

**Michelle Lujan Grisham**  
Governor

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**Office of the Secretary**

March 23, 2021

**DIVISIONS**

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Enclosed is the following proposal:

The New Mexico Taxation and Revenue Department hereby gives notice as required under Section 14- 4- 5.2 NMSA 1978 and 1.24.25.11 NMAC that it proposes to amend, repeal and replace, repeal and adopt the following rules as authorized by Section 9-11-6.2 NMSA 1978:

**Purpose:** The proposed rules are being enacted, amended, repealed, and repealed and replaced to align with current law and provide guidance on the new method of sourcing to marketplace providers and sellers.

**Summary of Proposed Changes:** The New Mexico Taxation and Revenue Department proposes to amend/repeal/replace/adopt the following rules:

**Tax Administration Act**

*(Reporting according to Business Location)*

3.1.4.13 NMAC Section 7-1-14 NMSA 1978

**Gross Receipts and Compensating Tax Act**

*(Definitions)*

3.2.1.7 NMAC Section 7-9-3 NMSA 1978

*(Engaging in Business)*

3.2.1.12 NMAC Section 7-9-3.3 NMSA 1978

*(Gross Receipts – General)*

3.2.1.14 NMAC Section 7-9-3.5 NMSA 1978

*(Gross Receipts; Tangible Personal Property)*

3.2.1.15 NMAC Section 7-9-3.5 NMSA 1978

*(Gross Receipts of Marketplace Providers and Marketplace Sellers)*

[NEW] 3.2.1.20 NMAC Section 7-9-3.5 NMSA 1978

*(Separately State the Gross Receipts Tax)*

3.2.6.8 NMAC Section 7-9-6 NMSA 1978

*(The Use in New Mexico of a Service Performed Entirely Outside New Mexico)*

3.2.10.10 NMAC Section 7-9-7 NMSA 1978

*(Compensating Tax on Services Performed Outside the State)*

[NEW] 3.2.10.23 NMAC Section 7-9-7 NMSA 1978

*(Purchaser Entitled to Rely on Seller’s Statement as to Whether Tax Was Charged)*

[NEW] 3.2.10.24 NMAC Section 7-9-7 NMSA 1978

*(Guidelines for “Activity”)*

3.2.13.8 NMAC Section 7-9-10 NMSA 1978

*(Third Party Sales by Agents for Collection of Compensating Tax)*

3.2.13.9 NMAC Section 7-9-10 NMSA 1978

*(Exemptions of Gross Receipts of Marketplace Sellers and Marketplace Providers)*

[NEW] 3.2.100.10 NMAC Section 7-9-12 NMSA 1978

*(Deductions of Gross Receipts of Marketplace Providers and Marketplace Sellers)*

[NEW] 3.2.203.11 NMAC Section 7-9-45 NMSA 1978

**Hearing Date:** Notice of public rule hearing: A public hearing will be held on the proposed rule changes on Thursday, April 29, 2021, at 12:00 p.m. through the internet, email, and telephonic means in response to concerns surrounding COVID-19 and in accordance with Executive Order 2020-004, Declaration of a Public Health Emergency, and the March 12, 2020 Public Health Emergency Order to Limit Mass Gatherings Due to COVID-19.

**Technical Information:** No technical or scientific information was consulted in drafting these proposed rule changes.

**Public Hearing Location:** The Public Hearing will be accessible via WebEx by going to <https://nm-tax.webex.com/nm-tax/j.php?MTID=mf62ce1c91ba6017f237a822566543bbb> Meeting number (access code): 132 352 9832 Meeting password: 04292021 or by telephone by dialing 1-844-621-3956. Any oral comments made during this hearing will be recorded and any electronic written comments can be submitted during the hearing at [policy.office@state.nm.us](mailto:policy.office@state.nm.us).

**How to participate:** Individuals with disabilities who need any form of auxiliary aid to attend or participate in the public hearing are asked to contact Alicia Romero at [Alicia.Romero@state.nm.us](mailto:Alicia.Romero@state.nm.us). The Taxation and Revenue Department will make every effort to accommodate all reasonable requests but cannot guarantee accommodation of a request that is not received at least ten calendar days prior to the scheduled hearing.

**Complete Copies** of the proposed rule changes can be found at [www.tax.newmexico.gov/proposed-regulations-hearing-notices.aspx](http://www.tax.newmexico.gov/proposed-regulations-hearing-notices.aspx) or are available upon request by contacting the Tax Policy Office at [policy.office@state.nm.us](mailto:policy.office@state.nm.us).

The copies of the proposed amended, repealed, and replaced rules were placed on file in the Office of the Secretary on March 12, 2021. Pursuant to Section 9-11-6.2 NMSA 1978 of the Taxation and Revenue Department Act, the final rules, if filed, will be filed as required by law on or about May 27, 2021.

**When are comments due:** Written comments on the proposals can be submitted by email to [policy.office@state.nm.us](mailto:policy.office@state.nm.us) or by mail to the Taxation and Revenue Department, Tax Information and Policy Office, Post Office Box 630, Santa Fe, New Mexico 87504-0630 or on or before April 29, 2021. All written comments received by the agency will be posted on [www.tax.newmexico.gov](http://www.tax.newmexico.gov) no more than three business days following receipt to allow for public review.

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Stephanie Schardin Clarke  
Cabinet Secretary

### **3.1.4.13 REPORTING ACCORDING TO BUSINESS LOCATION**

#### **A. REPORTING ACCORDING TO BUSINESS LOCATION GENERAL**

(1) Any person maintaining more than one place of business in New Mexico and reporting under one identification number is required to report the taxable gross receipts for each location on a single CRS-1 form. Receipts from locations in each municipality or in each county outside a municipality where a place or places of business are maintained must be indicated separately on the CRS-1 form.

(2) A person who maintains multiple places of business in a single municipality or multiple places of business not within a municipality but within a single county and who reports under one identification number is required to combine the taxable gross receipts from these places of business, indicating the total taxable gross receipts derived from all locations in each municipality or county on the CRS-1 form.

(3) For persons engaged in the construction business, "place of business" includes each place where construction is performed.

(4) The "place of business" of a person who has no other place of business in New Mexico, but who has sales personnel who reside in New Mexico, includes each place where such personnel reside. Such persons are required to report gross receipts in the manner provided in Paragraphs (1) and (2) of Subsection A of 3.1.4.13 NMAC. The place of business of a person who has no other place of business and does not have sales personnel who reside in New Mexico but who does have service technicians who perform service calls in New Mexico is "out of state", whether the service technicians live in New Mexico or elsewhere. For the purposes of Paragraph (4) of Subsection A of 3.1.4.13 NMAC, a "service technician" is an employee whose primary work responsibility is the repair, servicing and maintenance of the products sold or serviced by the employer and whose sales activities are at most incidental.

(5) A person who is liable for the gross receipts tax and who has no "place of business" or resident sales personnel in New Mexico is required to indicate on the CRS-1 form that the business location is "out of state".

(6) A person is required to report receipts for the location where the place of business is maintained even though the sale or delivery of goods or services was not performed at or from the place of business, except as provided in Subsection J of this section. It should be noted, however, that each construction site, as indicated in Paragraph (3) of Subsection A of 3.1.4.13 NMAC, is a "place of business" for this purpose.

(7) If a person has more than one place of business in New Mexico, the department will accept, on audit, this person's method of crediting sales to each place of business, provided the method of crediting is in accordance with the person's regular accounting practice and contains no obvious distortion.

(8) Example 1: The X company maintains its only place of business in Roswell, but sends its sales personnel to different cities in New Mexico to solicit sales and take orders. X is not required to report its gross receipts for each municipality in which its sales personnel are operating. X reports its gross receipts only for Roswell because its sole place of business is Roswell.

(9) Example 2: The Z company maintains its only place of business in Grants. It makes deliveries in its own trucks to customers in various other cities within New Mexico. Z is not required to report its gross receipts for each municipality in which it makes deliveries. Z reports its gross receipts only for Grants. It is not maintaining a place of business in municipalities outside Grants solely because of its deliveries.

(10) Example 3: The W furniture company maintains its only office and showroom inside the city limits of Carrizozo. W's furniture warehouse is located outside the Carrizozo city limits. Furniture sold by W is, for the most part, delivered from its warehouse. W's "place of business" is in Carrizozo and it must report all its gross receipts for that municipality, regardless of the location of its warehouse.

(11) Example 4: The X appliance company maintains offices and showrooms in both Truth or Consequences and Las Cruces. The Truth or Consequences place of business initiates a sale of a refrigerator. The refrigerator is delivered from stock held in the Las Cruces place of business. X's place of business to which it credits the sale will be accepted on audit, if the crediting is in accordance with X's method of crediting sales in its regular

accounting practice and contains no obvious distortion. If X credits the sale to its Truth or Consequences place of business, the department will accept Truth or Consequences as the location of the sale. The same result will occur if X credits the sale to its Las Cruces place of business.

