tourist-related attractions, facilities and events of the municipality or county and tourist facilities or attractions within the area;
- (4) providing police and fire protection and sanitation service for tourist-related events, facilities and attractions located in the respective municipality or county;
- (5) paying principal and interest on certain premiums due in connection with lodgers' tax revenue bonds; and
- (6) performing audits pursuant to Section 3-38-17.1 NMSA 1978.

[9/30/96; Recompiled 10/01/01]

#### **2.105.2.9 LIMITATION OF PROCEEDS USE:**

A. The occupancy tax may not exceed five percent of the gross taxable rent.

B. The following portions of occupancy tax proceeds must be used for advertising, publicizing and promoting tourist-related attractions, facilities and events.

(1) Municipalities or counties imposing a tax of no more than two percent must expend one-fourth of the tax proceeds for those purposes.

(2) Municipalities located outside of class A counties and counties not classified as class A counties imposing a tax of more than two percent must expend at least one-half of the proceeds from the first three percent of the tax and one-fourth of the proceeds in excess of three percent for those purposes.

(3) Municipalities located in class A counties and class A counties imposing a tax of more than two percent must expend at least one-half of all tax proceeds for those purposes.

C. Proceeds required to be used to advertise, publicize and promote must be used within two years of the close of the fiscal year in which they were collected and shall not be used for any other purpose.

D. The expenditure requirements of 9.2.2 [now Paragraph 2 of Subsection B of 2.105.9 NMAC] may be reduced, if necessary, to make principal and interest payments on lodgers' tax bonds issued prior to January 1, 1996.

[9/30/96; Recompiled 10/01/01]

#### **2.105.2.10 REPORTING REQUIREMENTS:**

A. All reporting entities must submit a lodgers' tax quarterly report to the local government division within 30 days following the end of the quarter.

B. All reporting entities must provide copies of the lodgers' tax quarterly report to their advisory board when they are filed with the local government division.

[9/30/96; Recompiled 10/01/01]

#### **2.105.2.11 LODGERS' TAX QUARTERLY REPORT FORM:**

The lodgers' tax quarterly report shall include:

A. the percent imposed;

B. a revenue summary detailing the amount of lodgers' tax proceeds, investment income, intergovernmental transfers and other revenue received by a reporting entity as result of the occupancy tax;

C. a revenue allocation detailing the amount of revenue dedicated to the non-promotional fund, the promotional fund and administrative costs; administrative costs shall not exceed ten percent of the total revenue prior to allocation between promotional and non-promotional funds;

D. a cash balance summary stating the amount of cash on hand in the non-promotional and promotional funds;

E. an expenditure summary identifying the amount expended from the non-promotional fund for contractual services, operating expenses, capital outlay, debt service and net transfers and the amount expended from the promotional fund for contractual services, tourist related events and net transfers; and for expenditures in the contractual services category, a description of the activity or event, the date of the activity or event, and name of the contractor must be included.

[9/30/96; Recompiled 10/01/01]

## **CHAPTER 106-109: [RESERVED]**

## **CHAPTER 110: LOCAL GOVERNMENT GRANTS**

### **PART 1: GENERAL PROVISIONS [RESERVED]**

### **PART 2: SMALL CITIES COMMUNITY DEVELOPMENT BLOCK GRANT**

#### **2.110.2.1 ISSUING AGENCY:**

Department of Finance and Administration Local Government Division, Suite 202  
Bataan Memorial Building Santa Fe, New Mexico 87501.

[2.110.2.1 NMAC - Rp, 2 110.2.1 NMAC, 11/15/2016]

#### **2.110.2.2 SCOPE:**

All counties and incorporated municipalities, except the cities of Albuquerque, Farmington, Las Cruces, Santa Fe and Rio Rancho.

[2.110.2.2 NMAC - Rp, 2 110.2.2 NMAC, 11/15/2016]

#### **2.110.2.3 STATUTORY AUTHORITY:**

Title 1 of the Housing and Community Development Act of 1974, as amended.

[2.110.2.3 NMAC - Rp, 2 110.2.3 NMAC, 11/15/2016]

#### **2.110.2.4 DURATION:**

Permanent.

[2.110.2.4 NMAC - Rp, 2 110.2.4 NMAC, 11/15/2016]

#### **2.110.2.5 EFFECTIVE DATE:**

November 15, 2016, unless a later date is cited at the end of a section.

[2.110.2.5 NMAC - Rp, 2 110.2.5 NMAC, 11/15/2016]

#### **2.110.2.6 OBJECTIVE:**

The objective of Part 2 of Chapter 110 is to establish procedures to be used by counties and incorporated municipalities when applying for a small cities community development block grant.

[2.110.2.6 NMAC - Rp, 2 110.2.6 NMAC, 11/15/2016]

#### **2.110.2.7 DEFINITIONS:**

**A. "Asset management"** means a systematic process of maintaining, upgrading, and operating physical assets cost-effectively. It combines engineering principles with sound business practices and economic theory, and it provides tools to facilitate a more organized, logical approach to decision making. It is a planning process that ensures the most value from each asset with a plan to rehabilitate and replace them when necessary. An accurate and up-to-date asset management plan will help communities comply with the government accounting standards board's statement #34 (GASB 34), an accounting standard for publicly owned systems.

**B. "Blighted area"** means, pursuant to the Metropolitan Redevelopment Act, Section 3-60A-4 NMSA 1978 (as amended), "an area within the area of operation other than a slum area that, because of the presence of a substantial number of deteriorated or deteriorating structures, predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions of title, improper subdivision or lack of adequate housing facilities in the area or obsolete or impractical planning and platting or an area where a significant number of commercial or mercantile businesses have closed or significantly reduced their operations due to the economic losses or loss of profit due to operating in the area, low levels of commercial or industrial activity or redevelopment or any combination of such factors, substantially impairs or arrests the sound growth and economic health and well-being of a municipality or locale within a municipality or an area that retards the provisions of housing accommodations or constitutes an economic or social burden and is a menace to the public health, safety, morals or welfare in its present condition and use."

**C. "CDBG"** means the small cities community development block grant program.

**D. "Council"** means the New Mexico community development council.

**E. "Council of governments"** means a regional association of municipalities, counties and special districts formed to provide planning and other services to its member organization.

**F. "Department"** means the department of finance and administration.

**G. "Division"** means the local government division.

**H. "Economic development"** means an activity that improves a community's economic base by using private and public investments that provide expanded business activity, jobs, personal income and increased local revenues in a defined geographic area.

**I. "Federal rules"** means code of federal regulations, housing and urban development 24 CFR Part 570 which governs the CDBG program.

**J. "ICIP"** means an infrastructure capital improvement plan. An ICIP is a planning document developed by a unit of local government, water association, or land grant/merced that includes capital improvement priorities over a five year period and is developed and updated annually. An ICIP includes policy direction, funding time frames, estimated costs, justifications, and details of each specific infrastructure capital improvement project proposed, by year, over the five year period.

**K. "Land grant/merced"** means a political subdivision of the state organized under Section 49-1-1 through 49-1-23 NMSA 1978, Land Grants General Provisions.

**L. "Low and moderate income person"** means a member of a household whose income would qualify as "very low income" under the Section 8 housing assistance payments program. Section 8 limits are based on fifty percent of the county median income. Similarly, CDBG moderate income is based on Section 8 "lower income" limits, which are generally tied to eighty percent of the county median low and moderate income.

**M. "Non-rural"** means a county or an incorporated municipality that does not meet the definition of rural.

**N. "Program income"** means amounts earned by a unit of general local government or its sub recipient that were generated from the use of CDBG funds.

**O. "Rural"** means a county with a population of less than 25,000 and an incorporated municipality with a population of less than 3,000. For purposes of determining population a unit of local government, water association, or land grant/merced must use Attachment I at the end of 2.110.2 NMAC.

**P. "SBA"** means the United States small business administration.

**Q. "Set-aside"** means a portion of all CDBG funding received by the CDBG program that is annually allocated by the council to be used only for certain set-aside categories that are chosen by the council.

**R. "Slum area"** means, pursuant to the Metropolitan Redevelopment Act, Section 3-60A-4 NMSA 1978 (as amended), "an area within the area of operation in which numerous buildings, improvements and structures, whether residential or non-residential, which, by reason of its dilapidation, deterioration, age, obsolescence or inadequate provision for ventilation, light, air, sanitation or open spaces, high density of population, overcrowding or the existence of conditions that endanger life or property by fire or other causes, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime and is detrimental to the public health, safety, morals or welfare."

**S. "Units of local government"** means an incorporated municipality or county.

**T. "Water association"** means political subdivisions of the state organized under Section 3-29-1 through Section 3-29-20 NMSA 1978, the "Sanitary Projects Act" or Section 73-21-1 through Section 73-21-55 NMSA 1978, the "Water and Sanitation District Act".

[2.110.2.7 NMAC - Rp, 2 110.2.7 NMAC, 11/15/2016]

#### **2.110.2.8 INTRODUCTION:**

**A.** The council is responsible for allocating grants under the CDBG program to assist local communities with basic infrastructure and community development needs.

**B.** These application regulations will govern the CDBG appropriation allocated to the state from the United States department of housing and urban development.

**C.** As part of their administrative responsibility, the council and the division will continue to provide technical assistance to prospective applicants and grantees. The nature of these programs requires a thorough outreach effort to ensure that units of local government are aware of program requirements.

**D.** The council and the division assure local entities and citizens of the state of New Mexico that public comment will be solicited should the council choose to make any substantial changes to these application regulations.

[2.110.2.8 NMAC - Rp, 2 110.2.8 NMAC, 11/15/2016]

#### **2.110.2.9 PROGRAM OBJECTIVES:**

**A.** The CDBG program was established under Title I of the Housing and Community Development Act of 1974, as amended, to assist communities in providing essential

community facilities, providing decent housing for residents, promoting economic development, and maintaining a suitable living environment.

**B.** State and national objectives of the CDBG program require that assistance be made available for activities that address at least one of the following, which are described in greater detail in 2.110.2.16 NMAC:

- (1) benefit principally low and moderate income families;
- (2) aid in the prevention or elimination of slums or blight;
- (3) meet other community development needs of recent origin having a particular urgency because existing conditions pose a serious and immediate threat to the health and welfare of the community where other financial resources are not available to meet such needs.

**C.** The state encourages successful applicants to award a fair share of contracts and subcontracts to small, minority, and women's businesses and to commit itself to hire locally for any employment opportunities that will be created as a result of project funding.

[2.110.2.9 NMAC - Rp, 2 110.2.9 NMAC, 11/15/2016]

#### **2.110.2.10 ELIGIBLE APPLICANTS:**

**A.** All counties, incorporated municipalities, and New Mexico mortgage finance authority (MFA) are eligible to apply except: the city of Albuquerque, the city of Farmington, the city of Las Cruces, the city of Santa Fe and the city of Rio Rancho which cannot apply since they receive funding directly from the department of housing and urban development (Title I, Section 106) as entitlement cities.

**B.** Other entities such as water associations, sanitation districts, land grants, public nonprofit groups, council of governments, mutual domestic water consumer associations, etc., cannot apply directly for assistance, other than planning grants.

**C.** However, these entities may be involved in the execution of an approved CDBG project if the eligible applicant chooses to operate the program through such an entity under a contractual agreement.

**D.** Indian pueblos and tribes receive funding directly from the department of housing and urban development (Title I, Section 107). Native American tribes are encouraged to submit applications to the Albuquerque HUD Office of Native American Programs, 201 3rd St., N.W., Suite 1830, Albuquerque, New Mexico 87102-3368, (505) 346-6923.

[2.110.2.10 NMAC - Rp 2 110.2.10 NMAC, 11/15/2016]

## **2.110.2.11 ELIGIBLE ACTIVITIES/CATEGORIES:**

Applicants may apply for funding assistance under the following categories:

**A. Community infrastructure:** Eligible activities may include, but are not limited to:

- (1) real property acquisition;
- (2) construction or rehabilitation of the following:
  - (a) water systems;
  - (b) sewer systems;
  - (c) municipal utilities;
  - (d) roads;
  - (e) streets;
  - (f) highways;
  - (g) curbs;
  - (h) gutters;
  - (i) sidewalks;
  - (j) storm sewers;
  - (k) street lighting;
  - (l) traffic control devices;
  - (m) parking facilities;
  - (n) solid waste disposal facilities.

**B. Housing:** Eligible activities may include, but are not limited to:

- (1) real property acquisition;
- (2) rehabilitation;
- (3) clearance;

(4) demolition and removal of privately-owned or acquired property for use or resale in the provision of assisted housing;

(5) provision of public facilities to increase housing opportunities;

(6) financing the repair, rehabilitation and in some cases reconstruction of privately-owned residential or other properties through either loan or grant programs;

(7) certain types of housing modernization;

(8) temporary relocation assistance;

(9) code enforcement; and

(10) historic preservation activities;

(11) not to exceed sixty-five thousand dollars (\$65,000) in CDBG funds per home can be used on home rehabilitation/repair activities.

**C. Public facility capital outlay:** Eligible activities may include, but are not limited to:

(1) real property acquisition;

(2) construction or improvement of community centers;

(3) senior citizen centers;

(4) non-residential centers for the handicapped such as sheltered workshops;

(5) other community facilities designed to provide health, social, recreational or similar community services for residents.

**D. Economic development:** The economic development category is established to assist communities in the promotion of economic development and is described in 2.110.2.26 NMAC.

**E. Emergency:** The emergency fund provides funding for emergency projects that address life threatening situations resulting from disasters or imminent threats to health and safety.

(1) Applications under this category will be accepted throughout the year.

(2) Application shall include verification of emergency from an authoritative state agency documenting the need for the emergency project, and shall be submitted

no later than 18 months from the date of the authoritative state agency's written verification of emergency.

**(3)** An applicant for emergency funding must verify that it does not have sufficient local resources to address the life threatening condition; and that other federal or state resources have been explored and are unavailable to alleviate the emergency.

**F. Planning:** Municipalities, counties, water associations, water and sanitation districts, and land grants are eligible to apply directly for planning grants. Municipalities or counties who have a comprehensive plan dated five years or greater from the date of application submission are required to use CDBG planning grant funds solely for the development of a comprehensive plan. A comprehensive plan must be focused on a community's physical development over the next 15-20 years related to the goals and policies of the community, developed with input from all segments of the community, adopted by resolution or ordinance, and include as a minimum the following required elements and may include the following optional elements:

**(1)** required elements:

**(a)** land use including:

**(i)** an analysis and mapping of existing land patterns and an inventory of the amount, type and intensity of uses by land category;

**(ii)** a projection of the distribution, location and extent of future land uses by land use category over a 20-year period;

**(iii)** goals, objectives and policies that address maintaining a broad variety of land uses, including the range of uses existing when the plan is adopted or amended; and

**(iv)** specific actions and incentives that the entity may use to promote planned development, reduction in greenhouse gas emissions, or otherwise encourage certain identified development patterns and the locations where such development patterns should be encouraged;

**(b)** housing including:

**(i)** an analysis of existing housing supply and demand, and forecasted housing needs;

**(ii)** goals, objectives and policies for the improvement of housing quality, variety and affordability, for reduction of greenhouse gas emissions, and for provision of adequate sites for housing and housing opportunities for all segments of the community;

(iii) a description of the actions that may be taken to implement housing goals, objectives and policies; and

(iv) must comply with the affordable housing act.