~~B. REPORTING ACCORDING TO BUSINESS LOCATION UTILITIES:~~

~~(1) Each municipality and the portion of each county outside a municipality in which customers of a utility are located constitute separate places of business. The physical location of the customer's premises or other place to which the utility's product or service is delivered to the customer is a business location of the utility.~~

~~(2) The department will accept, on audit, a utility's method of crediting its sales to its places of business, provided the method of crediting is based on the location of its customers as business locations and the method of crediting contains no obvious distortion.~~

~~(3) For the purposes of 3.1.4.13 NMAC, "utility" means a public utility or any other person selling and delivering or causing to be delivered to the customer's residence or place of business water via pipeline, electricity, natural gas or propane, butane, heating oil or similar fuel or providing cable television service, telephone service or internet access service to the customer's residence or place of business.~~

~~C. REPORTING BY PERSONS ENGAGED IN THE LEASING BUSINESS: A person from out of state who is engaged in the business of leasing as defined in Subsection E of Section 7-9-3 NMSA 1978 and who has no place of business or resident sales personnel in New Mexico is required to indicate "out of state" on the CRS-1 report form and to calculate gross receipts tax due using the tax rate for the state. An out of state person engaged in the business of leasing who has a place of business or resident sales personnel in New Mexico is required to report gross receipts for each municipality or area within a county outside of any municipalities in which the person maintains a place of business or resident sales personnel. An in-state person engaged in the business of leasing with more than one place of business is required to report gross receipts for each municipality or area within a county outside of any municipality in which the person maintains a place of business.~~

~~D. REPORTING TAXABLE GROSS RECEIPTS BY A PERSON MAINTAINING A BUSINESS OUTSIDE THE BOUNDARIES OF A MUNICIPALITY ON LAND OWNED BY THAT MUNICIPALITY: For the purpose of distribution of the amount provided in Section 7-1-6.4 NMSA 1978, persons maintaining a place of business outside the boundaries of a municipality on land owned by that municipality are required to report their gross receipts for that location. For the purpose of calculating the amount of state and local gross receipts tax due, such persons shall use the sum of the gross receipts tax rate for the state plus all applicable tax rates for county-imposed taxes administered at the same time and in the same manner as the gross receipts tax.~~

~~E. ITINERANT PEDDLERS TEMPORARY BUSINESS LOCATIONS:~~

~~(1) An itinerant peddler is a person who sells from a nonreserved location chosen for temporary periods on a first come, first served basis. An itinerant peddler does no advertising or soliciting, has no one employed to sell and is not employed as a salesperson.~~

~~(2) An itinerant peddler shall report taxable gross receipts by the municipality or the area of a county outside any municipality where the peddler maintains a place of business. If the itinerant peddler sells from only one location, that location shall be the place of business. If an individual peddler has no set sales location, the place of business shall be the peddler's temporary or permanent residence within New Mexico.~~

~~(3) Example: X occasionally places a blanket on a sidewalk in a town wherever X can find space for the blanket and sells homemade pies. X is an itinerant peddler because the space is not reserved specifically for X, it is chosen for temporary periods, and X is not employed nor does X have employees. Additionally, because X cannot be expected to be found regularly carrying on business at the same sidewalk location every day, X's place of business, for reporting purposes, is X's residence.~~

~~(4) Any person who pays a fee to occupy a particular location or space for a determined period of time and who sells any item or performs any service at that location is not an itinerant peddler and shall report that location as a place of business.~~

~~(5) Example: X pays fifty dollars (\$50.00) to rent a space for a booth for two days during a festival. X is not an itinerant peddler because the space was assigned, and during the festival X could normally be expected to be found carrying on business at that place. X must therefore report the gross receipts from sales made during the festival to the location of the space.~~

~~(6) Any person who, in advance, advertises through print or broadcast media or otherwise represents to the public that the person will be at a particular location for a specified period of time and who sells property or performs service at that location shall report that location as a place of business.~~

~~(7) Example: X sells fish from a truck in a shopping center parking lot. X places an advertisement in the local paper informing the public where X will be located and the dates when X will sell fish at that location. X is not an itinerant peddler because X advertises and solicits business, and X can normally be expected to be found at that location during the time designated in the advertisement. The shopping center is X's place of business and X must report all activity occurring there to that location.~~

~~F. OBVIOUS DISTORTION: For purposes of 3.1.4.13 NMAC, obvious distortion shall be presumed whenever the method used to credit sales to a place of business treats similar transactions inconsistently. Any method which intentionally credits sales to a location with a lower combined tax rate primarily for the purpose of reducing the taxpayer's total tax liability shall be presumed to contain obvious distortion, shall not be allowed and may be the basis of establishing intent to evade or defeat tax under the provisions of Section 7-1-72 NMSA 1978.~~

~~G. SPACE PROVIDED BY CLIENT CONSTITUTES BUSINESS LOCATION:~~

~~(1) Except as provided otherwise in Paragraph (6) of Subsection G of 3.1.4.13 NMAC, any person performing a service who occupies space provided by the purchaser of the service being performed has established a business location if the following conditions are present:~~

~~(a) the space is occupied by the provider of the service for a period of six consecutive months or longer;~~

~~(b) the provider or employees of the provider of the service are expected, by the purchaser of the services or representatives of the purchaser, to be available at that location during established times; and~~

~~(c) critical elements of the service are performed at, managed or coordinated from the purchaser's location.~~

~~(2) The following indicia will be considered in determining if the above conditions are present:~~

~~(a) the provider of the service has assigned employees to the client's location as a condition of employment;~~

~~(b) telephone is assigned for the exclusive use by the service provider;~~

~~(c) the space has been designated for the use of the service provider;~~

~~(d) the space contains office furniture or equipment furnished by either the client or the service provider for the sole use of the service provider;~~

~~(e) the service provider is identified by business name on a sign located in or adjacent to the provided space;~~

~~(f) the client or other persons can expect to communicate, either in person or by telephone, with the service provider or employees or representatives of the service provider at the space provided by the client; and~~

~~(g) the contract between the client and the service provider requires the client to provide space to the service provider.~~

~~(3) Any person meeting the three conditions as evidenced by the listed indicia must report the receipts derived from the performance of the service at the client's location to the municipality or county in which the furnished space is located.~~

~~\_\_\_\_\_ (4) Example 1: X has entered into a contract to perform research and development services for the army at a location on White Sands missile range within Doña Ana county. The term of the contract is one year and is renewable annually. X is required by the contract to assign employees to the project at White Sands missile base on a full time basis. The assigned employees consider White Sands as their place of employment. The army furnishes X with office and shop space as well as furniture and equipment. The space is identified as X's location by a sign containing X's business name at the main entrance to the assigned space. A specific telephone number has been assigned for X's exclusive use during the term of the contract. X shall report the receipts from services performed at the White Sands location under this contract using Doña Ana county as the location of business for gross receipts tax purposes.~~

~~\_\_\_\_\_ (5) Example 2: Y has entered into a maintenance contract with a state agency to maintain and repair computer equipment. The state agency provides storage facilities to Y for the storage of equipment and parts which will be used by Y in the maintenance and repair of computer equipment. Y's employees are present at the location of the state agency only when required to repair the computers. The agency contacts Y at Y's regular place of business to report equipment problems and to request necessary repairs. On receipt of a request from the agency, Y dispatches an employee to the agency's location to repair the equipment. The location of the state agency does not constitute a separate business location for Y. Y shall report its receipts from the state agency under this contract to the location where Y maintains a regular place of business.~~

~~\_\_\_\_\_ (6) The provisions of Subsection G of 3.1.4.13 NMAC do not apply when:~~

~~\_\_\_\_\_ (a) the provider of the service is a co-employer or joint employer with the client of the employees at the client's location or has entered into a contract to provide temporary employees to work at the client's facilities under the client's supervision and control; and~~

~~\_\_\_\_\_ (b) the provider of the service has no employees at the client's location other than employees described in Subparagraph (a) of Paragraph (6) of Subsection G of 3.1.4.13 NMAC above.~~

~~H. REPORTING ACCORDING TO BUSINESS LOCATION PERSONS SUBJECT TO INTERSTATE TELECOMMUNICATIONS GROSS RECEIPTS TAX ACT:~~

~~\_\_\_\_\_ (1) Each municipality and the portion of each county outside all municipalities in which customers of a person who is engaging in an interstate telecommunications business and who is subject to the interstate telecommunications gross receipts tax are located constitute separate places of business. Except for commercial mobile radio service as defined by 47 C.F.R. 20.3, the location of the person's customer is the location of the telephone sets, other receiving devices or other points of delivery of the interstate telecommunications service.~~

~~\_\_\_\_\_ (2) The department will accept, on audit, the person's method of crediting its sales to its places of business, provided the method of crediting is based on the location of its customers as business locations and the method of crediting contains no obvious distortion.~~

~~\_\_\_\_\_ (3) This version of Subsection H of 3.1.4.13 NMAC applies to all interstate telecommunications gross receipts tax returns due after January 1, 2000.~~

~~I. REPORTING ACCORDING TO BUSINESS LOCATION COMMERCIAL MOBILE RADIO SERVICE PROVIDERS: For interstate telecommunications gross receipts tax returns due after January 1, 2000, each municipality and the portion of each county outside all municipalities in which customers of the provider of a commercial mobile radio service as defined by 47 C.F.R. 20.3 are located constitute separate places of business. With respect to the provision of commercial mobile radio service, the business location of a customer will be determined by the customer's service location. A customer's service location is determined first by the customer's billing address within the licensed service area. If the customer does not have a billing address within the licensed service area or if the customer's billing address is a post office box or mail drop, then the customer's service location is the street or rural address of the customer's residence or business facility within that service area.~~

~~J. TRANSACTIONS ON TRIBAL TERRITORY: A person selling or delivering goods or performing services on the tribal land of a tribe or pueblo that has entered into a gross receipts tax cooperative agreement with the state of New Mexico pursuant to Section 9-11-12.1 NMSA 1978 is required to report those~~

receipts based on the tribal location of the sale or delivery of the goods or performance of the service rather than the person's business location.