(c) transportation including:

(i) description and assessment of the location, type, capacity and condition of existing transportation facilities, such as freeways, arterial and collector streets, mass transit or other modes of transportation as may be appropriate;

(ii) goals, objectives and policies for encouraging safe, convenient, efficient and economical transportation, including mass transit and facilities for bicyclists and pedestrians, for reduction of greenhouse gas emissions, and potential funding mechanisms; and

(iii) a description and assessment of proposed location, type and capacity of proposed transportation facilities designed to implement transportation goals, objectives and policies and a description of funding mechanisms that will be used to fund proposed transportation improvements;

(d) infrastructure including:

(i) a description and assessment of the location, type, capacity and condition of existing infrastructure, including emergency services, sewage, drainage, local utilities and other types of facilities;

(ii) goals, objectives and policies for promoting the efficient provision of infrastructure; and

(iii) a description and assessment of proposed facility expansion and improvements designed to support planned uses and implement infrastructure goals, objectives and policies;

(e) economic development including:

(i) a description of existing job composition and trends by industry and location characteristics, such as access to transportation or proximity to natural or human resources, that influence the economic development potential of the entity;

(ii) goals, objectives and policies for promoting economic development; and

(iii) a description of the actions that the entity will take to implement economic development goals, objectives and policies;

**(f)** water including:

- (i)** description and assessment of the sources of water supply;
- (ii)** the existing demand for water by residential, commercial, institutional, industrial and recreational sectors;
- (iii)** assessment of the unaccounted for water losses due to leaks, theft or other reasons;
- (iv)** goals, objectives and policies for promoting the efficient use of water and for managing periods of drought; and
- (v)** an analysis of the demand for water that will result from future growth projected in the plan, when added to existing uses, and how the demand for water that will result from future projected growth will be served by current water supplies, water conservation, water reuse or a plan to obtain additional water supplies or increase water use efficiencies;

**(g)** hazard including:

- (i)** an analysis of the risks of hazards such as wildfire, floods, extreme weather conditions, accidents, and terrorism;
  - (ii)** goals, objectives and policies for hazard mitigation; and
  - (iii)** a description of the actions that will be taken to mitigate hazards;
- and

**(h)** implementation; a compilation of the plan's goals, objectives, policies, standards or guidelines, along with specific actions to be completed in a stated sequence, which start with adoption of the comprehensive plan by ordinance;

**(2)** optional elements:

- (a)** drainage;
- (b)** parks, recreation and open space;
- (c)** tourism;
- (d)** growth management;
- (e)** fiscal impact analysis;
- (f)** intergovernmental cooperation;

- (g) social services;
- (h) historic preservation;
- (i) asset management plan.

(3) if the entity has a comprehensive plan that is not more than five years old at the date of application, it may apply for funding assistance for any of the following planning activities:

- (a) data gathering analysis and special studies;
- (b) base mapping, aerial photography, geographic information systems, or global positioning satellite studies;
- (c) improvement of infrastructure capital improvement plans and individual project plans;
- (d) development of codes and ordinances, that further refine the implementation of the comprehensive plan;
- (e) climate change mitigation and adaptation plan;
- (f) preliminary engineering report (according to United States department of agriculture/rural utilities service (USDA/RUS) guidelines);
- (g) related citizen participation or strategic planning process;
- (h) other functional or comprehensive planning activities;
- (i) asset management plan; or
- (j) regionalization of infrastructure and service delivery.

(4) applicants may apply for planning assistance throughout the year.

#### **G. Colonias:**

(1) The Colonias category is established in the amount of ten percent of the annual CDBG allocation for specific activities including water, sewer and housing improvements, which are the three conditions that qualify communities for designation to be carried out in areas along the U.S. - Mexican border.

(2) Eligible applicants for the Colonias set aside are municipalities and counties located within 150 miles of the U.S. - Mexico border.

**(3)** Colonias must be designated by the municipality or county in which it is located. The designation must be on the basis of objective criteria, including:

- (a)** lack of potable water supply; or
- (b)** lack of adequate sewage systems; or
- (c)** lack of decent, safe and sanitary housing.

**(4)** Appropriate documentation to substantiate these conditions must be provided along with the application for funding.

[2.110.2.11 NMAC - Rp, 2 110.2.11 NMAC, 11/15/2016]

#### **2.110.2.12 OTHER ELIGIBLE ACTIVITIES:**

**A.** Administrative costs associated with implementing a program such as preparing environmental reviews, and other costs for services are eligible activities.

**B.** Although the costs of conducting program audits are considered an eligible activity, it is recommended that they be paid by the applicant to expedite grant closeout.

**C.** Applicants may use fifteen percent of a CDBG grant for public facility program activities including:

- (1)** employment;
- (2)** crime prevention;
- (3)** child care;
- (4)** drug abuse prevention;
- (5)** education;
- (6)** energy conservation;
- (7)** welfare and recreation.

**D.** The council may pledge future CDBG allocations to guarantee repayment of loans to non-entitlement municipalities and counties for CDBG eligible projects in accordance with Section 108 of the Housing and Community Development Act of 1974, as amended.

[2.110.2.12 NMAC - Rp, 2 110.2.12 NMAC, 11/15/2016]

### **2.110.2.13 INELIGIBLE ACTIVITIES:**

The following are among the activities that are not eligible for CDBG funding assistance:

- A.** construction or rehabilitation of buildings used for the general conduct of government, such as city halls or county courthouses; compliance with the Americans with Disabilities Act is an eligible activity;
- B.** general operation and maintenance expenses associated with public facilities or services;
- C.** income maintenance;
- D.** housing allowance payments and mortgage subsidies;
- E.** expenditures for the use of equipment or premises for political purposes, sponsoring or conducting candidates' meetings, engaging in voter registration, voter transportation or other political activities;
- F.** costs involved in the preparation of applications and securing of funding.

[2.110.2.13 NMAC - Rp, 2 110.2.13 NMAC, 11/15/2016]

### **2.110.2.14 RURAL ALLOCATION:**

- A.** A minimum of fifteen percent of the CDBG allocation will be awarded to rural counties and municipalities.
- B.** Rural applicants will compete for funding from the community infrastructure, housing, Colonias, and public facility capital outlay categories.
- C.** Rural and non-rural applicants will compete for funding from the economic development, emergency and planning categories.

[2.110.2.14 NMAC - Rp, 2 110.2.14 NMAC, 11/15/2016]

### **2.110.2.15 PROGRAM PUBLIC PARTICIPATION REQUIREMENTS:**

Applicants must provide opportunities for public participation in the development of community development goals, objectives, and applications for funding assistance by undertaking the following activities:

- A.** provide for and encourage citizen participation within their areas of jurisdiction with particular emphasis on participation by persons of low and moderate income;

**B.** provide citizens with reasonable and timely access to local meetings, information, and records relating to proposed and actual use of funds;

**C.** provide for technical assistance as determined by the applicant, groups and representatives of low and moderate income persons that request assistance in developing proposals; the level and type of assistance is to be determined by the applicant.

**D.** provide for public hearings to obtain citizen participation and respond to proposals and questions at all stages;

**E.** prior to selecting a project and submitting an application for CDBG funding assistance, conduct at least one public hearing for the following purposes:

**(1)** to advise citizens of the amount of CDBG funds expected to be made available for the current fiscal year;

**(2)** to advise citizens of the range of activities that may be undertaken with the CDBG funds;

**(3)** to advise citizens of the estimated amount of CDBG funds proposed to be used for activities that will meet the national objective to benefit to low and moderate income persons;

**(4)** to advise citizens of the proposed CDBG activities likely to result in displacement, and the unit of general local government's anti-displacement and relocation plans;

**(5)** to obtain recommendations from citizens regarding the community development and housing needs of the community;

**F.** After considering all recommendations and input provided at the public hearing(s), the governing body must select one project for which to submit an application for funding assistance at an official public meeting.

**G.** The applicant must conduct a second public hearing prior to the submission of the application. Public hearing notices must be published in the non-legal section of newspapers, or posted in a minimum of three prominent public places within the project area, with public access. Notice of any public hearing must be published or posted at least 10 days in advance of the hearing date. Emergency hearings may be called upon 72 hour's notice unless threat of personal injury or property damage requires less notice. Emergency hearings may be called only under unforeseen circumstances, which demand immediate action to protect the health, safety and property of citizens or to protect the applicant from substantial financial loss. All applicants must be in compliance with all provisions of the Open Meetings Act Section 10-15-1 NMSA 1978 et., seq.

**H.** Evidence of compliance with these public participation requirements must be provided with each application, i.e., hearing notice, minutes of public meetings, list of needs and activities to be undertaken, etc.

**I.** Amendments to goals, objectives, and applications are also subject to public participation.

**J.** Applicants must provide for timely written answers to written complaints and grievances within 15 working days where practicable.

**K.** Applicants must identify how the needs of non-English speaking residents will be met in the case of public hearings where a significant number of non-English speaking residents can be reasonably expected to participate.

[2.110.2.15 NMAC – Rp, 2 110.2.15 NMAC, 11/15/2016]

#### **2.110.2.16 PROGRAM REQUIREMENTS FOR MEETING NATIONAL PROGRAM OBJECTIVES:**

Each CDBG application must meet at least one of the following three national objectives.

**A.** Low and moderate income benefit - an activity identified as principally benefiting fifty one percent persons of low and moderate income will be considered eligible only if it meets one of the following criteria:

**(1)** the activity must be carried out in a neighborhood or area consisting predominantly of persons of low and moderate income and provide services to such persons; or

**(2)** the activity must involve facilities designed for use by a specific group of people or clientele predominantly of low and moderate income; or

**(3)** the activity must add or improve permanent residential structures that will be occupied by low and moderate income households upon completion; or

**(4)** the activity must involve creating or retaining jobs, the majority of which must be for persons of low and moderate income.

**B.** Prevention or elimination of slums or blight - an activity identified as aiding in the prevention or elimination of a slum or blighted area must meet all of the following five criteria.

**(1)** The area must be designated by the applicant and must meet a definition of a slum, blighted area.

**(2)** The area must exhibit at least one of the following physical signs of blight or decay.

**(a)** At least one quarter of all the buildings in the area must be in a state of deterioration.

**(b)** Public improvements throughout the area must be in a general state of deterioration. For example, it would be insufficient for only one type of public improvement, such as the sewer system, to be in a state of deterioration; rather, the public improvements taken as a whole must clearly exhibit signs of deterioration.

**(3)** Documentation must be maintained by the applicant on the boundaries of the area and the condition that qualified the area at the time of its designation.

**(4)** The activity must address one or more of the conditions that contributed to the deterioration of the area.

**(5)** To comply with this objective on a spot basis outside of a slum or blighted area the proposed activity must be designated to eliminate specific conditions of blight or physical decay including:

**(a)** acquisition and clearance of blighted properties;

**(b)** renovation and reuse of abandoned, historic properties;

**(c)** commercial revitalization through façade improvements; or

**(d)** removal of environmental contamination on property to enable it to be redeveloped.

**C.** Urgent need - planning grants are not allowed under urgent need. Verification of the urgency of the need must be provided with written documentation by the appropriate authoritative state agency. An activity identified as having urgent community development needs will be considered only if the applicant verifies the following:

**(1)** that the activity is designed to alleviate existing conditions that pose a serious and immediate threat to the health and welfare of the community;

**(2)** that the condition(s) to be alleviated is of recent origin, i.e., it developed or became critical within 18 months preceding the certification by the applicant; and

**(3)** that the applicant is unable to finance the activity on its own and other sources of funding are not available.

## **2.110.2.17 APPLICATION REQUIREMENTS:**

**A.** Number of applications - all eligible applicants may submit one application for CDBG funding assistance in the community infrastructure, public facility capital outlay, or Colonias categories.

**B.** Planning applicants may submit at any time an additional planning application that shall not exceed fifty thousand dollars (\$50,000).

**C.** Applications for the economic development and emergency categories may be submitted at any time and shall be limited to a maximum of five hundred thousand dollars (\$500,000.00) for applications without certified cost estimates; and a maximum of seven hundred fifty thousand dollars (\$750,000.00) for applications accompanied by a certified cost estimate from an engineer, architect, or landscape architect licensed to do business in the State of New Mexico, which must be certified no more than 120 days prior to application submission.

**D.** Counties may submit multiple applications for planning grants on behalf of eligible applicants.

**E.** Planning, economic development, and emergency applications may be submitted even if the applicant has not completed previously awarded CDBG projects.

**F.** Single purpose application -an application must be limited to a project specific activity or set of activities that address a particular need in a designated target area of a unit of local government.

**G.** Joint applications - Joint applications are allowed when two or more eligible applicants within reasonable proximity of each other wish to address a common problem.

**(1)** Joint applications must satisfy certain criteria found in federal rules and must receive division approval prior to submitting an application for funding assistance.

**(2)** One community will be designated to serve as the lead applicant and will be subject to administrative requirements and to the application limit requirements.

**(3)** Other parties to the joint application may submit another application.

**H.** The following minimum requirements apply to all applications for CDBG funding:

**(1)** Applications must involve a project that will be fully functional on a stand-alone basis once awarded CDBG and other committed funds have been expended.

**(2)** Projects shall be completed within 24 months of an executed grant agreement signed by both parties.

**(3)** Applications shall be limited to a maximum of five hundred thousand dollars (\$500,000.00) for applications without cost estimates; and a maximum of seven hundred fifty thousand dollars (\$750,000.00) for applications accompanied by a certified cost estimate from an engineer, architect, or landscape architect licensed to do business in the State of New Mexico, which must be certified no more than 120 days prior to application submission.

**(4)** Application must be complete, with all documentation provided as listed on the submission and attachment checklist included in the application, otherwise application will be deemed ineligible and the application will be returned to the applicant and will not be considered for funding.

**(5)** Applications must include a determination of rural or non-rural status.

**(6)** Applications must include estimates of both full and phased project costs.

**I.** Threshold requirements - a project must be completed by the deadline for threshold compliance.

**(1)** Any open CDBG project must be completed at the time of application (certificate of occupancy or certification of operation must be in place).

**(2)** Any previous CDBG project's monitoring findings and concerns must be resolved.

**(3)** The current applicant's fiscal operating budget must be certified by the division.

**(4)** The applicant's quarterly/monthly financial reports to the division must be current.

**(5)** An applicant must have submitted to the New Mexico state auditor its most current audit(s) that were required to be conducted and submitted for review per the New Mexico state auditor's required report due dates for the previous fiscal year(s) and an applicant must be in compliance with the budget certification rule, 2.2.3 NMAC.

**(6)** The set aside categories; planning, economic development and emergency, are exempt from threshold requirements set forth in Subsections I of 2.110.2.17 NMAC.

**J.** Matching requirements - to extend available resources and to ensure applicants are invested in projects, the following matches will be required.

**(1)** Rural applicants must provide, at a minimum, a five percent cash match during the project period from local, state or other public resources, excluding local work force or local equipment.

**(2)** Non-rural applicants must provide, at a minimum, a ten percent cash match during the project period from local, state or other public resources, excluding local work force or local equipment.

**(3)** An application in the economic development category must provide at least one private dollar in match for each dollar of CDBG funds requested.

**(4)** Local funds expended by an eligible applicant for engineering, architectural design or environmental review prior to project approval can be applied towards the required match.

**(5)** Applicant may request a waiver of the matching requirement if documentation can be provided to demonstrate the absence of local resources to meet the required match. Criteria used by the division to recommend council approval/disapproval will be as follows:

**(a)** the required match must exceed five percent of the applicant's general fund budget;

**(b)** the required match must equal or exceed the available balance of funds in the applicant's overall budget.

**K.** Other funding commitments - if other funding is necessary to make a proposed project feasible, funding commitments must be in place and letters of commitment or grant agreement from the funding agency must be submitted with the application.

**L.** Asset management - communities that implement an asset management program and use that approach as the basis for their rate analysis will be credited in the application process for their achievement. To support the long term operation, maintenance, repair and replacement of system facilities, infrastructure, public facilities, or other eligible activities the following will be required to be submitted at the time of application. The model for the asset management program is the international infrastructure asset management model. This approach includes five core components:

**(1)** current state of the assets: an asset inventory that includes at a minimum: asset name, asset location, asset condition, useful life, and an estimate of replacement value;

**(2)** level of service: a description of type and level of service provided;

**(3)** criticality: an evaluation of which assets are critical to sustaining the operation;

**(4)** life cycle costing: at a minimum, a capital improvement plan that describes the replacement of assets and some consideration of operation and maintenance of the assets;

(5) financing plan: a description of the funding sources that will be used to pay for capital and operational needs.