**3.1.4.13. REPORTING ACCORDING TO BUSINESS LOCATION [Applicable to periods beginning July 1, 2021]**

A. DEFINITIONS: As used in this Reg. 3.1.4.13, these terms have the following definitions:

(1) "Gross receipts." Under Section 7-1-14 NMSA 1978, "gross receipts" is defined as that term is used in the Gross Receipts and Compensating Tax Act, the Leased Vehicle Gross Receipts Tax Act, or the Interstate Telecommunications Gross Receipts Tax Act, as applicable. As used in this Reg. 3.1.4.13, the term "gross receipts from" or similar terms indicates that under the applicable tax acts, the gross receipts would be treated as derived from a particular source or characterized as relating to a particular activity such as the lease or property or the sale of services.

(2) "In-person service." Under Section 7-1-14 NMSA 1978 "professional service," as defined, "does not include an in-person service." The term "in-person service" means a service physically provided in person by the service provider, where the customer or the customer's real or tangible personal property upon which the service is performed is in the same location as the service provider at the time the service is performed. If the service is not generally provided, or does not generally need to be provided, physically in the presence of or upon the customer or upon the customer's property, it is not an "in-person service" simply because it may be or sometimes is performed in the presence of the customer or at the location of the customer's property.

(a) Examples of services that will generally be treated as in-person services include, but are not limited to:

(i) Services provided by healthcare or mental health workers that are generally performed or required to be performed on or in the presence of the patient.

(ii) Services provided by athletic trainers or physical therapists for clients.

(iii) Services provided by barbers and cosmologists.

(iv) Home healthcare services.

(b) Examples of services that will generally not be treated as in-person services include, but are not limited to:

(i) Architectural and engineering services. Note, however, that when performed as part of or billed to a construction project, these services are considered "construction-related services" rather than professional services pursuant to Section 7-9-3.4(C) NMSA 1978, and the reporting location for gross receipts from these services is the construction site per Section 7-1-14(F)(2) NMSA 1978.

(ii) Legal services.

(iii) Accounting and tax preparation services.

(iv) Real estate appraisal services.

(3) "Professional service." The term "professional service" as defined in Section 7-1-14 NMSA 1978 means a service, other than an in-person service or construction-related service, that requires either an advanced degree from an accredited post-secondary educational institution or a license from the state to perform. As provided in Paragraph (2) of this Subsection A, just because a service is provided in person by the service provider does not make it an "in-person" service if the service is not generally provided, or does not generally need to be provided, physically in the presence of or upon the customer or upon the customer's property.

(4) "Reporting location." This Reg. 3.1.4.13 uses the term "reporting location" in place of the term "business location," the term that is used in Sections 7-1-3 and 7-1-14 NMSA 1978 as well as local option taxes to refer to the location code designated by the department and required to be used to report the gross receipts and related deductions subject to gross receipts tax or the value of items whose taxable use is subject to the compensating tax. Like the term "business location," the term "reporting location" refers to the location code and applicable tax rate for reporting gross receipts tax and compensating tax, as designated by the department.

(5) “Seller’s location” or “place of performance.” This regulation may use the terms “seller’s location” or “place of performance” or similar terms to refer to the general facts that may be essential for determining the reporting location. In general, a seller’s location may include a particular building, including a store or office, or other physical location maintained or operated by or for the seller, or used by the seller, where some designated activity giving rise to gross receipts takes place. If the seller uses no such physical location in New Mexico, and if the seller’s domicile is not in New Mexico, then the “seller’s location” as used in this regulation is deemed to be outside the state.

B. REPORTING ACCORDING TO REPORTING LOCATION - GENERAL:

(1) Reporting Location and Rate of Tax for Gross Receipts and Taxable Use. Section 7-1-14 NMSA 1978, amended effective July 1, 2021, determines the proper reporting jurisdiction and rate of tax that apply under the Gross Receipts and Compensating Tax Act, Interstate Telecommunications Gross Receipts Tax Act, Leased Vehicle Gross Receipts Tax Act and any act authorizing the imposition of a local option gross receipts or compensating tax.

(2) Effect of the Substantive Tax Provisions on the Rules for Reporting Location. Unless otherwise indicated, the provisions of this Reg. 3.1.4.13 should be read consistently with the provisions of the Gross receipts and Compensating Tax Act, Interstate Telecommunications Gross Receipts Tax Act, Leased Vehicle Gross Receipts Tax Act, as appropriate, and any acts authorizing imposition of local option gross receipts or compensating tax, and any regulations issued under these acts. No provisions of this Reg. 3.1.4.13 should be read as subjecting to tax items that are not subject to tax, or excluding from tax items that are subject to tax, under these substantive tax provisions.

(3) State Reporting Location and Application of the State Rate. In some cases, taxable gross receipts or the value of items whose taxable use is subject to the compensating tax may not be required to be reported to a particular reporting location in this state. In those cases, the reporting location is the state reporting location and only the state tax rate will apply.

(a) Example: Gross receipts from a professional service performed outside New Mexico, the product of which is delivered to a New Mexico customer for initial use in the state, are taxable in the state. Because Paragraph (9) of Subsection C of this Reg. 3.1.4.13 provides that the reporting location of gross receipts from professional services is the location where the services are performed or sold, the gross receipts would be reported to the reporting location for the state and taxed at the state rate.

(b) Example: A nonresident individual with no regular place of business in the state is hired by an out-of-state seller to represent the seller. In order to perform this service, the individual obtains tangible personal property in a tax-free transaction outside the state, which would have been subject to the gross receipts tax had it been acquired inside the state. After acquiring the property, the individual brings that property into New Mexico, using the property in the service performed at various locations throughout the state. The compensating tax on the value of this property would be reported to the reporting location for the state and taxed at the state rate. See Subsections E and C(5)(e)(ii) of this Reg. 3.1.4.13.

(c) Example: Under Subparagraph (5)(e) of Subsection C of this Reg. 3.1.4.13, a seller that does not have access to sufficient information for reporting sales of tangible personal property to the location where the customer receives that property may report to the gross receipts from those sales to the seller’s location. So an out-of-state seller may have certain sales that would be reported to the reporting location for the state and taxed at the state rate. As explained under Subparagraph (5)(e), however, sellers who have access to reliable information from which they can determine an estimate of receipts by reporting location must use that information.

(4) Gross Receipts Tax Not Required to Be Charged or Collected. Nothing in Section 7-1-14 NMSA 1978 or this Reg. 3.1.4.13 requires the person that engages in activity or transactions resulting in taxable gross receipts to charge or collect the tax from purchasers. The gross receipts tax is a tax on the seller and under Section 7-9-6 NMSA 1978, the taxpayer need only affirmatively state on the billing to its purchaser whether gross

receipts tax is included in the amount billed. Furthermore, Reg. 3.2.6.8 provides that the amount of gross receipts tax owed may be “backed out” of the total charged to the customer.

(5) Gross Receipts of Commissioned Sales Agents versus Consignors/Consignees and Marketplace Sellers/Providers.

(a) Commissioned Sales Agents. Under Section 7-9-3.5(2)(a) NMSA 1978 and applicable regulations, commissioned sales agents report only their commission or fee when the property or services which they promote for sale are those of a third party. Under Section 7-1-14 NMSA 1978, the commission is gross receipts from the performance of a service by the sales agent and the reporting location of those receipts is determined in accordance with Paragraph (9), Subsection C of this regulation.

(b) Gross Receipts of Consignors/Consignees and Marketplace Sellers/Providers. Under Section 7-9-3.5(2)(b) and (g) NMSA 1978 and applicable regulations, the gross receipts and related deductions for sales on consignment and for sales facilitated by marketplace providers are generally defined as all amounts paid or collected from the sale, lease, or licensing of property or services even where a third party consignor or marketplace seller also has gross receipts from selling the related property or service provided. The reporting location of gross receipts and related deductions of the consignor/consignee or the marketplace seller/provider is determined under this Reg. 3.1.4.13 as follows:

(i) By looking to the nature of the transaction or activity from which the gross receipts are derived, as though the consignor and consignee, or the marketplace seller and marketplace provider, is each the seller or provider of that transaction or activity to the customer; and, except as provided in Clause (ii) and (iii) of this Subparagraph (b), imputing to both parties information known by either party that may be relevant in properly determining the reporting location of the gross receipts.

(ii) In a case where the consignor or marketplace seller may properly claim a deduction under the Gross Receipts and Compensating Tax Act and applicable regulations on account of the transaction with the consignee or marketplace provider, respectively, the consignor or marketplace seller may report these deductions and related gross receipts to the reporting location based on information available to them, without imputing of information known by the consignee or marketplace provider.