[2.110.2.17 NMAC - Rp, 2 110.2.17 NMAC, 11/15/2016]

#### **2.110.2.18 APPLICATION SUBMISSION PROCEDURES AND CONTENT:**

The application packet provided by the division must be used. It is only necessary to answer the questions on the application that pertain to the relevant single project category.

**A.** An applicant must submit an original (hard copy) and two separate electronic copies of each application to the division, and one electronic copy to the appropriate council of governments.

**B.** Applications for community infrastructure, housing and public facility capital outlay must be date stamped by the division on or before 5:00 p.m. on the designated application deadline. Applications received after that time will not be processed.

[2.110.2.18 NMAC - Rp, 2 110.2.18 NMAC, 11/15/2016]

#### **2.110.2.19 APPLICATION REVIEW AND EVALUATION PROCESS:**

**A.** Upon receipt of an application, division staff will review for eligibility, completeness, feasibility, and compliance and ensure that all other funding necessary to make the project functional is in place. Applications not meeting the criteria will be returned to the applicant and will not be considered for funding.

**B.** Applications will be forwarded to appropriate state agencies for technical review and comment. Review agencies may include, but are not limited to, the environment department, department of transportation, department of health, state engineer's office, agency on aging and long term services, economic development department, state fire marshal and governor's commission on disability.

**C.** An eligible applicant will be allowed to make a presentation to the council and division staff at the official hearing. Testimony related to the application will be presented by an official or designee of the applicant who may be assisted by technical staff.

**D.** Community infrastructure, housing, public facility capital outlay, emergency, and Colonias rating criteria: The following rating criteria will be used to evaluate and score CDBG applications for the community infrastructure, housing, public facility, capital outlay, emergency, and Colonias categories.

(1) **Description and need** - (10 points) the more severe the need as documented in the application, the higher the score.

**(2) Benefit to low and moderate income beneficiaries and appropriateness** - (20 points) extent to which the CDBG application:

**(a)** documents the number and percentage of low and moderate income beneficiaries, also include race and gender; or

**(b)** addresses the prevention or removal of slum or blighting conditions; or

**(c)** addresses conditions that pose a serious and immediate threat to the health and welfare of the community (for emergency applications only).

**(3) Leveraging** - (10 points) extent to which state, local and other public resources, in addition to the required match, will be used by the applicant for the proposed project.

**(4) Citizen participation** - (10 points) extent to which the applicant evidences opportunity for citizen activities related to the proposed project:

**(a)** (10 points) has provided four or more citizen activities;

**(b)** (7 points) has provided three citizen activities;

**(c)** (5 points) has provided two citizen activities.

**(5) Planning** - (10 points) extent to which:

**(a)** (3 points) applicant has adopted a local ICIP, which has qualified for publication in the most recent state published prior to the CDBG application deadline. Evidence of the adopted ICIP for the current year must be provided as part of the application;

**(b)** (3 points) project has qualified for publication in the most recent state ICIP prior to the CDBG application deadline and applicant has selected CDBG as one of its possible funding sources. Evidence of such publication identifying the project and selecting CDBG funds as a possible funding source must be provided with application;

**(c)** (1 point) project shows consistency with applicant's comprehensive plan;

**(d)** (1 point) applicant has adopted a drought contingency plan, setting in place various drought management stages and accompanying restrictions on water use;

**(e)** (1 point) applicant has adopted a water conservation ordinance, setting in place various methods for conserving potable water;

(f) (1 point) applicant has implemented a water conservation ordinance, accompanied by evidence of exercising at least two various methods for conserving potable water.

**(6) Feasibility/readiness** - (20 points) extent to which the project is technically and economically feasible and ready to be implemented;

(a) (5 points) necessary real property or easements acquired;

(b) (5 points) professional services contract executed;

(c) (5 points) completed plans, specifications, bid documents, or preliminary engineering reports; and

(d) (5 points) completed environmental review process.

**(7) Cost benefit** - (10 points) the amount of funds requested divided by the number of direct low and moderate income beneficiaries of the project; the lower the ratio, the higher score.

**(8) Asset management plan** - (maximum of 10 points).

(a) (1 point) attendance within the last three years at an asset management training that includes the five core components as described in the international infrastructure asset management model;

(b) (2 points) development of an asset management plan that includes some, but not all, of the five core components;

(c) (10 points) development of a complete asset management plan with all five core components.

**(9) Council application scoring** - (10 points) Each member of the council shall be allowed to award up to 10 points per application in the application rating process, with one point for a low priority, five points for a medium priority and 10 points for a high priority project based on the criteria used for rating. The points will be averaged by totaling the individual member scores and dividing by the number of members who scored the project.

**(10) Additional Colonias criteria** - When submitting a Colonias applicant shall prove documentation of the Colonias designation and documentation that the project shall address one of the following conditions:

(a) lack of potable water; or

(b) lack of an adequate sewage system; or

(c) lack of safe, sanitary housing.

**E. Planning grant criteria:** The following rating criteria will be used to evaluate and score CDBG applications for the planning category.

**(1) Description and need** - (20 points) extent to which the application:

(a) provides detail for and documents community need for the project; and

(b) describes the impact that the project will have on the community; and

(c) is determined to be feasible.

**(2) Benefit to low and moderate income beneficiaries and appropriateness** - (20 points) extent to which the CDBG application:

(a) documents the number and percentage of low and moderate income beneficiaries, including race and gender; and

(b) is in alignment with existing planning documents, or proposes the development of a new comprehensive plan.

**(3) Leveraging** - (15 points) extent to which federal, state, and local resources in addition to the required match, will be used by the applicant for the proposed project.

**(4) Citizen participation** - (10 points) extent to which the applicant evidences opportunity for citizen activities related to the proposed project:

(a) (10 points) has provided 4 or more citizen activities;

(b) (7 points) has provided 3 citizen activities;

(c) (3 points) pledges opportunities for activities;

(d) (2 points) has provided 1 citizen activity;

**(5) Planning** - (20 points) extent to which:

(a) (5 points): applicant has adopted a local ICIP, which has qualified for publication in the most recent state ICIP published prior to the CDBG application;

(b) (5 points): the proposed project has qualified for publication in the most recent state ICIP prior to the CDBG application and applicant has selected CDBG as one of its possible funding sources;

(c) (2.5 points): applicant's proposed project shows consistency with applicant's comprehensive plan;

(d) (2.5 points): applicant adopts a drought contingency plan, setting in place various drought management stages and accompanying restrictions on water use;

(e) (2.5 points): applicant adopts a water conservation ordinance, setting in place various methods for conserving potable water;

(f) (2.5 points): applicant implements a water conservation ordinance, accompanied by evidence of exercising at least two various methods for conserving potable water.

(6) **Cost benefit** - (10 points) the amount of funds requested divided by the number of low and moderate direct beneficiaries of the project. The lower the ratio the higher the score.

(7) **Comprehensive plan** - (5 points) whether the community has an updated comprehensive plan that is not more than five years old.

F. Economic development rating criteria is included in 2.110.2.26 NMAC.

G. Site visits will be conducted as needed to verify or review information presented.

H. Emergency, economic development and planning applications that are in compliance with all applicable rules and regulations are received and evaluated throughout the year.

I. The council delegates to the division director the authority to award, in the division director's discretion, funding for applications for emergency, economic development, and planning projects in compliance with applicable rules and regulations. The division will provide the council with an update on all such awards at each council meeting.

[2.110.2.19 NMAC - Rp, 2 110.2.19 NMAC, 11/15/2016]

## **2.110.2.20 SELECTION OF CDBG GRANTEES BY COUNCIL:**

A. Division staff will present its recommendation to the council at least seven days prior to each allocation meeting.

(1) Staff recommendation will present projects in high, medium and low groupings.

(2) Staff recommendation will include specific funding allocation amount to each project, within total available funds.

**B.** The council will review staff recommendation and funding allocation and make funding decisions in an open public meeting.

**C.** The council, in making its final decisions, will consider the past performance of the applicant in administering CDBG projects.

**D.** The council may adjust the scope and dollar amount to stay within available funding or for purposes of consistency.

**E.** The council may deviate from staff recommendation and funding allocation, if the council by majority vote determines and substantiates that any of the following conditions apply:

**(1)** To not fund a project recommended by the division staff other funding sources for the project are available or other applications were deemed to be a priority or circumstances have changed since the application was submitted.

**(2)** To fund a project not recommended by division staff.

**(a)** the health and safety of area residents is at stake;

**(b)** funding committed to the project from other sources may be jeopardized;

**(c)** significant economic benefits will be realized if the project is implemented;  
or

**(d)** the need for the project is critical.

**F.** The council will make funding determinations by a majority vote.

**G.** The council may waive or adjust any division imposed CDBG application requirement as long as the waiver will not result in violation of state or federal statutes, regulations, rules, or penalize other applicants.

**H.** If the council sets aside funding for emergency, economic development or planning; the council may at any time during the calendar year, transfer funds between categories if there is limited demand in the funded categories. The transferred funds may be used to fund projects that were previously submitted for funding.

[2.110.2.20 NMAC - Rp, 2 110.2.20 NMAC, 11/15/2016]

#### **2.110.2.21 REVERSIONS, SUPPLEMENTAL FUNDING AND UNDERRUNS:**

**A.** Decision of the division to impose special conditions or fiscal agent requirements - if a CDBG award is provided to a grantee that has deficiencies identified in the audit(s) approved by the state auditor's office, the division reserves the right to impose special

conditions or fiscal agent requirements dependent upon the specific findings or opinions as described in the audit(s).

**B. Decision by the council to revert funds** - if, within 12 months of a CDBG award for a project by the council, the CDBG award has not resulted in a signed grant agreement between the division and the applicant or the applicant has not made adequate progress on the project or the council determines there was fraud or misrepresentation regarding the project by the applicant, the division may recommend to the council to revert all or part of the award and the council may vote to revert all or part of the award. The applicant shall receive written notice from the division of the council's decision to revert all or part of award by certified mail. The applicant may appeal, in writing, the council's decision to revert all or part of the award within 30 days of receipt of the written notice of the council's decision. The appeal of the council's decision by the applicant shall be held at a council meeting no later than 90 days from the council's receipt of the written appeal. The council's decision on the appeal of the reversion shall be final. The council may grant the applicant a reasonable period of time to cure the particular default that was the basis of the reversion. At the end of the cure period, the council shall vote again on the issue of the reversion and this decision shall be final.

**C. Reversions and supplemental funding** - When funds are reverted from a previously approved project grant or additional funds are made available for any other reason, the council may decide that the funds will:

- (1) be added to the emergency fund;
- (2) be returned to the category of the program from which it was awarded;
- (3) go into any other category; or
- (4) take other action as deemed appropriate.

**D. Underruns** - if upon completion of the approved activities a balance of funds remains after all payments have been made, this balance shall be handled as follows: if the grantee has not accomplished all work called for in the original application submitted for funding consideration, the grantee may request division staff to approve the expenditure of underrun funds for a portion or all of the remaining work.

(1) if appropriate justification and sufficient funding exist, division staff may approve the request for use of underrun funds and amend the grant agreement accordingly;

(2) a negative decision may be appealed to the council.

**E. If the grantee proposes to undertake activities not included in the approved application, the grantee may request council approval to expend underrun funds for**

other eligible activities. The council may approve the request if appropriate justification and sufficient funding exist.

**F.** If the council disapproves a request for use of an underrun, associated funds shall revert to the council for disposition.

**G.** The processes described above for handling underruns are intended to encourage the grantee to use the most cost efficient means possible to construct projects funded by the council. Grantees shall not take advantage of this process by inflating initial funding requests.

[2.110.2.21 NMAC - Rp; 2 110.2.21 NMAC, 11/15/2016]

#### **2.110.2.22 PROGRAM INCOME:**

**A.** Grantees must pay CDBG program income to the state, except that grantees will be permitted to retain program income only if they always use the income for CDBG eligible activities upon council approval of a program income utilization plan.

**B.** Program income received by the state will be placed in the economic development category.

**C.** Program income retained by grantees shall be used to fund CDBG eligible activities and must meet CDBG requirements.

[2.110.2.22 NMAC - Rp, 2 110.2.22 NMAC, 11/15/2016]

#### **2.110.2.23 CITIZEN ACCESS TO RECORDS:**

Citizens and units of general local government will be provided with reasonable access to records regarding the past use of CDBG funds.

[2.110.2.23 NMAC - Rp, 2 110.2.23 NMAC, 11/15/2016]

#### **2.110.2.24 NM COMMUNITY ASSISTANCE FUNDS:**

The council will allocate and administer New Mexico community assistance underrun funds in accordance with the provisions of the Community Assistance Act.

[2.110.2.24 NMAC - Rp, 2 110.2.24 NMAC, 11/15/2016]

#### **2.110.2.25 MEETING PROCEDURES:**

**A.** Special meetings. Special meetings of the council may be called by a majority of the council members or the chairperson of the council, and will be held at the time and place fixed by the division.

**B. Notice.** Written notice stating the time, place and, if a special meeting, the purpose, will be delivered either personally, by mail, or email by the division, to each council member at least 72 hours before the scheduled date of the meeting. The meeting notice and agenda will be available to the public and posted on the department of finance and administration web site. The council may establish dates and times for regularly scheduled meetings.

**C. Quorum.** A majority of the current members of the council in attendance either in person or by telephone will constitute a quorum at council meetings.

**D. Record of meetings.** The meeting shall be recorded and the division shall have the minutes made into a written record. The original of this record shall be retained by the division and a copy shall be forwarded to the council members. Copies shall be available upon request.

**E. Participation methods.** A member of council may participate in a meeting of the council by means of a conference telephone or other similar communications equipment when it is otherwise difficult or impossible for the member to attend the meeting in person, provided that each member participating by conference telephone can be identified when speaking, all participants are able to hear each other at the same time and members of the public attending the meeting are able to hear any member of the council who speaks during the meeting.

[2.110.2.25 NMAC - Rp, 2 110.2.25 NMAC, 11/15/2016]

#### **2.110.2.26 ECONOMIC DEVELOPMENT PROGRAM GUIDELINES:**

**A. Goals and objectives:** The state's CDBG economic development goals and objectives include:

- (1) creating or retaining jobs for low - and moderate-income persons;
- (2) preventing or eliminating slum areas and blighted areas;
- (3) meeting urgent needs;
- (4) creating or retaining businesses owned by community residents;
- (5) assisting businesses that provide goods or services needed by, and affordable to low - and moderate-income residents;
- (6) providing technical assistance to promote any of the activities under Paragraph (1) through (5) of Subsection A of 2.110.2.26 NMAC.

**B. Eligible activities:** CDBG eligible activities authorized under Sections 570.200, 570.201, 570.202, 570.203, 570.204, 570.482 and 570.483 of the federal rules and

directly affecting the creation or retention of employment opportunities, the majority of which are made available to low and moderate income persons, may include activities carried out by public, private nonprofit, or private for-profit entities when such activities are appropriate.

(1) To meet the needs and objectives of the community economic development plan, a project may include: acquisition of real property, construction, reconstruction rehabilitation, or installation of public facilities, site improvements, and utilities, and commercial or industrial buildings or structures and other commercial or industrial real property improvements and planning.

(2) Grantees and nonprofit sub recipients may carry out for the purpose of economic development, a wide range of activities such as those listed in Section 570.203 of the federal rules.

(3) The for-profit businesses, however, may carry out only the activities listed in that section and rehabilitation activities listed in Section 570.202 of the federal rules.

**C. Financing policies and techniques:** The CDBG program, as a development tool, can provide flexibility and take greater risks than conventional lending sources in its lending policies and financing techniques. For example, the program may:

- (1) offer a negotiated period for repayment of principal and interest;
- (2) take greater risk than banks are traditionally prepared to take, provided substantial economic development benefits will result if the loan is granted;
- (3) leverage capital by reducing risk for commercial lenders and by taking a subordinate security/collateral position; or
- (4) provide more favorable rates and terms than are generally available through conventional sources.