(iii) In a case where the marketplace provider, in determining the reporting location of gross receipts, reasonably relies on erroneous information provided by the marketplace seller as provided in Section 7-9-5(C) NMSA 1978, the correct information that may be known to the marketplace seller will not be imputed to the marketplace provider.

(c) Examples:

(i) Commissioned Sales Agent X works for Business Y to sell tangible personal property owned by Y to customers in New Mexico. Agent X receives a commission based on the amount of the sale made on behalf of Business Y to a customer. Business Y will have gross receipts from selling tangible personal property. The reporting location of Y’s gross receipts from the sale of the property is the location of Y’s customer, determined under the provisions of Paragraph (5) of Subsection C of this regulation. Agent X is performing a service sourced under Paragraph (9)(e) of Subsection C of this regulation. The product of the service performed by Agent X is the completion of the order and sale to a customer of Y’s products. Therefore, the reporting location of Agent X’s gross receipts from commissions paid by Y for services performed is also the location of Y’s customer and this location should be determined consistent with the provisions of Paragraph (5) of Subsection C of this regulation.

(ii) Same facts as Example (i) except that, rather than a commissioned sales agent, X is a consignee and Y is a consignor. Under the consignment arrangement, X receives receipts from customers for Y’s tangible personal property and agrees to pay Y a portion of those receipts. Under the Gross Receipts and Compensating Tax Act and applicable regulations, both X and Y have gross receipts from selling tangible personal property. The reporting location for the gross receipts and any related deductions of both X and Y is the location of the customer determined under the provisions of Paragraph (5) of Subsection C of this regulation.

(iii) Same facts as Example (ii) except that rather than the consignee/consignor relationship described, X is a marketplace provider and Y is a marketplace seller. Under the Gross Receipts and Compensating Tax Act and applicable regulations, both X and Y have gross receipts from selling or facilitating the sale of tangible personal property. The reporting location for the gross receipts and any related deductions of both X and Y is the location of the customer determined under the provisions of Paragraph 5 of Subsection C of this regulation.

(iv) Same facts generally as Examples (ii) and (iii). In addition, while the consignee or marketplace provider offers the tangible personal property for sale to the customer and collects the payment, it is the consignor or marketplace seller that ships the tangible personal property to the customer. Information as to the customer's location is imputed to the consignee or marketplace provider when determining reporting location of its gross receipts, but the marketplace provider is also allowed to reasonably rely on information provided by the marketplace seller, even if erroneous, in determining the reporting location.

(v) Same facts generally as Examples (ii) and (iii). In addition, the consignee or marketplace provider offers the tangible personal property for sale to the customer, collects the payment, and also ships the tangible personal property to the customer. The consignor or marketplace seller may report gross receipts for which a proper deduction can be taken on account of the sale by the consignee or marketplace seller based on information known by the consignor or marketplace seller, without imputing information known by the consignee or marketplace provider.

#### C. GENERAL RULES FOR DETERMINING REPORTING LOCATION:

(1) Meaning of Certain Terms. Unless otherwise defined in this Regulation, Section A or otherwise indicated by the context, the terms used in these rules have the same meaning as under the Gross Receipts and Compensating Tax Act.

(2) Effect of the Reporting Location. A person that has gross receipts and a person making taxable use of property or services in New Mexico subject to the compensating tax shall report the gross receipts or compensating tax to the proper reporting location as provided in this section. The gross receipts and compensating taxes imposed by the Gross Receipts and Compensating Tax Act may include both a state rate of tax as well as applicable local option rates authorized by state law and imposed by county and municipal governments. The reporting location, as that term is used under this Regulation 3.1.4.13, determines the local jurisdiction to which the tax will be reported as well as the gross receipts or compensating tax rate that applies.

(3) Reporting to Multiple Locations. Any person that must report gross receipts or taxable use of items to more than one reporting location under one identification number is required to report gross receipts, deductions, and the value of items used for each location on [tax return] and in accordance with the reporting location codes as designated by the Secretary under Section 7-1-14 NMSA 1978 and this Regulation 3.1.4.13.

(4) Gross Receipts from Transactions Involving Real Property. If the gross receipts are from the sale, lease or granting of a license to use real property located in New Mexico, then the reporting location for those gross receipts and any related deductions is the location of the real property.

(5) Gross Receipts from Sale or License of Tangible Personal Property and from Certain Licenses and Other Services. If the gross receipts are from the sale or license of tangible personal property, or if the receipts are from activity described in Paragraph (6) or (9)(e) of this Subsection C, the reporting location for the gross receipts and related deductions is determined as follows:

(a) If the gross receipts are from the property or the product of a service that is delivered by the seller and received by the purchaser from the seller at the seller's location, then the reporting location of the gross receipts and any related deductions, is the seller's location.

(b) If the gross receipts are from property or the product of a service that is not delivered by the seller and received by the purchaser at the seller's location as described in Subparagraph (a) of this Paragraph (5), the reporting location is the location indicated by instructions for delivery to the purchaser, or the purchaser's donee, when known to the seller.

(c) If Subparagraphs (a) and (b) of this Paragraph (e) do not apply, the reporting location is the location indicated by an address for the purchaser available from the business records of the seller that are maintained in the ordinary course of business; provided that use of the address does not constitute bad faith.

(d) If Subparagraphs (a) through (c) of this Paragraph (e) do not apply, the reporting location is the location for the purchaser obtained during consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available; provided that use of this address does not constitute bad faith.

(e) If Subparagraphs (a) through (d) of this subsection do not apply, including a circumstance in which the seller is without sufficient information to apply those provisions, then the reporting location for the gross receipts and related deductions is the location from which the property or product of the service was shipped or transmitted to the purchaser.

(i) Except as provided in provision (ii) below, the seller is not considered to be without sufficient information to apply provisions of Subparagraphs (a) through (d) if:

(I) it obtains or has access to sufficient information at the time of the sale, or subsequently, but simply fails to maintain that information in its records; or

(II) it has access to sufficient information from other reliable sources to make a reasonable estimate of the reporting location under Subsection F of this regulation at the time the gross receipts are required to be reported. Examples of information from other reliable sources includes population or market-penetration information that may be used to develop a reasonable estimate of the location of consumers of certain products.

(ii) If gross receipts are derived from a single sale or transaction where the property or the product of a service provided is determined to be delivered simultaneously at multiple locations throughout the state, the seller is deemed not to have sufficient information to determine the reporting location under this Subparagraph (e).

(I) Example: Company X provides an advertising service to Customer Y that will be distributed or displayed to persons in New Mexico through general access to particular media. The product of the advertising service is delivered to the location of the person accessing or viewing the advertising. Under Subparagraph (e), the reporting location of the gross receipts and related deductions from this service is the location of Company X as determined by the location from which the advertising service was primarily provided.

(II) Example: Company X provides Customer Y with a license to use digital goods by Customer Y at various locations throughout the state. The license is delivered to Customer Y throughout the state. Under Subparagraph (e), the reporting location of the gross receipts and related deductions of Company X from providing the license to use digital goods is the location of Company X as determined by the location from which the digital goods was primarily provided. A person may report different gross receipts and deductions to different reporting locations under the rules of this Paragraph (5) as applicable.

(6) If the gross receipts are from the sale of a license of digital goods, or any other sale of a license not otherwise specifically addressed in these regulations, the reporting location of the gross receipts and related deductions is determined consistent with Paragraph (5).

(7) If the gross receipts are from the lease of tangible personal property, including vehicles, other transportation equipment, and other mobile tangible personal property, then the reporting location for the gross receipts any related deductions is the location of primary use of the property, as indicated by the address for the property provided by the lessee that is available to the lessor from the lessor's records maintained in the ordinary course of business; provided that use of this address does not constitute bad faith. The primary reporting location shall not be altered by intermittent use at different locations, such as use of business property that accompanies employees on business trips and service calls.

(8) If the gross receipts are from the sale, lease or license of franchises, then the reporting location for the gross receipts and any related deductions is where the franchise is used. The location where the franchise is

used may be determined from the franchise agreement or from other facts and circumstances related to the exercise of the franchise.

(9) The reporting location of gross receipts and related deductions from the sale of services is determined as follows:

(a) If the gross receipts are from professional services, whether performed in New Mexico or performed outside the state where the product of the service is initially used in New Mexico, the reporting location of the gross receipts and related deductions is the location of the performance of the service. Gross receipts from a service performed outside the state that are taxable in New Mexico because the buyer makes initial use of the product of the service in this state are reported to the state reporting location and taxed at the state rate.

(b) If the gross receipts are from construction services and construction-related services, as those terms are defined under the Gross Receipts and Compensating Tax Act and applicable regulations, performed for a construction project in New Mexico, the reporting location of the gross receipts and related deductions is the location of the construction site.

(c) If the gross receipts are from the service of selling of real estate located in New Mexico, the reporting location of the gross receipts and related deductions is the location of the real estate.

(d) If the gross receipts are from transportation of persons or property in, into or from New Mexico, the reporting location of the gross receipts and related deductions is the location of where the person or property enters the vehicle.