**D. Project requirements:** Project requirements for eligible CDBG economic development assistance include, but are not limited to:

- (1) specific employment commitments for low and moderate income residents, generally with no more than fifty thousand dollars (\$50,000.00) in CDBG funds being used for each job created or retained;
- (2) at least fifty-one percent of the jobs created/retained must be held or made available to persons of low to moderate income persons;
- (3) within six months of completion of the project, the grantee is required to report to LGD, documentation to reflect the total number of jobs created or retained;

(4) a firm commitment for private financial participation in carrying out the proposed project, contingent on award of CDBG funding only, must be included with the application;

(5) a minimum leveraging ratio of one new private investment dollar to one CDBG dollar is required additional; greater leveraging will enhance a project's competitiveness;

(6) a determination by the applicant and its governing body that there is a well-documented need for CDBG assistance to make the project financing feasible and that the level of assistance requested is commensurate with the public benefits expected to be derived from the economic development project;

(7) evidence of project feasibility including a business plan that contains financial statements, project pro forma (cash flow projections) and specific source and intended use of all funds or assets used in the project;

(8) generally, projects that directly assist in the relocation of a business or industry from one community to another, intrastate or interstate, will be disqualified;

(9) prior to submission of an application, applicants should thoroughly review the credit worthiness of the proposed borrower and should obtain appropriate credit reports, audited financial statements, tax returns and verify collateral.

**E. Program income:** In addition to program income the requirements of 2.110.2.22 NMAC the Housing and Urban Rural Recovery Act that amended the Housing and Urban Rural Recovery Act 1983, provides, relative to economic development, the following:

(1) states may require program income to be returned to the state but local governments must be allowed to keep program income when used for the same activity which generated the income;

(2) if the applicant intends to retain program income, a program income utilization plan must be submitted with the application for approval.

**F. Application cycle:** Applications for economic development can be submitted at any time, and the division staff has 30 days to review them.

**G. Pre-application conference:** It is recommended that a pre-application conference be held prior to the submission of the final application to ensure that all elements are adequately addressed and to review any new federal guidelines that may be issued that relate to economic development activities. Contact the division, economic development representative for information. More detailed and extensive financial and project data may be required depending on the specific project. In addition, meeting the national objective to benefit low and moderate income requires documentation certifying

that the majority of the jobs are created for or retained by low and moderate income persons or the majority of jobs are considered available to them. Please contact the division for a copy of the HUD guidelines.

**H. APPLICATION REQUIREMENTS:** The following must be included along with the regular CDBG application, and should be submitted in lieu of question #2 in the regular application.

**(1) Economic development plan:** The applicant must submit as an attachment to the application a short (five page maximum) description of its plan for encouraging local economic development. The plan, incorporating references to the proposed project, should include a discussion of the following elements.

**(a) Need** - List the community's underlying economic problems. Need might include recent major industry shutdowns or extended layoffs, substantial increases in population without a corresponding increase in job opportunities, substantial population decreases due to lack of available or appropriate job opportunities, a lack of industrial diversification, the existence of large numbers of workers in the area with obsolete skills or skills for which there is no current demand, or other problems unique to the applicant's community.

**(b) Goals** - Describe what the community attempting to accomplish through its overall economic development program (not just that activity for which CDBG funding is sought). Goals might include preserving existing businesses or industries, encouraging community growth, fostering industrial diversification, revitalizing the central business district, or creating complementary industries to provide jobs in the off-season for workers now only seasonally employed.

**(c) Resources** - List the public and private resources, both financial and technical, available to help the community carry out its economic development program. Resources may include for example, a local development corporation or similar body has any agency organization assigned staff member(s) to work on economic development activities for a major portion of their time has the financial community's demonstrated willingness to participate in development activities, whether there is adequate available labor force to meet the demands of new or expanding businesses and industries, or whether the community has unique development advantages, e.g., location, transportation facilities, industrial park or other plant sites, available raw materials, abundant power supplies, employee training capabilities, a locally-administered revolving loan fund to assist growing businesses or industries, technical assistance programs to help business people deal with marketing, management, or financial planning problems.

**(d) Strategy** - Describe the strategy the community is using to pursue its economic development goals. Strategy might include the specific prioritized activities that have been identified as components of the community's strategy for encouraging local economic development costs of each strategy, funding sources available, and how

the local government will support the strategies. Strategies might include offering property tax reductions to new or expanding industries, forming a local economic development corporation, or preparing industrial or tourism promotion packages.

**(e) Results** - Describe actions the community has already undertaken to implement its economic development plan, the funding sources used and results achieved. Results may include how many new jobs have been created or existing jobs retained, how many new firms have begun operations in the community. Or how many existing firms have undertaken expansion activities.

**(2) Hiring and training plan:**

**(a)** Applicants must establish procedures for the project to ensure preferential recruitment, hiring, and training of local workers, particularly those of low and moderate income.

**(b)** In the event of a grant award, the applicant's commitment to the hiring plan will be considered binding and will be incorporated by reference in the grant agreement between the local governing body and the division.

**(3) Private sector commitments:**

**(a)** Applicants must provide evidence of firm commitments of financial resources from the private sector.

**(b)** Such commitments should be binding, contingent only upon receipt of CDBG funds.

**(c)** Investments made or costs incurred prior to the grant application are not eligible for use as matching funds or leverage but should be referenced as related to the total project, if applicable.

**(4) Public sector commitments:**

**(a)** If public sector resources are to be involved in the proposed economic development project, applicants must demonstrate evidence of a firm commitment of public funds or other resources.

**(b)** Such commitments should be binding, contingent only upon receipt of CDBG funds to the project.

**(c)** Evidence may include resolutions or ordinances passed by the local governing body and other appropriate local groups.

**(5) Use of CDBG funds for economic development loans (if applicable):**

(a) Any project that includes a loan should provide an explanation of the proposed interest rate, terms and rationale for the proposed financing structure.

(b) Any loan made by a local governing body with CDBG funds as a part of an approved CDBG economic development project must be adequately secured.

(c) Subordinated loans may be made when justifiable and appropriate in the sole discretion of council.

(d) The applicant must include a detailed description of the proposed use of program income. (principal and interest). Applicants are encouraged to designate program income to be returned to the state for future economic development set-aside eligible activities.

**(6) Viability of assisted enterprises:** Any for-profit entity to be assisted with CDBG funds must document that without participation of CDBG funds the proposed activity would not be feasible and that after receipt of CDBG assistance the enterprise will be viable and self-sustaining. All applicants proposing an economic development activity shall submit the following for any entity to be assisted with CDBG funds.

(a) a business plan consisting of at least a description of the history of the firm, background, and experience of the principals, organizational structure, a description of its major products or services, market area and market share, goals, and planned expansions or changes in operations; the plan should also describe the impact the CDBG project, if funded, would have on the firm's activities;

(b) a three year to five year operating plan forecast (profit and loss projection); applicants may use SBA forms or equivalent;

(c) a monthly cash flow analysis, SBA forms or equivalent;

(d) for any existing business, the two most recent year-end financial statements, including an income statement and balance sheet.

**I. RATING CRITERIA:** The economic development rating criteria will give priority to projects that firmly demonstrate the following: need, appropriateness, impact, and benefit to low and moderate income persons. Since each application will be unique, there are no "right" or "wrong" activities or solutions. The ranking of "appropriateness" and "impact" will necessarily be in part subjective, with the division taking into account not only how well each applicant addresses the problems it has defined, but also how its problems and responses compare with those of other applicants.

**(1) NEED - (200 points) -** In analyzing an applicant's need for a project, the division will use statistical information provided by the New Mexico department of workforce solutions and the U.S. bureau of the census which is uniformly available for all 33 counties. Since similar data is not accumulated at the municipal level, cities and

towns will be scored with the figures for the county in which they are located. The three factors that will be considered are: the average number of unemployed persons in the county during the last calendar year; average percent of unemployment in the county during the last calendar year; the average unemployment rate in the county in the last five calendar years.

**(a)** The data will be calculated and each applicant assigned a relative score.

**(b)** The division will consider assigning a different score in exceptional cases, where an applicant can conclusively demonstrate that the first two factors used to measure economic need are not reflective of local economic conditions (such as major recent plant closings) and the situation is substantiated by the New Mexico department of workforce solutions. A request for consideration of local economic data must be submitted with the application. The applicant should identify sources of data and define methodologies.

**(2) APPROPRIATENESS** - (200 points) - Scores will be based on the soundness of the applicant's economic development plan and the related project for which CDBG funding is sought, and the strength of the applicant's hiring and training plan for ensuring that local residents, particularly those of low and moderate income, will be hired to fill the stated number of jobs created or retained as a result of CDBG-funded activities. Points are available as follows:

**(a) Plan and program** - (140 points) - Scoring will reflect whether:

**(i)** the applicant has developed a complete, well-reasoned, appropriate, and achievable plan for dealing with its total economic development needs, taking into consideration all available public and private resources and local capacity;

**(ii)** the local governing body has officially adopted the economic development plan as a matter of public policy;

**(iii)** the proposed project is an integral part of that plan; (it need not be the first priority item identified in the overall plan if other, more appropriate, resources are available and already being used to meet higher priority items);

**(iv)** the applicant has made substantial local efforts to deal with its economic development problems;

**(v)** the proposed CDBG project is realistic and workable, and the job savings or creation expected to result from its implementation will occur within a reasonable time following the date of grant award;

**(vi)** if income is to be generated by CDBG-funded activities, and retained locally, a plan for the use of that program income has been developed and submitted with the application; this plan must include mechanisms established for

administration of the funds, (if a revolving loan fund is to be established with program income, procedures must be outlined covering local application processing, time frames, approval, negotiation, pricing, packaging, servicing, etc.);

(vii) there has been active citizen participation in the development of the economic development plan and in the selection of the project.

**(b) Hiring and training plan** - (60 points) - Each applicant must include in its application an employment and training plan to be used in filling jobs created or retained as a result of CDBG activities. Scoring will reflect whether:

(i) the applicant's employment and training plan provides clear, complete procedures for outreach, recruitment, screening, selection, training, and placement of workers which will ensure maximum access of local residents, particularly persons of low and moderate income, to jobs created or saved by the project;

(ii) attention has been given to necessary supportive services for trainees needing them;

(iii) a complete training curriculum has been developed and all training resources identified;

(iv) responsibility has been assigned for all phases of the training program;

(v) a written agreement to follow the plan has been obtained from each firm expected to benefit directly from the project.

**(3) IMPACT** - (200 points) - In weighing the anticipated impact of the applicant's proposed CDBG activities on the community's identified problems, the following four factors will be scored:

**(a) Leverage** - (50 points) - Applicants will be scored based on the ratio of private non-CDBG dollars for each dollar of CDBG funds requested.

**(b) CDBG dollars per job** - (50 points) - The total CDBG funds to be used (exclusive of administrative funds) will be divided by the total number of full-time jobs expected to result. In evaluating an applicant's job creation projections, the division will consider the historical relationships of sales, space, and machines to jobs. It will also look at typical ratios for the industry of which the firm to be assisted is a part. Applicants should be prepared to justify job creation claims that substantially exceed industry norms or fifty thousand (\$50,000) per job created or retained.

**(c) Type of jobs** - (50 points) - Applicants must indicate the percentage of jobs to be created or retained that are full-time or part-time, skilled, semi-skilled, or

unskilled. Scores will be higher to the extent and application will create or retain full-time skilled, and semi-skilled jobs.

**(d) Overall economic impact** - (50 points) - The applicant must discuss both the direct and indirect effects the CDBG program is expected to have on the community's economy. Some of the factors that will be scored are:

(i) the additional payroll expected to be generated for the jobs created or retained by the program;

(ii) the total number of jobs to be created or retained;

(iii) whether the firm to be assisted is an economic base industry (producing goods or services mainly to be sold outside the area or state, thereby importing dollars into the community and state economy); and

(iv) whether local property tax revenues will be significantly increased as a result of the proposed business start-up, expansion, retention, etc.

**(4) BENEFIT TO LOW AND MODERATE INCOME PERSONS** - (200 points)

**(a)** This ranking criterion assesses the extent to which persons of low and moderate income will directly benefit from the expenditure of CDBG funds. To determine this score, the number of jobs to be created or retained and made available to low and moderate income persons will be divided by the total number of jobs to be created or retained as a result of the CDBG program.

**(b)** The highest score will receive up to a maximum of 200 points to be eligible for consideration a project must demonstrate that it will benefit principally persons of low and moderate income.

[2.110.2.26 NMAC - Rp, 2 110.2.26, 11/15/2016]

Attachment I
(Referenced by: 2.110.2.7 NMAC)
CDBG projects are designed to meet one of three national objectives: low and moderate income, slum and blight, or emergency. For those projects that are designed to meet the low and moderate income national objective, applicants may choose between two different processes to determine low and moderate income eligibility: (1) conduct a special survey using the HUD approved methodology in accordance with Section A "Survey Methodology" and Section C "HUD Section 8 Income Limits" below; or (2) use the most recent low and moderate income data from

section B "American Community Survey" and Section C "HUD Section 8 Income Limits" below.
<b>A. Survey Methodology</b>
The division recommends using the following HUD approved methodology:
This survey methodology was designed by HUD to assist States and entitlement cities in determining whether most of the individuals in a proposed target area are of low and moderate income.
Upon requesting permission from the division to conduct a sample survey, an applicant should indicate the justification for the sample survey. Applicants must provide to the division a map of the project service area, a brief description of the proposed project, and a description of how the six steps described in the suggested methodology will be implemented.
If the applicant conducts a sample survey, such applicant must be prepared to document all efforts. There must be a master list (with telephone numbers, where possible) to match the surveys. The master list must be coded to the individual surveys.
Such documentation must include a separate survey for each household, for unreachables that could not be replaced from the universe, and for "non-households" in the survey area, such as empty lots, business and government property. The sixth step of the methodology provides a complete listing of the information that an applicant must maintain in its files and submit to the division.
The six steps of the survey methodology are located on the department of finance and administration website, local government division, community development bureau, CDBG information page.
<b>B. American community survey (ACS)</b>
The U.S. census bureau provides a fact finder source for population, housing, economic, and geographic information. This source may be used by applicants to determine eligibility for low to moderate income persons. This source is located at the American FactFinder website, community facts.
<b>C. HUD Section 8 Income Limits</b>
HUD Section 8 income limits must be used in conjunction with either the survey methodology or ACS data to determine low and moderate income eligibility. Applicants should contact the division for the most current data sets.

## PART 3: LAW ENFORCEMENT PROTECTION FUND DISTRIBUTION

### 2.110.3.1 ISSUING AGENCY:

Department of Finance, and Administration, Local Government Division.

[2.110.3.1 NMAC - Rp, 2 NMAC 110.3.1, 12/27/2017]

**2.110.3.2 SCOPE:**

These rules and regulations shall apply to all governmental entities that have participated in and received money from the fund or that expect to qualify to participate in the annual distribution of the fund.

[2.110.3.2 NMAC - Rp, 2 NMAC 110.3.2, 12/27/2017]

**2.110.3.3 STATUTORY AUTHORITY:**

The division makes these rules pursuant to the authority of the Law Enforcement Protection Fund Act, being Sections 29-13-1 through 29-13-9 NMSA 1978, as amended.

[2.110.3.3 NMAC - Rp, 2 NMAC 110.3.3, 12/27/2017]

**2.110.3.4 DURATION:**

Permanent.

[2.110.3.4 NMAC - Rp, 2 NMAC 110.3.4, 12/27/2017]

**2.110.3.5 EFFECTIVE DATE:**

December 27, 2017, unless a different date is cited at the end of a section or paragraph.

[2.110.3.5 NMAC - Rp, 2 NMAC 110.3.5, 12/27/2017]

**2.110.3.6 OBJECTIVE:**

These rules and regulations provide procedures for applying for participation in the annual distribution of the fund and clarify the eligible uses of the fund.