(e) If the gross receipts are from services other than those described in Subparagraphs (a) through (d) of this subsection, including in-person services, the reporting location of those gross receipts and related deductions is the location where the product of the service is delivered. In general, the location of delivery of the product of the service is determined under rules consistent with Paragraph (5) of this Subsection C. The “product of the service” is determined under applicable provisions of the Gross Receipts and Compensating Tax Act and related regulations.

(i) Advertising services. An advertising service involves an agreement with a client to communicate or to place advertisements before an intended audience, on behalf of the client. The product of an advertising service is the ad which is capable of being heard or viewed by the intended audience. The reporting location for gross receipts from an advertising service is determined under Paragraph (5) of this Subsection C based on delivery of the product of the service, which is the location where the ad may be heard or seen by the intended audience.

(ii) Services ancillary to advertising. Services ancillary to advertising include design of the advertisement, creation of data processing or information technology to capture of customer related information, etc., which the seller may treat as a separate service under Section D of this Reg. 3.1.4.13 and which are provided to a client. The reporting location of gross receipts from a service ancillary to advertising under Paragraph 5 of this Subsection C depends on the product of the service and where it is delivered, but will generally be the location of delivery of that product of the service to the client.

(f) The reporting location of gross receipts from in-person services is the location of the performance of the service, which is also the location of the customer or the customer’s property on which the service is performed.

#### D. MIXED TRANSACTIONS.

Where a single transaction gives rise to gross receipts that would have different reporting locations under Paragraphs (4)-(9) of Subsection C if they were provided to the customer in the form of separate transactions, the reporting location for those gross receipts shall be determined as follows:

(1) If the billing to the customer does not break out the charges for the separate items, then the reporting location will be determined based on how the gross receipts for the transaction would be treated under the

Gross Receipts and Compensating Tax Act and applicable regulations, and applying Subsection C, Paragraphs (4)-(9).

(2) If the billing to the customer breaks out the separate charges for the items and one or more items would be treated as incidental charge or an element of the sales price of other items under the Gross Receipts and Compensating Tax Act and applicable regulations, then the reporting location of those incidental receipts will be the reporting location as determined for the gross receipts from the remaining related item or items.

(3) If the billing to the customer breaks out the separate charges for the items and one or more items would not be treated as an incidental charge or an element of the sales price of other items under the Gross Receipts and Compensating Tax Act, and if the reporting location for the gross receipts from two or more such items would be different under Subsection C, Paragraphs (4)-(9), then the gross receipts and related deductions reported to each reporting location will be determined as follows:

(a) the separate gross receipts for each item will be reported to the separate reporting locations, based on the separate charges in the bill to the customer; or

(b) all of the gross receipts may be reported to the single reporting location properly determined for the item or items from which the majority of the gross receipts result as properly determined under Subsection C.

(4) Example: Taxpayer sells a professional service along with tangible personal property delivered to the buyer. The billing to the buyer includes a separate charge of \$100 for the service, \$100 for the tangible personal property, and \$5 for shipping. Assume that under the Gross Receipts and Compensating Tax Act and applicable regulations, the taxpayer would be treated as having \$100 of gross receipts from the sale of a service and \$105 (the charge for the property and the incidental charge for shipping) from the sale of tangible personal property. Assume also that the reporting location of the gross receipts from the sale of the service under this Reg. 3.1.4.13 is the location where the service is performed but the reporting location for the gross receipts from the sale of the tangible personal property is the location of the delivery to the customer. The taxpayer may report the gross receipts from the service to the reporting location as properly determined under Subsection (9)(a) and the gross receipts from the sale of property to the reporting location as properly determined under Subsection (5)(b)-(d). Alternatively, the taxpayer may report all of the gross receipts to the reporting location as determined for the sale of the property.

#### E. REPORTING LOCATION FOR COMPENSATING TAX.

(1) Except as provided in Paragraphs (2) and (3) of this Subsection E, the value of an item that is subject to compensating tax under Section 7-9-7 NMSA 1978 is generally reported to the same reporting location to which gross receipts from the transaction in which the item was acquired would have been reported under Subsections C or D of this regulation, had the transaction been subject to gross receipts tax. In applying Subsections C or D to determine the reporting location to report the value of items for compensating tax, the taxpayer should assume that the person providing those items would have had information on the taxpayer's location at the time of the transaction.

(2) In the case of an individual who owes compensating tax for non-business use of items acquired in a transaction with a person that did not have nexus in New Mexico, the reporting location for reporting that compensating tax is the individual's residence or primary place of abode in the state at the time of the transaction.

(3) In the following cases, the reporting location for reporting compensating tax on purchases, other than professional services, is the location of first use in the state:

(a) purchases made by a business that were not subject to the gross receipts tax solely because they were made outside the state, where the later use inside New Mexico is subject to the compensating tax; or

(b) where the taxpayer has information that can show that first use upon which compensating tax is imposed occurred at a different time and place than would be determined under Paragraphs (1) or (2) of this Subsection G.

(4) Examples:

(a) A business acquires tangible personal property in a transaction with a person that lacks nexus in New Mexico. The business uses the property in a manner that would have rendered the transaction subject to the gross receipts tax, had the person had nexus. The reporting location for purposes of reporting the compensating tax is the reporting location to which the gross receipts would have been reported by the person if the person had had nexus and assuming, for this purpose, that the person would have had information on the location of the business that acquired the property.

(b) A business with offices both inside and outside New Mexico purchases tangible personal property at its office outside the state and later ships that property to its New Mexico office for use. The use of the property in New Mexico was such that the property would have been subject to the gross receipts tax had it been acquired in New Mexico. The reporting location for purposes of reporting the compensating tax is the office in New Mexico at which the property is first used.

(c) A business purchases tangible personal property for resale from a New Mexico seller and takes delivery of that property at the seller's place of business in Location X, using a nontaxable transaction certificate to purchase the property tax-free. Subsequent to the purchase, the business uses the property, rather than reselling it, at its own place of business in Location Y. The reporting location for purposes of reporting the compensating tax is Location Y.

(d) A business with offices both inside and outside New Mexico obtains a license to use digital goods which will be used at its offices inside and outside the state. In the transaction with the provider of the license, the provider knows only the purchaser's out-of-state office and conducts the transaction with that office. The reporting location for the portion of the value of the license used in New Mexico is the location of the office in New Mexico.

(e) A business purchases a service from an out-of-state person who lacks nexus in New Mexico. The product of the service is initially used in New Mexico. The reporting location of the value of the service for purpose of compensating tax is the location of the initial use by the business in New Mexico.

(f) A nonresident individual with a place of abode in New Mexico purchases tangible personal property for use in New Mexico from a seller who lacks nexus in New Mexico. The transaction would not otherwise be exempt or deductible from gross receipts tax had it occurred in New Mexico. The reporting location of the compensating tax owed by the individual is that individual's place of abode.

F. USE OF REASONABLE ESTIMATES.

(1) Use of Reasonable Estimates Allowed. Where a person subject to the gross receipts or compensating tax maintains records or has access to other reliable information that would allow that person to determine or estimate the reporting location for those gross receipts or the compensating tax under the rules of Subsections C and D of this regulation, those records or other information may be used to establish reasonable estimates of the amounts reported to be reported by reporting location. Provided that the taxpayer's reporting of gross receipts or compensating tax otherwise complies with provisions of the Gross Receipts and Compensating Tax Act and applicable regulations, the department will not assess the taxpayer for additional tax if the taxpayer uses reasonable estimates, applied consistently and in good faith to determine the reporting location, so long as there is no obvious distortion. Obvious distortion shall be presumed whenever the method used to estimate the reporting location treats similar transactions inconsistently. Any method which intentionally credits sales to a location with a lower combined tax rate primarily for the purpose of reducing the taxpayer's total tax liability shall be presumed to contain obvious distortion.

(2) Use of Reasonable Estimates Required. Where a person has gross receipts that would generally be sourced under the rules of Subsection C, Paragraph(5) of this regulation, and where the person has records or information that would allow a reasonable estimate of the reporting location of those receipts applying Subparagraphs (a)-(d) of that Paragraph (5), the taxpayer shall use a reasonable estimate before applying Subparagraph (e) of Paragraph (5).

G. REPORTING LOCATION – RECEIPTS SUBJECT TO THE INTERSTATE TELECOMMUNICATIONS GROSS RECEIPTS TAX:

Notwithstanding anything in Section 7-1-14 NMSA 1978, or provisions of this Reg. 3.1.4.13, the reporting location for gross receipts subject to the interstate telecommunications gross receipts tax is the state location and rate. The following telecommunications services are subject to the tax:

(1) Interstate telecommunications services (other than mobile telecommunications services) that originate or terminate in New Mexico and are charged to a telephone number or account in New Mexico, and

(2) Mobile telecommunications services that originate in one state and terminate in any location outside it, to a customer with a place of primary use in New Mexico as defined under Section 7-9C-2(E) NMSA 1978.

H. TRANSACTIONS ON TRIBAL TERRITORY:

A person selling or delivering goods or performing services on the tribal land of a tribe or pueblo that has entered into a gross receipts tax cooperative agreement with the state of New Mexico pursuant to Section 9-11-12.1 NMSA 1978 is required to report those receipts based on the tribal location of the sale or delivery of the goods or performance of the service.

[3/5/70, 7/6/79, 11/20/79, 4/11/83, 11/5/85, 1/4/88, 8/22/88, 12/29/89, 8/15/90, 9/3/92, 2/22/95, 10/31/96, 7/30/99, 10/29/99; 3.1.4.13 NMAC - Rn & A, 3 NMAC 1.4.13, 12/29/00; A, 12/30/03; A, 1/17/06; A, 4/30/07; A, 12/15/11; Rp xx/xx/xxxx]

**3.2.1.7. DEFINITIONS**

The terms defined in 3.2.1.7 NMAC apply throughout 3.2 NMAC.

A. Benefit: A "benefit" is any consideration to either party. "Benefit" is not limited to profits, pecuniary gains, or any particular kind of advantage.

B. Consideration: "Consideration" is any benefit, interest, gain or advantage to one party, usually the seller, or any detriment, forbearance, prejudice, inconvenience, disadvantage, loss of responsibility, act or service given, suffered, or undertaken by the other party, usually the buyer.

C. Detriment: A "detriment" is a forbearance of either party of a right which the party is entitled to exercise or any consideration flowing from either party, not limited to payment of money or transfer of property.

D. Digital good: A "digital good" means a digital product delivered electronically, including software, music, photography, video, reading material, an application and a ringtone. A digital good generally takes the form of a license to use and which property is stored, conveyed, and used in a digital or electronic format. Digital goods are generally intangible property for purposes of the Gross Receipts and Compensating Tax Act.

[D]. E. Financial corporations:

(1) A financial corporation is any corporation primarily dealing in moneyed capital and in substantial competition with commercial banks.

(2) Example 1: FC is a corporation which is primarily engaged in the following activities:  
(a) buying and selling mortgages on real estate,  
(b) initiating mortgages on real estate and selling these mortgages, and  
(c) servicing mortgages. FC is a financial corporation because it is primarily dealing in moneyed capital and is in substantial competition with commercial banks.

(3) Example 2: IA is an insurance agency which, as an adjunct of its primary business, loans money to finance premiums. IA is not a financial corporation because it is not primarily dealing in moneyed capital and it is not in substantial competition with commercial banks.

(4) Example 3: A corporation which receives a commission on sales of money orders to its customers as an adjunct of its primary business is not a financial corporation within the meaning of Subsection C of Section 7-9-3 NMSA 1978 simply because it engages in this business activity.

(5) Example 4: A corporation which is engaged in the following activities is not a financial corporation because it is not primarily dealing in moneyed capital and is not in substantial competition with commercial banks:

- (a) acting as an investment advisor to a mutual fund and others and receiving a fee for such services;
- (b) acting as principal underwriter for the same mutual fund as in 1 above and receiving a fixed percentage of the selling price of the securities sold as a commission or fee; or
- (c) issuing a weekly stock analysis report as an advisory service, receiving for this service payment in the form of subscription fees.

~~[E-]~~ E. Franchise:

(1) A "franchise" is an agreement in which the franchisee agrees to undertake certain business activities or to sell a particular type of product or service in accordance with methods and procedures prescribed by the franchisor, and the franchisor agrees to assist the franchisee through advertising, promotion and other advisory services. The franchise usually conveys to the franchisee a license to use the franchisor's trademark or trade name in the operation of the franchisee's business.

(2) Example: Y, a pie company of Cambridge, Massachusetts, grants to X of Virden, New Mexico, the right to make pies according to their exclusive recipe and to operate Y Pie shops throughout New Mexico. The right to make the pies and operate the pie shops, whether granted for a "one-time" payment or for a continuing percentage of the proceeds of the shops, is a franchise. Therefore, the receipts of Y, from its granting of the franchise are subject to gross receipts tax.

~~[F-]~~ G. Computer-related terms:

- (1) "Computer software" means computer programming in whatever form or medium.
- (2) "Custom software" means computer programming developed specifically at the order of another or for a specific purpose. "Custom software" includes the modification of existing computer programming.
- (3) "Packaged software" means computer programming embodied in electronic, electromagnetic or optical materials for transfer from one person to another, with or without explanatory materials, instructions or other programming and intended to be sold or licensed without modification to multiple buyers or users.
- (4) "Digital software" means packaged software that is transmitted electronically rather on any type of material.

~~[(4)]~~ (5) "Software" means "computer software".

H. "Marketplace provider." A marketplace provider means a person who facilitates the sale, lease or license of tangible personal property or services or licenses for use of real property on a marketplace seller's behalf, or on the marketplace provider's own behalf. To "facilitate", as that term is used here, means listing or advertising the sale, lease or license, by any means, whether physical or electronic, including by catalog, internet website or television or radio broadcast; and either directly or indirectly, through agreements or arrangements with third parties collecting payment from the customer and transmitting that payment to the seller, regardless of whether the marketplace provider receives compensation or other consideration in exchange for the marketplace provider's services. A marketplace provider also includes a person that has gross receipts as a marketplace provider under Section 7-9-3.5 NMSA 1978 from the sales of licenses, including digital goods.

I. "Marketplace seller." A "marketplace seller" means a person who sells, leases or licenses tangible personal property or services or who licenses the use of real property through a marketplace provider. A marketplace seller also includes a seller that sells licenses through a marketplace provider.

~~[G-]~~ J. Practitioner of the healing arts: A "practitioner of the healing arts" is a person licensed to practice in this state medicine, osteopathic medicine, acupuncture and oriental medicine, dentistry, podiatry, optometry, chiropractic, nursing or similar medical services for human beings. The term also includes veterinarians licensed to practice in this state.

~~[H.]~~ K. Person engaged in the construction business: A "person engaged in the construction business" is a person who performs construction services as defined in Section 7-9-3.4 NMSA 1978. [12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 12/29/89, 11/26/90, 11/15/96, 4/30/97, 1/15/98; 3.2.1.7 NMAC - Rn & A, 3 NMAC 2.1.7, 4/30/01; A, 12/30/03; A, 12/14/12; A, xx/xx/xxxx]

### **Regulation 3.2.1.12 Engaging in Business**

A. Engaging in Business – Generally: For periods beginning July 1, 2020, “engaging in business” conforms to the constitutional requirement for substantial nexus under *South Dakota v. Wayfair*, 585 U.S. \_\_\_\_ (2018). A person that has physical presence in the state and is also conducting activity with the purpose of direct or indirect benefit is engaging in business and subject to the imposition of gross receipts tax. A person that does not have physical presence in the state is nevertheless engaging in business and has substantial nexus in New Mexico if, in the preceding calendar year, that person has total taxable gross receipts from sales, leases and licenses of tangible personal property, sales of licenses and sales of services and licenses for use of real property sourced to this state pursuant to Section 7-1-14 NMSA 1978, of at least one hundred thousand dollars (\$100,000).

~~[A.]~~ B. Affiliated corporations

(1) When a corporation is carrying on or causing to be carried on, with a wholly owned subsidiary, any activity with the purpose of direct or indirect benefit, both the corporation and the subsidiary are "engaging in business".

(2) Example: B corporation, which operates a hotel supply house, sells supplies only to C Hotel Corporation, which owns all the stock in B Corporation. B claims that since it sells only to C, its parent corporation, it is not engaging in business. B and C are each engaging in business because the purpose of their activities is to benefit either or both corporations.

~~[B.]~~ C. Corporation not for profit: When a corporation not for profit is carrying on or is causing to be carried on any activity with the purpose of direct or indirect benefit it is "engaging in business".

~~[C.]~~ D. Leasing property:

(1) Persons leasing property employed in New Mexico are engaging in business within the state for the purpose of direct or indirect benefit.

(2) Example: X, an out of state business, leases construction machinery to Y who employs the leased property in New Mexico. X asks if X is engaged in business in New Mexico for purpose of registration, reporting and paying the gross receipts tax. X is engaged in business in New Mexico.

~~[D.]~~ E. Hotels and motels providing interstate telecommunications service to guests:

(1) Hotels, motels and similar establishments offering interstate telecommunications service to guests in conjunction with the rental of rooms or other facilities are not "engaging in interstate telecommunications business" for purposes of the Interstate Telecommunications Gross Receipts Tax Act.

(2) A hotel, motel or similar establishment is primarily engaged in the business of renting rooms and meeting facilities to the general public. Providing interstate telephone service or other interstate telecommunications services to guests is incidental to the primary business of the hotel, motel or similar establishment. Receipts from providing such service are additional receipts from engaging in the primary business and are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(3) Subsection D of 3.2.1.12 NMAC is retroactively applicable to transactions occurring on or after July 1, 1992.

~~[E.]~~ F. Persons not engaging in business - foster parents: Individuals who enter into an agreement with the state of New Mexico to provide foster family care for children placed with them by the state are not thereby engaging in business. Receipts of the individuals from providing foster care pursuant to such an agreement are not receipts from engaging in business.

~~[F.]~~ G. Persons not engaging in business - certain caretakers: Individuals who enter into an agreement with the state of New Mexico to provide non-medical personal care and housekeeping assistance to low income disabled

adults pursuant to the critical in home care program are not thereby engaging in business. Receipts of the individuals from such caretaking activities are not receipts from engaging in business.