[2.110.3.6 NMAC - Rp, 2 NMAC 110.3.6, 12/27/2017]

**2.110.3.7 DEFINITIONS:**

**A. "Academy"** means the New Mexico law enforcement academy.

**B. "Accumulation"** means holding funds from year to year to create a balance at the governmental entity level.

**C. "Applicant"** means any governmental entity allowed by law to seek participation in the distribution from the fund.

**D. "Carryover"** means, with the written approval of the division, retaining an unexpended award amount remaining at the end of one fiscal year and applying it to the immediately succeeding fiscal year only.

**E. "Division"** means the local government division of the department of finance and administration.

**F. "Fund"** means the law enforcement protection fund created in the Law Enforcement Protection Fund Act, as amended.

**G. "Governmental entity"** means the academy, a municipality, university, tribe or pueblo located wholly or partly in New Mexico, or a county.

**H. "Tribal police department"** means any tribal or pueblo police department that has entered into an agreement with the department of public safety pursuant to Section 29-1-11 NMSA 1978. The law enforcement agencies of the bureau of Indian affairs do not qualify because they are federal agencies.

[2.110.3.7 NMAC - Rp, 2 NMAC 110.3.7, 12/27/2017]

#### **2.110.3.8 ELIGIBLE USES OF FUND:**

**A.** The fund shall be used only for the purposes set forth in the Law Enforcement Protection Fund Act, as amended, including but not limited to Section 29-13-7 NMSA 1978.

**B.** Eligible expenditures may include but are not limited to:

- (1)** law enforcement equipment;
- (2)** guns, holsters, surveillance equipment, vehicles, uniforms, belts, badges and related apparatus to be used by law enforcement personnel;
- (3)** computers, printers, phones, fax machines, copy machines, software and projectors which are used by sheriffs or police officers;
- (4)** advanced law enforcement training manuals;
- (5)** advanced law enforcement planning and training in New Mexico or out of New Mexico if a comparable level of training is not available;
- (6)** purchasing, certifying and training of dogs in K-9 units;
- (7)** purchase of law enforcement equipment, including protective vests, for police dogs;

- (8) mileage and per diem for advanced law enforcement training or planning;
- (9) conferences associated with advanced law enforcement training and planning; and
- (10) for the academy, providing tourniquet and trauma kits and training on the use of tourniquet and trauma kits.

**C.** Ineligible expenditures include but are not limited to:

- (1) operating expenses, including but not limited to maintenance agreements, paper and ink for fax or copy machines, phone bills or supplies;
- (2) desks, chairs and file cabinets;
- (3) educational costs not associated with advanced law enforcement training or planning;
- (4) district attorney investigators and attorney general investigators; and
- (5) kitchen appliances and bathroom accessories.

[2.110.3.8 NMAC - Rp, 2 NMAC 110.3.8, 12/27/2017]

**2.110.3.9 PROCEDURES FOR LAW ENFORCEMENT PROTECTION FUND DISTRIBUTION:**

**A.** All applicants must use the forms prescribed by the division, which will be available on the division's website by March 1. It is the ultimate responsibility of each governmental entity to ensure they receive an application.

**B.** Every governmental entity seeking to participate in the distribution of the fund shall submit an application to the division by March 31. Late applications will not be considered absent a showing of unusual circumstances. The division director shall review the unusual circumstances associated with any late applications and determine whether the division will accept the late application.

**C.** Sufficient and accurate information shall be given on each application to establish the need and eligibility for funds. The division reserves the right to request further information if the division receives an incomplete application; however, the division is not obligated to make such requests. Incomplete applications shall be given 10 days from the date of notification from the division to complete the application. Late applications that are incomplete may be given less than 10 days from the date of notification to complete the application, if necessary for the division to comply with the timeline established in these rules, in the discretion of the division director.

**D.** The application must be signed by the chief law enforcement officer and head of the governmental entity certifying that the information is accurate.

**E.** On or before April 15, the division shall consider and determine the needs of the applicants.

**F.** On or before May 1, the division shall notify each applicant in writing of the amount of distribution the applicant will receive. The division's decision will be based on Section 29-13-4 NMSA 1978, as amended.

**(1)** Any applicant may appeal the division's decision by filing a written notice of appeal with the secretary of finance and administration no later than May 15.

**(2)** The secretary of finance and administration shall review the division's determination in an informal and summary proceeding and shall certify the result of the appeal to the division no later than June 30. The division shall adjust its determination if the secretary of finance and administration approves the appeal.

**(3)** If no appeal is filed, the determination of the division shall be final and binding on May 15 and not subject to further review.

**G.** The division will certify and approve periodic allotments to be distributed from the fund by the state treasurer in accordance with Section 29-13-6 NMSA 1978, as amended.

[2.110.3.9 NMAC - Rp, 2 NMAC 110.3.9, 12/27/2017]

#### **2.110.3.10 LIMITATIONS OF USES:**

**A.** Amounts distributed from the fund shall be:

**(1)** expended only for the specific purposes as stated in the approved application; and

**(2)** expended pursuant to approved budgets and upon duly executed vouchers.

**B.** Any changes to the budget require prior written approval by the division.

**C.** The distributions from the fund are to be expended, not accumulated, except as provided for the peace officers' survivors fund. Any unexpended award amount remaining at the end of a fiscal year may be carried over to a succeeding fiscal year only with prior written approval from the division. An applicant wishing to request such a carryover must submit a request in writing to the division by July 31 explaining the unusual circumstances requiring an unexpended amount to be carried over to the succeeding fiscal year. The division director will review the unusual circumstances

associated with the unexpended amount and determine whether the amount may be carried over.

**D.** Interest earned through a governmental entity's deposit of unexpended amounts distributed from the fund must be used only for purposes allowed under the Law Enforcement Protection Fund Act. Because the fund is not intended for accumulation, unexpended amounts distributed from the fund are not allowed for long-term investment purposes.

**E.** As a prerequisite to applying for an award from the fund, governmental entities agree that any consideration received from the sale or trade of any item purchased in whole or in part with monies distributed in any fiscal year from the fund shall revert to the governmental entity's fund within six months of the governmental entity's receipt of such consideration to be used for fund allowable purposes. A reversion is not required if the consideration was taken as a trade towards the purchase of items to be used for fund allowable purposes.

[2.110.3.10 NMAC - Rp, 2 NMAC 110.3.10, 12/27/2017]

## **PART 4: LOCAL DWI GRANT AND DISTRIBUTION OF CERTAIN DWI GRANT PROGRAM FUNDS**

### **2.110.4.1 ISSUING AGENCY:**

Department of Finance and Administration, Local Government Division.

[2.110.4.1 NMAC - Rp, 2 NMAC.110.4.1, 1/17/2017]

### **2.110.4.2 SCOPE:**

All county and municipal governments.

[2.110.4.2 NMAC - Rp, 2 NMAC.110.4.2, 1/17/2017]

### **2.110.4.3 STATUTORY AUTHORITY:**

**A.** The Local DWI Grant Program Act, being Sections 11-6A-1 through 11-6A-6 NMSA 1978, as amended, provides for the local DWI grant program to be established by the local government division of the department of finance and administration to award grants to municipalities and counties for:

**(1)** new, existing innovative or model programs, services and activities to prevent or reduce the incidence of DWI, alcoholism, alcohol abuse; and

**(2)** programs, services and activities to prevent or reduce the incidence of domestic abuse related to DWI, alcoholism, alcohol abuse. The DWI grant council is

created to receive applications, consider grant requests and award DWI grants pursuant to the act.

**B.** Pursuant to Section 11-6A-5 NMSA 1978, as amended, the division, with advice and approval of the council, shall adopt regulations necessary for operation of the local DWI grant program and the county DWI program distribution, including:

(1) forms and procedures for the application process for the local DWI grant program and the county DWI program distribution;

(2) documentation to be provided by the applicant to assure compliance with the grant and the county DWI program distribution guidelines and other provisions of the act;

(3) procedures and guidelines for review, evaluation and approval of grant awards and for review and approval of programs to be funded by the county DWI program distribution;

(4) procedures and guidelines for oversight, evaluation and audit of DWI grantees to assure that grants are being administered in the manner and for the purposes that the grants were awarded; and

(5) design of an evaluation mechanism for DWI grant programs, distributions and services and submission by each DWI grantee of an annual report or other data on each local DWI grant program, distribution or service and its effectiveness and outcomes.

[2.110.4.3 NMAC - Rp, 2 NMAC.110.4.3, 1/17/2017]

**2.110.4.4 DURATION:**

Permanent.

[2.110.4.4 NMAC - Rp, 2 NMAC.110.4.4, 1/17/2017]

**2.110.4.5 EFFECTIVE DATE:**

January 17, 2017 unless a later date is cited at the end of a section.

[2.110.4.5 NMAC - Rp, 2 NMAC.110.4.5, 1/17/2017]

**2.110.4.6 OBJECTIVE:**

To establish procedures for the local DWI grant program applications and the distribution of certain local DWI grant program funds.

[2.110.4.6 NMAC - Rp, 2 NMAC.110.4.6, 1/17/2017]

#### **2.110.4.7 DEFINITIONS:**

**A. "Act"** means the Local DWI Grant Program Act, being Sections 11-6A-1 through 11-6A-6 NMSA 1978, as amended.

**B. "Administrative Guidelines"** means guidelines that establish the requirements for eligible counties and their municipalities to apply for funding and to administer the fund and that are consistent with both the applicable regulations and statute.

**C. "Alternative sentencing program"** means a program that provides -state courts with a sentencing alternative to traditional incarceration for a DWI offender while providing access to intervention services in an environment that is consistent with the "least restrictive" means possible, e.g., incarceration/treatment, non-residential treatment, compliance monitoring/tracking.

**D. "Board"** means the board of county commissioners of a county.

**E. "Compliance monitoring/tracking"** means any program or activity that enhances tracking, follow-up or otherwise works with DWI and other alcohol-related misdemeanor offenders to assist state courts in the monitoring of offenders for compliance with court-ordered sanctions.

**F. "Council"** means the New Mexico DWI grant council created pursuant to the act. Membership of the council consists of the president of the New Mexico municipal league or designee, the president of the New Mexico association of counties or designee, the secretary of health or the secretary's designee, the secretary of finance and administration or the secretary's designee, the chief of the traffic safety bureau of the state highway and transportation department, and two representatives of local governing bodies who shall be appointed by the governor so as to provide geographic diversity.

**G. "County DWI Plan"** means the local DWI grant application developed with the advice of the council and approved by the human services department.

**H. "County DWI planning council"** means a county planning council that is representative of a broad spectrum of interests and cultural perspectives such as, emergency medical services, community substance abuse treatment, public health, community traffic safety, law enforcement, courts/judicial, prosecutor/legal, and schools. A county DWI planning council is organized to assist in the development, implementation and evaluation of a county DWI program.

**I. "DFA"** means the department of finance and administration.

**J. "Division"** means the local government division of the department of finance and administration.

**K. "Distribution program"** means the distribution of certain local DWI grant funds on a quarterly basis by the division from the fund to eligible counties for council-approved DWI programs, services or activities in an amount in accordance with the formula in Subsection B of Section 11-6A-6 NMSA 1978 as amended.

**L. "DWI"** means driving while intoxicated.

**M. "Fund"** means the local DWI grant fund created pursuant to the act, which receives a portion of liquor excise tax revenue and is administered by the division.

**N. "Grant program"** means the local DWI grant program established by the division to make grants to municipalities or counties for new, existing innovative or model programs, services or activities to prevent or reduce the incidence of DWI, alcoholism and alcohol abuse. Grants shall be awarded by the council pursuant to the advice and recommendations of the division and the requirements of Subsection C of Section 11-6A-3 NMSA 1978, as amended.

**O. "Enforcement program"** means any program or activity improving law enforcement approaches to prevent or deter DWI behavior, such as DWI checkpoints, saturation patrols, warrant roundups and underage drinking prevention activities. Local DWI grants may be used for law enforcement overtime only in support of these types of activities. On a case by case basis local DWI grants may be used for a full-time DWI law enforcement officer if sufficient justification is provided.

**P. "Local DWI grant application"** means the forms required by the division to request funding through the fund.

**Q. "Offender program"** means any program or activity with the purpose of reducing the recidivism of DWI offenders.

**R. "Prevention program"** means any program or activity that has as its objective the fostering or creation of an environment that helps individuals make healthy and safe choices to prevent or reduce the incidence of DWI, alcoholism or alcohol abuse. Prevention programs should be designed to increase the ability of an individual to change behavior related to the misuse or abuse of alcohol, to resist pressures or influences to misuse or abuse alcohol, and to prevent or reduce the incidence of DWI, alcoholism, or alcohol abuse.

**S. "Public information and education program"** means any program or activity aimed at informing communities, families, and individuals about ways to improve efforts toward zero-tolerance of DWI and to support social action for change, such as holiday "survival" campaigns for safety, media conferences, speaker bureaus, resource

libraries, emergency medical service professionals providing school presentations, bill boards, and community fairs.

**T. "Screening program"** means the use of empirically-based procedures, such as standardized tests, self-reporting techniques and interviews to identify, at the judicial stage, those DWI offenders who have alcohol or drug-related problems/consequences, who are at risk for such difficulties, or who are at high risk of DWI recidivism. Screening measures are not designed to explain the nature and extent of such problems, or to substitute for assessments to aid in the treatment planning process.

**U. "Supplantation"** means the replacement or substitution of existing funding with local DWI grant funding.

**V. "Teen court program"** means an alternative sentencing program for juveniles accused of minor offenses, which program is sanctioned by a state court or by the juvenile justice division of the children, youth and families department's juvenile probation and parole offices. Teen court program includes juvenile defendants, paid or volunteer staff, teen court judges, community liaison, bailiffs, court clerks and teens serving as jurors, attorneys, or performing other duties.

**W. "Treatment program"** means an array of individual, family, group or social programs or activity alternatives directed to intervene and address DWI, alcohol problems and alcohol dependence, or alcoholism or alcohol abuse. Treatment seeks to reduce the consumption of alcohol, to support abstinence and recovery from drinking alcohol, and to improve physical health, family and social relationships, emotional health, well-being, and general life functioning.

[2.110.4.7 NMAC - Rp, 2 NMAC.110.4.7, 1/17/2017]

#### **2.110.4.8 ELIGIBLE APPLICANTS:**

**A.** Eligible applicants include all counties and all incorporated municipalities that join with the county in which they are located to participate in the proposed application, or any combination of two or more counties and the incorporated municipalities within the boundaries of the counties.

**B.** The council shall make grants only to counties or municipalities in counties that have established a local DWI planning council and adopted a county DWI plan or are parties to a multi-county DWI plan that has been approved by each applicable board and county DWI planning council pursuant to Section 43-3-15 NMSA 1978, as amended.

**C.** Pueblo and tribal governments and non-profit organizations are not eligible to apply directly under the grant and distribution programs. These entities are encouraged to participate in the county DWI planning council process.

**D.** Municipalities may apply for funding if they are officially designated as fiscal agent for their county by resolution of the applicable county board.

**E.** For multi-county applicants within reasonable geographic proximity to one another, a lead county or municipality must be identified to administer the project.

**F.** County DWI planning councils must have provided each municipality and tribal government within the county the opportunity to participate in the development of the application. Documentation of the applicant's efforts to acquire municipal or tribal government participation and endorsement must be presented with the application.

[2.110.4.8 NMAC - Rp, 2 NMAC.110.4.9, 1/17/2017]

#### **2.110.4.9 ELIGIBLE PROGRAMS, SERVICES OR ACTIVITIES:**

These include the following:

**A.** New, existing innovative or model programs, services, or activities of any kind designed to prevent or reduce the incidence of DWI, alcoholism or alcohol abuse. As provided in the definitions set forth in these regulations, areas suggested for programs and activities are prevention, enforcement, education, screening, treatment, compliance monitoring/tracking, alcohol related domestic violence, or alternative sentencing including programs that combine incarceration, treatment and aftercare, to prevent or reduce the incidence of DWI, alcoholism, alcohol abuse or domestic abuse related to DWI, alcoholism or alcohol abuse.

**B.** Existing community-based programs, services, or facilities for prevention, screening, and treatment of alcoholism and alcohol abuse, which demonstrate effective model approaches to prevent or reduce the incidence of DWI, alcoholism, alcohol abuse or domestic abuse related to DWI, alcoholism or alcohol abuse.

[2.110.4.9 NMAC - Rp, 2 NMAC.110.4.10, 1/17/2017]

#### **2.110.4.10 APPLICATION LIMITATIONS:**

**A.** Distribution programs shall be limited to the county's projected year's distribution amount determined by the distribution formula as contained in Section 11-6A-6 NMSA 1978, as amended.

**B.** Grant programs shall be limited to programs, services or activities that meet the requirements of Subsection C of Section 11-6A-3 NMSA 1978, as amended.

**C.** Applicants are required to limit the time period of the application as follows:

**(1)** distribution programs and yearly grant programs are limited to the 12 month fiscal year; and

**(2)** multi-year grant programs are limited to no more than 36 months; all multi-year requests must be for projects, activities, or services that support or complement existing DWI efforts and are reasonably anticipated to extend beyond one year.

**D.** For grant and distribution program applications, a minimum of 10 percent of the proposed operating budget must be from county or municipal matching funds. Cash valued in-kind resources may be applied to the required matching funds; applications proposing to use in-kind resources as required matching funds must demonstrate the value of the in-kind resources to be provided.

**E.** All approvals will be limited by availability of funds. The division and the council will review requests for funding to ensure all proposed expenditures are justified, meaningful, and feasible within the project period. Justification of need and applicant's past performance will be considered.

**F.** Multi-county applications will be given preference.

[2.110.4.10 NMAC - Rp, 2 NMAC.110.4.11, 1/17/2017]

#### **2.110.4.11 NUMBER OF APPLICATIONS:**

To ensure the most efficient and effective use of grant program and distribution program funds, applications are limited as follows:

**A.** Number of applications - One application per county per grant and distribution program. A county may apply for the funding of a distribution program and a grant program to be implemented in the same fiscal year.

**B.** Multi-county applications - Two or more counties, within reasonable geographic proximity to each other, may submit a joint application. Parties to a joint application are limited to participation in one distribution program and one grant program.

[2.110.4.11 NMAC - Rp, 2 NMAC.110.4.12, 1/17/2017]

#### **2.110.4.12 INELIGIBLE ACTIVITIES:**

**A.** Capital outlay expenditures are limited to 10 percent of the total grant or distribution amount.

**B.** Land or building/facility acquisition with DWI grant or distribution funds is not allowed, except that programs eligible for alcohol detoxification grants pursuant to Subsection D of Section 11-6A-3 NMSA 1978 may request approval for land or building/facility acquisition.

**C.** Use of grant or distribution funds to pay for indirect administrative costs for DWI programs is not allowed in the grant or distribution programs, except that indirect

administrative costs may be counted towards in-kind resources match. Administrative costs in direct support of programs may be budgeted in the direct program portion of the budget.

**D.** Supplantation - Grant or distribution program funds shall not be used to supplant other existing funds, but can be used for new, expanded, supplemental or complementary DWI activities.

**E.** Cash accumulations - Distribution program funding shall be obligated or encumbered in binding third-party obligations for council-approved programs, activities or services delivered in the fiscal year of the distribution. No distribution program funds may be accumulated beyond the fiscal year.

**F.** Cash transfers - Grant or distribution program funds will not be transferred by the county or the municipality designated by the county as fiscal agent to other funds in the fiscal agents' budget from the fiscal agent's established, separate local DWI grant and distribution fund.

[2.110.4.12 NMAC - Rp, 2 NMAC.110.4.13, 1/17/2017]

#### **2.110.4.13 APPLICATION PROCEDURES, FORM AND CONTENT:**

**A.** Applications for grant and distribution program funds shall conform to application instructions determined by the division, including an original signed cover sheet.

**B.** In the event that an application is incomplete or requires modification, the applicant will be promptly notified by the division. The applicant must then immediately submit the information or modification requested. Applicants that do not respond in writing in the timeframe established by the division may be disqualified.

**C.** The applicant's governing body must authorize the county or municipality designated as fiscal agent for the county to submit the application by resolution.

**D.** The form and content of applications will be determined by the division.

[2.110.4.13 NMAC - Rp, 2 NMAC.110.4.14, 1/17/2017]

#### **2.110.4.14 APPLICATION REVIEW, RATING AND SELECTION:**

**A.** The following review, rating and selection process will be used by the division for presentation to the council:

**(1)** Upon receipt of grant and distribution program applications, division staff shall review for eligibility, completeness and compliance. Additional information may be required and requested. The division may, in its discretion, consult appropriate experts for information and advice concerning technical aspects of any application.

(2) Division staff shall make recommendations to the council on the eligibility of distribution program applications considering compliance with these regulations and the act.

(3) Division staff shall rate grant program applications and present recommendations to the council based on the extent to which applicants meet program rating criteria.

**B.** Applications will be rated on the following criteria:

- (1) quality of statistical analysis of local data identifying gaps and needs;
- (2) quality of discussion around the focus of the project, reason for selection of components and brief descriptions of each component;
- (3) demonstrated reasonableness and justified costs appropriate to the proposed activities of component budgets (quantifies costs with a best estimate of units, activities, clients, etc.);
- (4) measures of past performance;
- (5) community participation, collaboration and planning - extent to which the local DWI planning council, solicited participation from municipal, tribal and pueblo representatives, extent of involvement by such parties in developing the application, and how the applicant provides continuing opportunities for public participation in the planned implementation and evaluation of the program's efforts;
- (6) extent to which there is proposed leveraging of in-kind match, cash match, self-sufficiency or other funding sources; and
- (7) extent to which the proposal is for new, innovative or model programs, services or activities.

**C.** The council will review division staff ratings and recommendations, and will make grant program funding decisions and distribution program approvals in an open public meeting held in accordance with the Open Meetings Act. The council may, in its sole discretion, approve all, part or none of an application, and may adjust the scope and dollar amounts of grant program applications. The council will make its grant program funding and distribution program approval determinations by a majority vote of the full council.

[2.110.4.14 NMAC - Rp, 2 NMAC.110.4.15, 1/17/2017]

**2.110.4.15 REVERSIONS, SUPPLEMENTAL FUNDING AND UNDERRUNS:**

**A.** Reversions/supplemental funding - When funds are reverted from a previously-approved grant program project or distribution program award, or additional funds are made available for council award for any other reason, the council may:

- (1) set aside the funds in a contingency fund; or
- (2) take other action as deemed appropriate.

**B.** Underruns - If, at the end of the fiscal year, a balance of funds remains after all expenditures have been reimbursed, the balance of funds for a grant or distribution program project shall revert to the fund. This underrun rule applies to multi-year grant programs in the last fiscal year of the council-approved program.

**C.** Special applications - Should additional funds become or be determined to be available in the fund, the council may call for and act on special applications from eligible applicants. The purpose and rating criteria of the special applications will be outlined in the call for applications.

[2.110.4.15 NMAC - Rp, 2 NMAC.110.4.16, 1/17/2017]

#### **2.110.4.16 ADMINISTRATIVE PROCEDURES:**

**A.** All successful grant and distribution program applicants must adhere to state procurement laws, regulations and other procedures as established by the division, to ensure that all grant and distribution program funds are expended in accordance with state law.

**B.** All counties and municipalities designated by a county as a fiscal agent must set up a separate local DWI grant and distribution program fund in the county or municipality's budget. This fund must be included in the entity's budget process and financial reports.

[2.110.4.16 NMAC - Rp, 2 NMAC.110.4.17, 1/17/2017]

#### **2.110.4.17 SANCTIONS:**

**A.** Grantee sanctions may include any administrative action authorized by the division director taken against a grant or distribution program for improper or inadequate performance or non-compliance with one or more condition(s) of the grant agreement, based on state program requirements, or failure to follow through on the approved DWI application, including the signed statement of assurances or the local DWI planning council approved plan. In each instance, to the extent possible under the circumstances, the sanctions imposed by the director will be intended first, to correct the deficiency; second, to mitigate any adverse effects or consequences of the deficiency; and third, to prevent recurrence of the same or similar deficiencies.

**B. Examples of deficiencies include but are not limited to the following:**

- (1)** failure to correct monitoring or audit findings;
- (2)** failure to document and report to the division in a timely manner all DWI expenditures of the grant or distribution programs;
- (3)** failure to implement the project in a timely fashion;
- (4)** lack of continuing capacity to administer the program;
- (5)** failure to execute planned activities in accordance with the grant agreement or the approved DWI application for distribution programs;
- (6)** failure to comply with the local DWI planning council approved plan; and
- (7)** implementation of a project change without prior division approval.

**C. Types of sanctions:**

- (1)** The division director may withhold grant program reimbursement payments, or disallow further distribution draw-downs when there are specific irregularities in payment requests or contractual obligations.
- (2)** The division director may withhold distributions to distribution programs if the DWI program is not implementing the council-approved DWI programs, services or activities as set forth in the application.
- (3)** The division director may suspend authority to proceed with any grant or distribution program's programs, services or activities when monitoring of the programs, services or activities warrants such action. Cause for suspension may include local management or project administration irregularities or nonperformance in matters of program compliance, failure to comply with the state procurement code, failure to implement council-approved DWI programs, services or activities as set forth in the application, including the signed statement of assurances, failure to implement the local DWI planning council approved plan, or any other failures or unsatisfactory performance for which the grant or distribution program has been cited by written correspondence or instructions. Any suspension will be in effect until the grant or distribution program cures all causes for suspension, or until termination. The division director shall provide the grant or distribution program with an opportunity to appeal the suspension within 15 calendar days after receipt of written notice of the suspension to demonstrate why the grant or distribution should not be suspended. The director will review any appeal of the suspension and may, in the director's sole discretion, proceed with the suspension, impose another sanction, or resume normal processing of the grant or distribution program.

**(4) Termination:**

**(a)** The division director may terminate a grant or distribution program's receipt of further funds after receiving council approval to do so.

**(b) Grounds for termination:**

**(i)** the grantee or distribution program is noncompliant with state program statutory requirements, or these regulations;

**(ii)** the grantee or distribution program lacks the continuing capacity to administer the project;

**(iii)** the grantee or distribution program has not implemented the project in a timely manner; or

**(iv)** the grantee or distribution program has not implemented the DWI programs, services or activities approved by the council in the county program application.

[2.110.4.17 NMAC - Rp, 2 NMAC.110.4.18, 1/17/2017]

**2.110.4.18 COUNCIL AUTHORITY:**

The council may at any time waive or adjust any requirement imposed in these regulations so long as the council finds that the waiver or adjustment is in the best interest of the state and that the waiver or adjustment does not unduly penalize or favor any applicant or violate any state law or other regulation.

[2.110.4.18 NMAC - Rp, 2 NMAC.110.4.19, 1/17/2017]

**PART 5: JUVENILE ADJUDICATION FUND GRANTS TO LOCAL GOVERNMENTS**

**2.110.5.1 ISSUING AGENCY:**

Department of Finance and Administration.

[2.110.5.1 NMAC - N, 7/1/2011]

**2.110.5.2 SCOPE:**

All county and municipal governments.

[2.110.5.2 NMAC - N, 7/1/2011]

### **2.110.5.3 STATUTORY AUTHORITY:**

Section 34-16-1 NMSA 1978. Section 9-6-5(E) NMSA 1978.

[2.110.5.3 NMAC - N, 7/1/2011]

### **2.110.5.4 DURATION:**

Permanent.

[2.110.5.4 NMAC - N, 7/1/2011]

### **2.110.5.5 EFFECTIVE DATE:**

July 1, 2011, unless a later date is cited at the end of a section.

[2.110.5.5 NMAC - N, 7/1/2011]

### **2.110.5.6 OBJECTIVE:**

A. In 2009, the New Mexico legislature enacted Laws of 2009, Chapter 244, which created the juvenile adjudication fund and was compiled as Section 34-16-1 NMSA 1978. Money in the juvenile adjudication fund is appropriated to DFA to administer the fund and to provide an alternative adjudication process for juveniles charged with traffic offenses and other misdemeanors.

B. The objective of 2.110.5 NMAC is to establish a juvenile adjudication fund grant program to fund programs providing alternative procedures of adjudication for juveniles charged with traffic offenses and other misdemeanors.

[2.110.5.6 NMAC - N, 7/1/2011]

### **2.110.5.7 DEFINITIONS:**

A. "**Applicant**" means a county, municipality, or combination of two or more counties or municipalities that submits an application for a grant.

B. "**Alternative adjudication program**" means a program providing alternative procedures of adjudication for juveniles charged with traffic offenses and other misdemeanors. Teen courts are a type of alternative adjudication program.

C. "**Cash transfer**" means the transfer of funds by a grantee from an established, separate grant fund to other fund(s) in the grantee's budget.

D. **"Charged"** means accused of traffic offenses or other misdemeanors. It is not necessary for formal criminal proceedings to be initiated through issuance of a citation or otherwise for a juvenile to be charged for purposes of this rule.

E. **"Components"** means programs that are designed to address one or more specific traffic or other misdemeanor offenses or their underlying causes, including, but not limited to, programs addressing:

- (1) substance abuse prevention;
- (2) shoplifting;
- (3) DWI;
- (4) truancy;
- (5) anger management;
- (6) drivers education;
- (7) counseling;
- (8) team building;
- (9) smoking cessation;
- (10) tutoring;
- (11) peer counseling;
- (12) parental involvement; and
- (13) teen parenting.

F. **"DFA"** means the department of finance and administration.

G. **"Division"** means DFA's local government division.

H. **"Grant"** means the award of funds from the juvenile adjudication fund to a grantee to assist an alternative adjudication program.

I. **"Grantee"** means a county, municipality, or combination of two or more counties or municipalities receiving a grant.

J. **"Grant funds"** means the funds awarded from the juvenile adjudication fund pursuant to a grant.

K. **"Grant program"** means the program established by this rule to make grants from the juvenile adjudication fund.

L. **"JPO"** means juvenile probation officer.

M. **"Juvenile adjudication fund"** means the fund created by Section 34-16-1 NMSA 1978.

N. **"Program guidelines"** means guidelines for the operation of alternative adjudication programs established and revised by the division from time to time.

O. **"Supplantation"** means the replacement or substitution of existing funding with grant funds.

[2.110.5.7 NMAC - N, 7/1/2011]

#### **2.110.5.8 ADMINISTRATIVE REQUIREMENTS:**

A. Grantees must comply with the program guidelines, all applicable laws and regulations, as well as requirements and procedures established in the grant agreement between the division and the grantee.

B. Grantees must establish a separate fund in their budget and accounting system to account for grant funds. This fund must be included in the grantee's budget process and financial reports.

C. Grantees must have financial management systems that meet the standards set forth in this subsection.

(1) Financial reporting. Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant agreement.

(2) Accounting records. Grantees must maintain records that adequately identify the source and application of funds provided for alternative adjudication programs. These records must contain information pertaining to grant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) Internal control. Effective control and accountability must be maintained for all grant funds and items purchased with grant funds. Grantees must adequately safeguard all such funds and items and must assure that they are used solely for authorized purposes.

(4) Budget control. Grantees must have adequate systems to ensure actual expenditures or outlays do not exceed budgeted amounts for each grant.

(5) Source documentation. Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc. The division may review the adequacy of the financial management system of any applicant or grantee as part of a preaward review or at any time after grant award.