~~[G.]~~ H. Persons not engaging in business - home care for developmentally disabled family members: Any individual who enters into an agreement with the state of New Mexico to provide home based support services for developmentally disabled individuals in the home of the developmentally disabled individuals or the home of the support provider and receives payments which under 26 USCA 131 are "qualified foster care payments" is not thereby engaging in business. Receipts of the individuals which are "qualified foster care payments" from providing such home based support services pursuant to such an agreement are not receipts from engaging in business.

~~[H.]~~ I. Owner engaged in business when selling to an owned entity:

(1) Except as provided in Paragraph (2) of this Subsection, when an owner of an entity sells property in New Mexico to, leases property employed in New Mexico to, or performs services in New Mexico for the entity or other owners of the entity, the owner is engaging in business in New Mexico except when the transaction may be characterized for federal income tax purposes as a contribution of capital.

(2) When a partner or interest holder in an entity taxed as a partnership is allocated profits or receives a guaranteed payment or other distributions for activities undertaken as a partner on behalf of the partnership such as administrative services done solely for the benefit of the partnership or for activities for third - parties transacting business with the partnership, the partner is not engaging in business separately from the partnership and the allocations, payments, or distributions are not gross receipts. A partner may, however engage in business separately from the partnership and any transactions between that partner and the partnership, where the partner is not acting as a partner on behalf of the partnership, constitute gross receipts from engaging in business. Indicia that a partner is not acting as a partner on behalf of the partnership may include:

(a) that the partner engages in similar transactions with third parties other than the partnership; or

(b) that the allocation, payment, or distribution made by the partnership is not made under the partnership agreement; or

(c) that the partner's transaction(s) with the partnership involve the sale or lease of goods or the sale of services not provided by the partnership to third parties.

(3) For the purposes of Subsection H of 3.2.1.12 NMAC, an "entity" means any business organization or association other than a sole proprietorship.

~~[H.]~~ J. Persons not engaging in business - sale or exchange of renewable-fueled electricity generated from a system installed in a personal residence. Any individual who sells or transfers electricity to an entity engaged in the business of selling electricity, for which the individual receives monetary compensation or credit against a future month's electricity use, is not engaged in business if the electricity is generated from a renewable-fueled system installed in a personal residence.

#### **Regulation 3.2.1.14. GROSS RECEIPTS - GENERAL**

~~[A. Gross receipts. Unless the receipt is from one or more of the following, it is not taxable:~~

~~\_\_\_\_\_ (1) selling property in New Mexico;~~

~~\_\_\_\_\_ (2) leasing property employed in New Mexico;~~

~~\_\_\_\_\_ (3) performing services outside of New Mexico the product of which is initially used in New Mexico; or~~

~~\_\_\_\_\_ (4) performing services in New Mexico.]~~

~~[B.]~~ A. Credit card sales: Gross receipts of the seller of property or services or the lessor of property include the full sale or lease contract amount of any property or service sold or of any property leased when payment is made through the use of a credit card which has been issued by a third party. The seller or lessor may not deduct from gross receipts the amount charged by the credit card company for converting the account into cash.

~~[C.]~~ B. Consideration other than money:

(1) If the consideration received by the seller or lessor for the item sold or leased or for the service performed is in a form other than money, the fair market value of the consideration received or the fair market value of the item sold or of the lease or of the service performed must be included in gross receipts. The value of the consideration received or the item sold or of the lease or of the service performed is the fair market value at the time of the transaction.

(2) Example 1: X has Y, a garage owner, repair X's automobile. In exchange for the service performed by Y, X gives Y a deer rifle. The fair market value of the rifle at the time of the transaction is the measure of Y's gross receipts.

(3) Example 2: X, a New Mexico construction company, contracts with Y Electric Co-op Association for the construction of transmission lines. The contract requires X to furnish all materials and labor for a fixed price; however, it permits a reduction of the contract price in the amount of the value of materials furnished by Y. The gross receipts of X include the value of any material supplied by the cooperative.

(4) Example 3: X is a firm engaged in the construction business in New Mexico. The receipts of X from the sale of a completed construction project include the value of construction services performed by the buyer of the construction project pursuant to a "sweat labor contract" if the performance of services are required to fulfill a contractual obligation of X. A "sweat labor contract", as used in this example, is a contract whereby the buyer of a completed construction project agrees to perform certain construction services for the seller of the construction project as partial payment of the sale price of the construction project.

(5) Example 4: M agrees to drill an oil well for the XYZ Oil Company. The contract provides that M will drill the well for \$7.50 per foot and a one-eighth interest in the minerals which belong to XYZ. The well, when completed, produces forty barrels of oil per day for a period which is expected to last for 10 years. M admits that the \$7.50 per foot that is received from drilling the well are gross receipts subject to the gross receipts tax. M questions whether the value of the one-eighth interest is gross receipts. The value of the mineral interest is consideration and must be included in M's gross receipts. It will be valued at its fair market value at the time the well is completed.

(6) Example 5: The A Oil Company hires the B Drilling Company to drill a well on its property. A furnishes drill bits to B, but A has the right to deduct the rental value of the bits from the total footage or day rate price it agrees to pay B for the drilling. The use of the drill bits is partial consideration, furnished by A, for the performance of the drilling service by B and the reasonable value of their use must be included in B's gross receipts. A also must include the rental value of the bits in its gross receipts because it is leasing the drill bits to B. However, if A furnishes drill bits to B and does not have the right to deduct the rental value of the bits from the total footage or day rate price which it has agreed to pay B for the drilling, then no amounts from the drill bit transaction are includable in either A's or B's gross receipts. The same applies if B furnishes the drill bits.

~~D.~~ C. Consideration less than fair market value:

(1) In a transaction where the actual consideration received does not represent the fair market value of the property sold or leased or of the service sold, the fair market value shall be included in the gross receipts of the seller or lessor. Fair market value is the value which the property or service can command in an arms length transaction between two independent parties in an open market.

(2) The following example illustrates the application of Section 7-9-3.5 NMSA 1978 with respect to consideration less than fair market value. Example: X, a land and cattle company, is a corporation which is affiliated with Y, an equipment company. Because of their affiliation, X leases a \$30,000 tractor from Y for \$1.00 a month. Y reports that its gross receipts from this transaction are \$1.00. Y's gross receipts are the market value of a monthly lease of a \$30,000 tractor. Y must pay gross receipts tax on the adjusted amount.

~~E.~~ D. Sale of commercial paper:

(1) The full sale or leasing contract amount of property or service sold, excluding any type of time price differential, is included in the seller's gross receipts even though the seller subsequently sells the contract

and does not receive the total contract price in money. No deduction is allowed for discounts suffered from the sale of commercial paper arising from a sale or lease.

(2) Example: X sells a washing machine to Y under a conditional sales contract in which the full sale contract amount, excluding time price differential, is \$120. The principal on the washing machine is to be paid for over a twelve month period at \$10 a month. X collects \$20 of principal under the contract and then assigns its rights to W for \$90. Depending upon the method regularly used for reporting gross receipts, X would either pay tax on the full contract amount for the month in which the sale was made (accrual basis) or pay tax measured by the receipts as they were received (cash basis). If X had elected to pay tax measured by its receipts as they were received, X would have reported \$20 during the first two months from this transaction. When X assigned the contract, X would have to include \$100 in the gross receipts for the third month since a deduction is not allowed for a discount suffered upon the transfer of a conditional sales contract.

~~[F.]~~ E. Interdepartmental transfers:

(1) Receipts derived from an interdepartmental transfer of services or property are not subject to the gross receipts tax. To qualify as an interdepartmental transfer, the transfer must be a transfer of services or property within the same corporation or other taxable entity.

(2) Example: C, a company located in New Mexico, operates both an electric utility and a water utility. C records on its books the sale of the electricity to the water utility in order to comply with the public service commission regulations but does not thereby incur gross receipts as that term is used in the Gross Receipts and Compensating Tax Act. Such book entries do not record receipts from selling property in New Mexico but record interdepartmental transfers. However, the value of the electricity at the time of its conversion to use by the water utility is subject to the compensating tax.

~~[G.]~~ F. Service charges computed on balances:

(1) Service charges on accounts receivable balances or installment sales contracts which are not computed at the time of sale, are time-price differential charges, are not subject to the gross receipts tax and are not to be included in the sales price of an item brought into New Mexico for the purpose of computing the compensating tax.

(2) Example: X corporation located outside New Mexico is engaged in the business of publishing books. X has several nonemployee salesmen soliciting orders on a commission basis in New Mexico. Every such order is forwarded to X's main office where it is reviewed and then either accepted or rejected. Accepted orders are shipped directly to the purchaser from X's binderies located outside of New Mexico. Since X has salesmen in New Mexico, it is an agent for collection of the compensating tax, pursuant to Section 7 9 10 NMSA 1978. The purchaser may elect to pay for the books on an installment basis. If after 90 days from purchase, the balance has not been paid, a one percent per month service charge is added to the balance. This charge is not precomputed and no portion thereof is due unless the purchaser elects to pay on an installment plan extending over 90 days. Such a charge is a time-price differential and is not a part of the sales price of the item. Therefore, it should not be included in the sales price when considering the amount of compensating tax that should be paid over to the state of New Mexico.