[2.110.5.8 NMAC - N, 7/1/2011]

#### **2.110.5.9 ELIGIBLE APPLICANTS:**

A. Counties and incorporated municipalities in New Mexico are eligible to apply for grants. Two or more counties or municipalities may jointly apply for a grant, provided that the joint applicants must be within reasonable geographic proximity to each other and one applicant must be identified through joint resolution of the governing bodies of the applicants to be the lead applicant, responsible to the division for the administration of the grant.

B. Pueblo and tribal governments and non-profit organizations are not eligible to apply directly for grants. These organizations may receive funds from grantees as subgrantees, in the case of pueblo or tribal governments, or service providers, in the case of pueblo or tribal governments and non-profit organizations.

[2.110.5.9 NMAC - N, 7/1/2011]

#### **2.110.5.10 ELIGIBILITY REQUIREMENTS:**

A. The threshold eligibility requirements set forth in this subsection must be met for an applicant to be considered for a grant.

(1) The head of the local JPO office responsible for the geographic area in which the alternative adjudication program covered in the application is located must submit a letter indicating the intent of the JPOs in that office to refer juveniles to the alternative adjudication program during the period covered by the requested grant.

(2) The alternative adjudication program covered by the application must have a qualified program coordinator in place responsible for the overall management of the alternative adjudication program. The applicant must identify the coordinator and explain the coordinator's qualifications in the application.

(3) The applicant must have completed all audits required under the Audit Act, have a budget approved by the division pursuant to the Chapter 6, Article 6 NMSA 1978, and be current on all financial reports required to be submitted to the division under that article.

(4) A minimum of 10 percent of the proposed operating budget of the alternative adjudication program to be assisted with grant funds must come from

sources other than grant funds or other state funds. Cash valued in-kind contributions may be used to meet this matching requirement; provided, however, that, in the event the division disagrees with the grantee's valuation of in-kind contributions, the division's determination of the cash value of the in-kind contributions shall control for purposes of compliance with this matching requirement.

(5) Only alternative adjudication programs are eligible to be assisted with grant funds.

B. If the alternative adjudication program covered by the application has been in operation less than two consecutive years, the additional threshold eligibility requirements in this subsection must also be met for an applicant to be considered for a grant; provided, however, that the division may waive the additional requirements in this subsection if the applicant demonstrates and the division determines in writing that good cause exists to believe that the alternative adjudication program covered by the application will satisfactorily operate without a mentorship relationship with an established alternative adjudication program.

(1) The alternative adjudication program must have a mentorship relationship with an alternative adjudication program that has been operational for more than two consecutive years. Documentation of that mentorship relationship must be submitted with the application.

(2) The mentor alternative adjudication program must submit a letter supporting the application for grant assistance for the alternative adjudication program that has been in operation less than two consecutive years.

[2.110.5.10 NMAC - N, 7/1/2011]

#### **2.110.5.11 ELIGIBLE EXPENDITURES:**

A. In accordance with the budget established pursuant to Subsection B of this section, grant funds may be spent on the following expenditures in support of the alternative adjudication program financially assisted by a grant:

(1) reasonable amounts of supplies and program materials that are directly related to the alternative adjudication program and will be consumed during the grant period;

(2) reasonable training expenditures for employees or volunteers providing direct services to the alternative adjudication program;

(3) travel for juvenile participants in and personnel and contractors of alternative adjudication programs, in accordance with and subject to the limitations provided in the Per Diem and Mileage Act and implementing regulations;

(4) the portion of employee salaries and benefits of personnel employed by an alternative adjudication program and county and municipal employees who provide direct services for the alternative adjudication program;

(5) indirect costs, such as overhead, salaries and benefits for support staff, equipment costs, administrative expenses, supplies, and other expenses incurred by the grantee that are not direct costs of the alternative adjudication program, not to exceed 5% of the total grant funds; and

(6) contracts for services that directly support the alternative adjudication program.

B. Grantees shall develop and the division shall approve a budget for grant funds in such detail and such format as the division shall from time to time prescribe. All expenditures must be in accordance with the approved budget. The budget may only be amended as provided in the grant agreement.

[2.110.5.11 NMAC - N, 7/1/2011]

#### **2.110.5.12 INELIGIBLE EXPENDITURES:**

Grant funds cannot be used for:

A. capital outlay expenditures, including, but not limited to, the lease or purchase of land, buildings, facilities, furnishings, or equipment;

B. the purchase of food or beverages;

C. supplantation;

D. cash transfers; or

E. licensing, professional membership, or organizational fees or dues.

[2.110.5.12 NMAC - N, 7/1/2011]

#### **2.110.5.13 APPLICATION PROCEDURES, FORM AND CONTENT:**

A. For each application cycle, the division shall determine:

(1) the amount available for grants;

(2) the limit (if any) that any single grantee may be awarded;

(3) the grant period during which grant funds may be expended;

- (4) the form and content of applications;
- (5) the application deadline;
- (6) the specific evaluation criteria to be used to evaluate and rate applications; and
- (7) the form of the grant agreement.

B. Two copies of the application for grant funds, one of which has original signatures, must be submitted to: Department of Finance and Administration Local Government Division, Bataan Memorial Building, Suite 201, Santa Fe, New Mexico 87501, Phone: (505) 827-4950.

C. Applications must be received at the local government division by 4:00 p.m. of the designated application deadline.

D. In the event that the application is incomplete or requires modification, the applicant will be promptly notified by the division. The applicant must then immediately submit the information and modification requested. Applicants that do not respond in writing may be disqualified.

E. The applicant's governing body must authorize by resolution the applicant to submit the application. A copy of the resolution must be included with the application.

[2.110.5.3 NMAC - N, 7/1/2011]

#### **2.110.5.14 APPLICATION REVIEW, RATING AND SELECTION:**

A. The evaluation criteria for applications shall be developed for each application cycle and shall include, but not be limited to, the following:

- (1) overall quality of the alternative adjudication program for which grant funds are sought and proposal approach;
- (2) financial need of the alternative adjudication program and estimated impact of grant funds (e.g., grant funds would allow alternative adjudication program to remain operational; grant funds would allow the alternative adjudication program to serve more clients; or grant funds would allow alternative adjudication program to provide a higher level of service to clients);
- (3) number of clients to be served;
- (4) number and quality of components to be provided to clients;

(5) past performance of the alternative adjudication program (except for new programs);

(6) expenditure rates and performance of any current or past grant(s); and

(7) whether the alternative adjudication program will receive direct legislative appropriations during the grant period, in which case the amount of grant funds that the grantee would otherwise be awarded will be reduced by the amount of such direct legislative appropriations for the alternative adjudication program.

B. Evaluators selected by the division shall evaluate all applications for eligibility and completeness. Complete applications that meet all threshold eligibility requirements shall be evaluated and rated based upon the evaluation criteria established in the application. Funding recommendations will be made to the division director based upon those ratings.

C. At any time during the application process, the division may request, and applicants shall provide, any additional information and documentation that the division feels is necessary to evaluate the application.

D. Division staff may consult appropriate non-staff experts for information and advice concerning technical aspects of any application.

E. The division director shall review staff ratings and recommendations and make grant program award decisions. The amount of the grant award may be less than the amount requested in the application

F. The division will enter into grant agreements with grantees. The grant period will ordinarily be for a single fiscal year; provided, however, that the division may, in its discretion, provide a longer or shorter grant period.

[2.110.5.14 NMAC - N, 7/1/2011]

#### **2.110.5.15 REVERSIONS AND SUPPLEMENTAL FUNDING:**

A. Reversions. If, at the end of the grant period set forth in the grant agreement, an unexpended balance of funds remains, the unexpended balance shall revert to the juvenile adjudication fund.

B. Reversions/supplemental funding. When funds are reverted as provided in Subsection A of this section, or additional funds are made available due to any other cause, the division may take one or more of the following actions:

(1) set aside the funds for contingencies or emergencies;

(2) make the funds available for grants during the next regular application cycle; or

(3) make the funds available through a special application cycle.

[2.110.5.15 NMAC - N, 7/1/2011]

#### **2.110.5.16 REPORTING REQUIREMENTS:**

A. Grantees shall submit a quarterly report to the division on October 15, January 15, April 15, and July 10.

B. The division shall prescribe the format and content of quarterly reports, which shall include, but not be limited to, the following:

(1) fiscal reporting on the expenditure of grant funds and match expenditures; and

(2) program reporting, including, but not limited to, the number of clients served; the gender, age, grade, and ethnicity of clients; the type of offense; the number of components provided to clients; and the number of open, pending and closed cases.

[2.110.5.16 NMAC - N, 7/1/2011]

#### **2.110.5.17 EVALUATION:**

A. The division may conduct periodic evaluations of grantees and alternative adjudication programs receiving grant funds to determine compliance with applicable law and regulations, the grant agreement, and the program guidelines.

B. Grantees must cooperate fully with such evaluations, including, but not limited to, by making all financial and program records available for inspection and making personnel available for interview.

[2.110.5.17 NMAC - N, 7/1/2011]

#### **2.110.5.18 SANCTIONS:**

A. The division may impose sanctions on a grantee based upon one or more of the following grounds:

(1) improper or inadequate performance, including, but not limited to, the failure to implement grant activities in a timely fashion or in accordance with the grant agreement or conduct the alternative adjudication program in accordance with the program guidelines;

- (2) fraud, abuse, misconduct, or misuse of grant funds;
- (3) failure to correct monitoring or audit findings;
- (4) failure to document and report to the division all grant expenditures;
- (5) lack of continuing capacity to successfully administer the alternative adjudication program;
- (6) implementation of an alternative adjudication program or budget change without prior division approval;
- (7) non-compliance with one or more condition(s) of the grant agreement;
- (8) criminal conduct involving the alternative adjudication program; or
- (9) violation of applicable laws or regulations.

B. The sanctions set forth in this subsection are the types of permissible sanctions that may be imposed upon a grantee. More than one sanction may be imposed for the same ground(s) giving rise to the sanction. The sanction or sanctions imposed will be based upon the underlying ground(s) for the sanction(s), past performance of and sanctions imposed upon the grantee, and the importance of the state interest implicated by the ground(s) for the sanction(s).

(1) Disallowance of expenditures. A grantee may not be reimbursed for expenditures.

(2) Withholding reimbursement. The division director may temporarily withhold payment, or disallow further draw-downs.

(3) Suspension. The division director may suspend the grant agreement. The grantee shall not be reimbursed for expenditures incurred during the period of the suspension unless the division director subsequently authorizes such reimbursement in writing.

(4) Repayment to the juvenile adjudication fund of amounts previously paid by the division to the grantee.

(5) Termination of the grant agreement.

(6) Disqualification from receiving future grants.

C. Before imposing any sanctions on a grantee, the division director shall give the grantee written notice of the proposed sanction and the grounds for the proposed sanction. The grantee shall be provided a reasonable opportunity to present facts and

arguments challenging the appropriateness of the proposed sanction and the grounds upon which it is based. The division director shall issue a final decision after duly considering the grantee's facts and arguments or after the time for presenting them has passed.

[2.110.5.18 NMAC - N, 7/1/2011]

## **PART 6: SCHOOL-TO-WORK OPPORTUNITY GRANT PROGRAM APPLICATION PROCEDURES**

### **2.110.6.1 ISSUING AGENCY:**

Department of Finance and Administration, Local Government Division.

[6/30/98; Recompiled 10/01/01]

### **2.110.6.2 SCOPE:**

These rules and regulations shall apply to all regional area partnerships formed in the state of New Mexico that will or have applied for a federal School-to-Work Opportunities Act of 1994 grant, or state appropriations for programs established under the School-to-Work Opportunities Act of 1994.

[6/30/98; Recompiled 10/01/01]

### **2.110.6.3 STATUTORY AUTHORITY:**

School-to-Work Opportunities Act of 1994. Public Law 103-239, May 4, 1994.

[6/30/98; Recompiled 10/01/01]

### **2.110.6.4 DURATION:**

These rules shall be contingent upon federal or state funding designated for statewide activities established under the School-to-Work Opportunities Act of 1994.

[6/30/98; Recompiled 10/01/01]

### **2.110.6.5 EFFECTIVE DATE:**

June 30, 1998 [unless a later date is cited at the end of a section.]

[6/30/98; Recompiled 10/01/01]

### **2.110.6.6 OBJECTIVE:**

The objective of Part 6, Chapter 110 [now 2.110.6 NMAC] is to establish procedures for regional area partnerships applying for a School-to-Work Opportunities Act of 1994 grant. Under the federal School-to-Work Opportunities Act of 1994 the state of New Mexico has been given a \$13.2 million grant, over a five year period, beginning January 1997. Annual funding is contingent upon the availability of federal funds, and the satisfactory performance of the regional area partnerships. The purpose of the grant is to create a school-to-work system so that all students can develop a set of academic or work skill standards which will prepare them for successful entry, after high school, into either an institution of higher learning or the labor market; and to enable the student to leave the labor market and return for further training.

[6/30/98; Recompiled 10/01/01]

#### **2.110.6.7 DEFINITIONS:**

A. "**All aspects of the industry**" means all aspects of the industry or industry sector a student is preparing to enter including planning, management, finances, technical and production skills, underlying principles of technology, labor and community issues, health and safety issues and environmental issues, related to such industry or industry sector.

B. "**All students**" means both male and female students from a broad range of backgrounds and circumstances, including disadvantaged students, students with diverse racial, ethnic, or cultural backgrounds, American Indians, Alaska natives, native Hawaiians, students with disabilities, students with limited-English proficiency, migrant children, school dropouts, and academically talented students.

C. "**Approved state plan**" means a statewide school-to-work opportunities system plan that is submitted by a state under Section 213 of the School-to-Work Opportunities Act of 1994, that is determined by the secretaries to include the program components described in sections 102 through 104 and otherwise meet the requirements of this act, and is consistent with the state improvement plan for the state, if any, under the Goals 2000: Educate America Act.

D. "**Career major**" means a coherent sequence of courses or field of study that prepares a student for a first job and that:

(1) integrates academic and occupational learning, integrates school-based and work-based learning, establishes linkages between secondary schools and postsecondary educational institutions;

(2) prepares the student for employment in a broad occupational cluster or industry sector;

(3) typically includes at least two years of secondary education and at least one or two years of post secondary education;

(4) provides the students, to the extent practicable, with strong experience in and understanding of all aspects of the industry the students are planning to enter;

(5) results in the award of a high school diploma or its equivalent, such as:

(a) a general equivalency diploma (GED); or

(b) an alternative diploma or certificate for students with disabilities for whom such alternative diploma or certificate is appropriate;

(c) a certificate or diploma recognizing successful completion of one or two years of postsecondary education (if appropriate); and

(d) a skill certificate.

(6) may lead to further education and training, such as entry into a registered apprenticeship program, or may lead to admission to a two or four year college or university.

E. **"Council"** means the school-to-work advisory council, the policy setting body for the New Mexico school-to-work system established by executive order of the governor. The council membership shall include:

(1) the governor;

(2) the department of labor secretary;

(3) the economic development department secretary;

(4) the executive director of the commission on higher education;

(5) the department of finance secretary;

(6) any additional member that may be necessary in the future;

(7) the state superintendent of public instruction;

(8) one local school district representative;

(9) two state legislators;

(10) five at large members representing large business, small business, and labor.

F. **"Division"** means the local government division of the New Mexico department of finance and administration.

G. **"Educational plan for student success"** ( EPSS) means a comprehensive long-range planning, implementation, and evaluation tool of the public school district designed to lead to improved student learning and school improvement.

H. **"Employer"** means both public and private employers.

I. **"Goal(s)"** means an ultimate outcome over a long period of time of activity. It sets the general direction of work performed.

J. **"Goals 2000"** means the Goals 2000 Act which provides resources to states and communities to develop and implement educational reforms aimed at helping students master academic and occupational skill standards.

K. **"Governance"** means a component in the school-to-work system which addresses the administrative function of the local school-to-work effort, including:

- (1) the organization and management of a partnership or consortium within a geographic region defined by a regional area partnership;
- (2) fiscal integrity to operate system components;
- (3) a school-to-work coordinator;
- (4) the ability to leverage funding through fund raising and/or reallocation to sustain the school-to-work system;
- (5) an assigned fiscal agent.

L. **"Implementation grant"** means a school-to-work grant awarded on a competitive basis to a regional area partnership that has planned and developed a base for a school-to-work system, and is ready to begin implementing it.

M. **"Job shadowing"** means an opportunity given to students to observe specific jobs in a business setting to help them make a career decision. As part of the experience they may briefly partake in some of the activities they will be observing, but they will not be paid for doing so.

N. **"Local partnership"** means a local entity that is responsible for local school-to-work opportunities system and that:

- (1) consists of employers, representatives of local educational agencies and local postsecondary educational institution (including representatives of area vocational educational schools where applicable), local educators (such as teachers, counselors, or administrators), representatives of labor organizations or non-managerial employee representative, and students;

(2) may include other entities, such as:

(a) employer organizations;

(b) community-based organizations;

(c) national trade associations working at the local levels;

(d) rehabilitation agencies and organizations;

(e) registered apprenticeship agencies;

(f) local vocational education entities;

(g) proprietary schools and institutions of higher education (as defined in section 481(b) of the Higher Education Act of 1965 (20 U.S.C. 1088 (b) that continue to meet the eligibility and certification requirements under Title IV of such act (20 U.S.C. 1070 et seq.);

(h) local government agencies;

(i) parent organizations;

(j) teacher organizations;

(k) vocational student organizations;

(l) private industry councils established under section 102 of the Job Training Partnership Act (29.U.S.C. 1512);

(m) job centers;

(n) workforce development centers;

(o) federally recognized Indian tribes, Indian organizations, and Alaska native villages;

(p) native Hawaiian entities.

O. **"Mentor"**: See workplace mentor and/or school site mentor.

P. **"Objective(s)"** means a specific accomplishment to be achieved during a given period of time. Objectives are driven by "goals".

Q. **"Planning grant"** means a school-to-work grant awarded on a competitive basis to a regional area partnership for the purpose of planning a school-to-work system.

R. "**Professional development**" means to provide training and/or orientation to teachers, counselors, administrators, school site mentors, workplace mentors, school-to-work coordinators, and others, on any or all aspects of the school-to-work system in order to provide skills and knowledge necessary to successfully implement the system.

S. "**Regional area partnership**" means a regional entity composed of one or more local partnerships based geographically on New Mexico's 17 postsecondary institution service areas as defined by the small business development centers.

T. "**School dropout**" means a youth who is no longer attending any school and who has not received a secondary school diploma or a certificate from a program of equivalency for such a diploma.

U. "**School site mentor**" means a professional employed at a school who is designated as the advocate for a particular student, and who works in consultation with classroom teachers, counselors, related services personnel, the employer of the student, to design and monitor the progress of the school-to-work opportunities program for the student.

V. "**School-to-work system**" means a statewide program established under the School-to-Work Opportunities Act of 1994 that will enable all students to develop a set of academic or work skill standards to prepare them for successful entry into either an institution of higher learning or the labor market or enable students to leave the labor market and return for further training.

W. "**Secretaries**" means the U.S. secretary of education and the U.S. secretary of labor.

X. "**Skill certificate**" means a portable, industry-recognized credential issued by a school-to-work opportunities program under an approved state plan, that certifies that a student has mastered skills at levels that are at least as challenging as skill standards endorsed by the national skill standards board established under the National Skill Standards Act of 1994, except that until such skill standards are developed, the term skill certificate means a credential issued under a process described in the approved state plan.

Y. "**State**" means each of the several states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the Virgin Islands, the Federated States of Micronesia, the Republic of the Marshall Island, and the Republic of Palau.

Z. "**Sustainability**" means a strategy on how the school-to-work system will continue after federal funding ceases.

AA. "**Workplace mentor**" means an employee or other individual, approved by the employer at a workplace, who possesses the skills and knowledge to be mastered by a

student, and who instructs the student, critiques the performance of the student, guides the student to perform well, and works in consultation with classroom teachers and the employer of the student.

[6/30/98; Recompiled 10/01/01]

#### **2.110.6.8 FUNDING CYCLE:**

A. Annual funding is available to regional area partnerships for implementation or planning grants.

B. The funding cycle is up to three years for an implementation grant and up to two years for a planning grant.

[6/30/98; Recompiled 10/01/01]

#### **2.110.6.9 ELIGIBLE APPLICANTS FOR A GRANT:**

Eligible applicants are the regional area partnerships in New Mexico.

[6/30/98; Recompiled 10/01/01]

#### **2.110.6.10 ELIGIBILITY REQUIREMENTS:**

To be eligible for either a planning or implementation grant, all applicants must be able to fulfill three essential elements of a school-to-work system.

[6/30/98; Recompiled 10/01/01]

#### **2.110.6.11 GENERAL PROGRAM REQUIREMENTS:**

A. All school-to-work systems must:

(1) integrate school-based and work-based learning, integrate academic and occupational learning, and establish effective linkages among elementary, middle school, secondary and postsecondary education;

(2) provide participating students with the opportunity to complete career majors;

(3) provide participating students with experience in and an understanding of all aspects of the industry the students are preparing to enter; and

(4) provide all students with equal access to the full range of program components and related activities, such as recruitment, enrollment and placement activities.

**B. SCHOOL- BASED LEARNING COMPONENT:** The school-based learning component of a school-to-work opportunities system shall include:

(1) career awareness and career exploration and counseling (beginning at the earliest possible age, but not later than 7th grade) in order to help students who may be interested to identify, and select or reconsider, their interests, goals, and career majors, including those options that may not be traditional for their gender, race, or ethnicity;

(2) initial selection by interested students of a career major not later than the beginning of the 11th grade;

(3) a program of study designed to meet the same academic standards the State has established for all students, including, where applicable, standards established under the Goals 2000: Educate America Act, and to meet the requirements necessary to prepare a student for postsecondary education and the requirements necessary for a student to earn a skill certificate;

(4) a program of instruction and curriculum that integrates academic and vocational learning (including applied methodologies and team-teaching strategies), and incorporates instruction, to the extent practicable, in all aspects of an industry, appropriately tied to the career major of a participant;

(5) regularly scheduled evaluations involving ongoing consultation and problem solving with students and school dropouts to identify their academic strengths and weaknesses, academic progress, workplace knowledge, goals, and the need for additional learning opportunities to master core academic and vocational skills; and

(6) procedures to facilitate the entry of students participating in a school-to-work system into additional training or postsecondary education programs, as well as to facilitate the transfer of the students between education and training programs.

**C. WORK-BASED LEARNING COMPONENT:** Mandatory activities: the work-based learning component of a school-to-work system shall include:

(1) work experience;

(2) a planned program of job training and work experiences (including training related to pre-employment and employment skills to be mastered at progressively higher levels):

(a) that are coordinated with learning in the school-based learning component described in section;

(b) are relevant to the career majors of students and lead to the award of skill certificates.

- (3) workplace mentoring;
- (4) instruction in general workplace competencies, including instruction and activities related to developing positive work attitudes, and employability and participative skills;
- (5) broad instruction, to the extent possible, in all aspects of the industry;
- (6) permissible activities: such component may include such activities as:
  - (a) paid work experience;
  - (b) job shadowing;
  - (c) school-sponsored enterprises;
  - (d) on-the-job training.

**D. CONNECTING ACTIVITIES COMPONENT:** The connecting activities component of a school-to-work system shall include:

- (1) matching students with the work-based learning opportunities of employers;
- (2) providing, with respect to each student, a school site mentor to act as a liaison among the student and the employer, school, teacher, school administrator, and parent of the student, and if appropriate, other community partners;
- (3) providing technical assistance and services to employers, including small and medium-sized businesses, and other parties in:
  - (a) designing school-based learning components described in section 102, work-based learning components described in section 103, and counseling and case management services;
  - (b) training teachers, workplace mentors, school site mentors, and counselors.
- (4) providing assistance to schools and employers to integrate school-based and work-based learning, and integrate academic and occupational learning into the program;
- (5) encouraging the active participation of employers, in cooperation with local education officials, in the implementation of local activities described in section 102, section 103 or this section;

(6) providing assistance to participants who have completed the program in finding an appropriate job, continuing their education, or entering into an additional training program;

(7) linking the participants with other community services that may be necessary to assure a successful transition from school-to-work;

(8) collecting and analyzing information regarding post-program outcomes of participants in the school-to work system, to the extent practicable, on the basis of socioeconomic status, race, gender, ethnicity, culture, and disability, and on the basis of whether the participants are students with limited English proficiency, school dropouts, disadvantaged students, or academically talented students;

(9) linking youth development activities under this Act with employer and industry strategies for upgrading the skills of their workers.

[6/30/98; Recompiled 10/01/01]

#### **2.110.6.12 APPLICANT'S FINANCIAL OR IN-KIND REQUIREMENTS:**

A. Implementation grants require at least 50 percent matching funds from the applicant.

B. This requirement can be met by providing, either cash or in-kind services.

C. If the applicant does not charge its administrative costs to the school-to-work grant the match requirement is reduced to 30 percent of the grant amount.

D. Planning grants do not require a local match.

[6/30/98; Recompiled 10/01/01]

#### **2.110.6.13 APPLICATION LIMIT:**

Only one grant application per regional area partnership will be accepted.

[6/30/98; Recompiled 10/01/01]

#### **2.110.6.14 APPLICATION REQUIREMENTS:**

A. The applicant shall establish a process by which the responsibilities and expectations of students, parents, employers, and schools are clearly established and agreed upon at the point of entry of the student into a career major program of study.

B. A public school applicant shall meet the intent and focus areas of its educational plan for student success (EPSS).

C. The applicant shall meet the intent and focus areas of their institutions' missions and long-range plans.

D. All other members of the regional area partnerships must develop relationships between local community-based organizations, local educational agencies, private schools and home schoolers, and other institutions of higher learning, and business and industry.

E. Applications shall include a plan for an entire regional area partnership, which will include one or more local partnerships.

F. If a regional partnership, is comprised of more than one local partnerships the applicant must clearly describe the role each local partnership plays with regard to implementation or planning grants.

G. Applications shall include a plan for all participating public school districts, private schools, bureau of Indian affairs and other.

H. The regional partnership shall designate a fiscal agent and a coordinator for the regional partnership which may be a fiscal agent may include any public entity within the regional area partnership such as an educational institution, school district, city, county, regional council of governments, state agency, or non-profit agency registered in New Mexico.

I. The designated fiscal agent and a designated coordinator, must sign the application.

[6/30/98; Recompiled 10/01/01]

#### **2.110.6.15 APPLICATION PROCEDURES/FORM AND CONTENT:**

A. The form and content of applications will be determined by the division.

B. Ten (10) copies of the application, one of which must contain original signatures must be submitted to: Department of Finance and Administration, Local Government Division, Bataan Memorial Building, Suite 201, Santa Fe, New Mexico 87503

C. Applications must be received at the local government division by 5 p.m. of the designated application deadline.

D. The division will determine whether an application is complete, and its decision is final and unappealable.

[6/30/98; Recompiled 10/01/01]

#### **2.110.6.16 APPLICATION REVIEW, RATING AND SELECTION:**

A. The following review, rating and selection process will be used.

(1) Upon receipt of applications, division staff shall review for eligibility, completeness and compliance with the requirements of the regulations.

(2) In the event that the application is incomplete, the applicant will be promptly notified by the division. The applicant must then immediately submit the information requested. Applicants that do not respond may be disqualified.

(3) The division may consult other appropriate personnel for information and advice concerning technical aspects and evaluation of any application.

B. Division staff shall rate applications and present recommendations to the council based on the extent to which applicants meet program rating criteria.

C. Applications will be evaluated on the following criteria that include but are not limited to:

(1) the quality and extent to which the regional area partnership's plan, goals and objectives are measurable and obtainable and are consistent with the federal act and state plan;

(2) quality and extent to which the general program requirements are met;

(3) quality and extent to which the program meets the requirements of the school-based learning component as set forth in 11.2 [now Subsection B of 2.110.6.11 NMAC];

(4) quality and extent to which the program meets the requirements of the work-based learning component as set forth in 11.3 [now Subsection C of 2.110.6.11 NMAC];

(5) quality and extent to which the program meets the requirements of the connecting activities component as set forth in 11.4 [now Subsection D of 2.110.6.11 NMAC];

(6) quality and extent of the plan for professional development;

(7) quality and extent of curriculum /instructional development;

(8) quality and extent of development of parent participation, postsecondary staff training, and recruitment of other partners;

(9) quality and extent of opportunities for all students to participate in school-to-work activities;

(10) quality and extent of involvement of private, bureau of indian affairs, and other native American school students, and students that are home schooled;

(11) quality and extent of support that will be given to students with regard to their activities;

(12) quality of assessment/evaluation process and record keeping system;

(13) quality and extent to which the program links school-to-work activities with other educational, workforce development, and economic development strategies, programs and efforts;

(14) quality and extent to which regional area partnership governance components are in place or will be developed such as regional area partnership members broad-based, fiscal tracking, budget auditing, time-table;

(15) quality and extent to which sustainability strategy will lead to continuation of the school-to-work system and programs after federal funding ceases.

[6/30/98; Recompiled 10/01/01]

#### **2.110.6.17 REVERSIONS, SUPPLEMENTAL FUNDING AND UNDERRUNS:**

The council, division staff, applicants, and grantees will adhere to the following referenced guidelines:

A. Reversions/supplemental funding - When funds are reverted from a previously approved project grant, or additional funds are made available for any other reason, the council shall decide whether the funds will be set aside in a contingency fund, or shall take any other action it has deemed appropriate. The council's decision is final and unappealable.

B. Underruns - When a balance of funds remain after the completion of approved project activities and after all payments have been made, the funds will automatically revert to the council. The grantee may propose to expand approved activities or request council approval to expend underrun funds for other eligible activities. The council's approval or disapproval is final and unappealable.

C. Special applications - Should additional school-to-work funds become or be determined to be available, the council may call for and act on special applications from eligible applicants. The purpose and rating criteria of the special applications will be outlined in the call for applications.

[6/30/98; Recompiled 10/01/01]

#### **2.110.6.18 ADMINISTRATIVE PROCEDURES:**

All successful school-to-work state and federal grant program applicants will be required to adhere to all federal and state procurement laws and any other procurement procedures established by the division, in order to ensure that grant funds are expended in accordance with state law.

[6/30/98; Recompiled 10/01/01]

#### **2.110.6.19 GRANTEE SANCTIONS:**

A. If a grantee materially fails to comply with the terms and conditions of an award, whether stated in a federal statute, regulation, assurance, application or notice of award, the division director, may in addition to imposing any specific conditions upon the award, take one or more of the following actions:

- (1) temporarily withhold cash payments pending correction of the deficiency by the recipient, or the division may enforce more severe penalties;
- (2) deny both use of funds and any applicable matching credit for all or part of the cost of the activity or action not in compliance;
- (3) wholly or partly suspend or terminate the current award;
- (4) withhold further awards for the project or program;
- (5) take other remedies that may be legally available.

B. In taking an enforcement action, the division director shall provide the grantee with notice and an opportunity for hearing as allowed under the Act, and 34 CFR Parts 74 through 80.

[6/30/98; Recompiled 10/01/01]

#### **2.110.6.20 COUNCIL AUTHORITY:**

The council may at any time waive or adjust any state imposed regulation relative to the school-to-work system selection and administration as long as the waiver or adjustment does not penalize any other applicant or violate either state or federal law, or the requirements of the federal school-to-work grant to the state.

[6/30/98; Recompiled 10/01/01]

## **CHAPTER 111-114: [RESERVED]**

## **CHAPTER 115: LOCAL GOVERNMENT DEPOSITS [RESERVED]**

**CHAPTER 116-119: [RESERVED]**

**CHAPTER 120: LOCAL GOVERNMENT  
INDEBTEDNESS AND SECURITIES [RESERVED]**