~~[H.]~~ G. Corporations and organizations not organized for profit - fund raising activities:

(1) Receipts of a corporation or organization not organized for profit, other than an organization granted a 501(c)(3) determination by the internal revenue service, derived from fund raising activities which are in the nature of donations, gifts, and contributions are not subject to the gross receipts tax.

(2) The department will presume that the total receipts of such a nonprofit organization from a fund raising activity are receipts derived from a taxable activity if the project involves the performance of any service or the sale or lease of any property by the organization. This presumption may be overcome by establishing the following:

(a) the purchaser or lessee of the property or service intended by the purchase or lease to make a gift, donation, or contribution to the organization; and

(b) the purchase or lease price clearly exceeded the fair market value of the service or property or the fair rental value of the property.

(3) If these conditions are satisfied, the amount of consideration received by the organization in excess of the fair market price or fair rental value is not subject to the gross receipts tax.

~~[F.]~~ H. Discount coupons: The gross receipts attributable to a sale in which a seller accepts discount coupons provided by buyers are measured by the cash received plus the value of the coupon. However, if the discount coupon is not redeemable by the seller, the acceptance of the coupon constitutes a cash discount allowed and taken and is excluded from gross receipts.

~~[F.]~~ I. Gross receipts embezzled: Receipts that have been embezzled or lost through bookkeeping errors are not a cash discount allowed and taken; such receipts are not deductible under Section 7967 NMSA 1978 because they are not a refund, allowance or uncollectible debt.

~~[K.]~~ J. Vending machines:

(1) A vending machine is a device that, when the appropriate payment has been inserted into it, whether payment is made by coins, tokens, paper money, credit card, debit card or other means, dispenses tangible personal property, performs a service (including entertainment) or dispenses tickets, tokens or similar objects redeemable for money, tangible personal property or services; but “vending machine” does not include any device which is designed to primarily or solely to play a game of chance, such as slot machines, video gaming machines and the like.

(2) Amounts received from allowing the vending machine to be placed in a location as well as amounts received from use of or sales from vending machines are gross receipts and are subject to the gross receipts tax. The vending machine owner is responsible for reporting the receipts and paying the gross receipts tax.

(3) Receipts derived from allowing vending machines to be placed in a location not owned or rented by the vending machine owner are gross receipts and are subject to the gross receipts tax. Except as provided otherwise in Subsection K of Section 3.2.1.14 NMAC, the person receiving the receipts is responsible for reporting the receipts and paying the gross receipts tax with respect to such receipts.

(4) If the vending machine owner and a person controlling the premises where the machine is located enter into a written agreement similar to the one below, the department will presume that a joint venture has been created, that the joint venture is registered with the department and that the vending machine owner has agreed to pay all gross receipts tax due with respect to the joint venture. In such a case, the person owning the machine, on behalf of the joint venture, will report and pay the gross receipts tax due on all the receipts derived from either allowing the vending machine to be placed in a location or sales from the vending machine for all parties in the joint venture and the person controlling the premises is relieved of the duty to report or pay gross receipts tax on those same receipts.

(5) Agreement: Total amounts collected from the vending machine shall be allocated between the vending machine owner and the person controlling the location. The vending machine owner will receive a percentage of the amounts collected net of gross receipts tax due, plus an amount equal to the gross receipts tax payable on the entire proceeds from the vending machine. The person controlling the location will receive a percentage of the amounts collected net of gross receipts tax due. The vending machine owner will report and pay any gross receipts tax due on all the receipts derived from either the use of or sales from the vending machine.

(6) In the event that no such agreement exists, the department will presume that no joint venture exists. In such a case, the vending machine owner will be subject to gross receipts tax on the entire amounts collected from the use of or sales from the vending machine, and the person controlling the premises will be subject to gross receipts tax on the amount that person receives from the vending machine owner for allowing the placement of the machine on the premises.

(7) In the event the vending machines are leased to the person who services them, the term “vending machine owner” means the lessee of the vending machines.

~~[L.]~~ K. “Gross receipts” excludes leased vehicle surcharge: For the purposes of Subparagraph (b) of Paragraph (3) of Subsection A of Section 7-9-3.5 NMSA 1978, the term “leased vehicle gross receipts tax” includes the leased vehicle surcharge. The amount of any leased vehicle surcharge may be excluded from gross receipts.

~~[M.]~~ L. Receipts from furnishing parts or labor under automotive service contract:

(1) When an automobile dealer, who is the promisor under an automotive service contract as that term is defined under Subsection C of Section 3.2.1.16 NMAC, furnishes parts or labor or both to satisfy the promisor's obligation to repair the breakdown involving a part specified in the contract, the dealer has taxable gross receipts equal to the retail value of the parts and labor furnished. A transfer of property or performance of service for a consideration has occurred and therefore a receipt from selling property or performing services has been realized by the dealer.

(2) The consideration received by the dealer is the discharge of the dealer's obligation to make the repair which obligation arose when the covered breakdown occurred.

(3) Receipts of a repair facility, including an automobile dealer, from furnishing parts and labor to fulfill the obligation of another person under an automotive service contract are gross receipts and not deductible under Sections 7 9 47 and 7 9 48 NMSA 1978, even though the seller has received NTTCs for other transactions.

~~[N.]~~ M. Receipts from deductibles/co-payments under automotive service contracts: The receipts of a New Mexico automotive dealer or other repair facility, including the promisor under an automotive service contract, from the “deductible” or “co-payment” amount paid by a customer as required by automotive service contract as that term is defined in Subsection C of Section 3.2.1.16 NMAC in connection with the provision of repair services under contract are gross receipts.

~~[O.]~~ N. Receipts of dealer from own reserve:

(1) The receipts of a New Mexico auto dealer for repairs provided by the dealer under an automotive service contract as that term is defined in Subsection C of Section 3.2.1.16 NMAC, on which the dealer is obligated as promisor are not gross receipts if:

(a) the receipts are paid from a reserve account established by the dealer under an agreement with an auto service contract administrator or an insurance company, or both, and

(b) the dealer is entitled to a return of any amounts in the reserve account not used to pay for parts and labor or to pay other charges against the dealer in connection with the auto service contract.

(2) In this situation, the dealer is being “paid” from the dealer's own funds and has no receipts. However, the dealer as promisor is liable for gross receipts tax on the retail value of the parts or labor or both furnished to discharge the dealer's obligation.

~~[P.]~~ O. Water conservation fee: Section 74-1-13 NMSA 1978 imposes the water conservation fee on the operator of a public water supply system. The fee is measured by the amount of water produced. The operator is not authorized to impose the water conservation fee on the operator's customers. If the operator of the system separately bills an amount characterized as a reimbursement of the water conservation fee to the operator's customers, the separately stated amount is simply an element of the price of the water sold and the “reimbursement” is included in gross receipts. The definition of “gross receipts” does not exclude the water conservation fee or amounts characterized as reimbursements of water conservation fee paid.

~~[Q.]~~ P. Sales of items subject to the federal manufacturer’s excise tax:

(1) The gross receipts from sales of items such as motor vehicle tires include the total amount of money or the value of other consideration received even though this amount includes the Federal Manufacturer's Excise Tax, 26 U.S.C.A. Section 4061 et seq.,(1986) which is separately stated on the invoice. Gross receipts do not include the amount of money attributable to the Federal Communications Excise Tax, 26 U.S.C.A. Section 4251, et seq., (1986), and the Federal Air Transportation Excise Tax, 26 U.S.C.A. Section 4261 et seq., (1986), which are user's taxes.

(2) Example: A tire dealer sells a tire in New Mexico to a retail customer for \$40.00 and separately states \$1.00 for Federal Manufacturer's Excise Tax on the sales ticket. The seller's gross receipts for this transaction are \$41.00.

~~[R-]~~ Q. Transactions among related persons are gross receipts

(1) Each person engaging in business in New Mexico is subject to the provisions of the Gross Receipts and Compensating Tax Act. Each person who is a member of any group of related or affiliated persons and who engages in business in New Mexico is a taxpayer. The provisions of the Gross Receipts and Compensating Tax Act apply to the transactions between that taxpayer and all other persons, including the other related or affiliated persons, even though consideration is not received in the form of cash or other monetary remuneration.

(2) Example 1: A cooperative association and X both engage in business in New Mexico. The cooperative sells services to X, one of its members. The cooperative is a taxpayer and the receipts from this transaction are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(3) Example 2: Both X and a cooperative association engage in business in New Mexico. X is a member of the cooperative and sells services to it. X is a taxpayer and the receipts from this transaction are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(4) Example 3: X engages in business in New Mexico, specifically by selling office supplies. X is also a partner in a partnership. Sales by X to the partnership are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(5) Example 4: C is a corporation engaging in business in New Mexico. S, an individual who is the majority stockholder in C, buys in New Mexico services and goods from C. C's receipts from these transactions with S are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(6) Example 5: C and S are corporations engaging in business in New Mexico. S is a wholly-owned subsidiary of C. C sells tangible personal property in New Mexico to S. C's receipts from the transaction are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(7) Example 6: X and Y are both divisions of corporation Z. X and Y are both parts of the same person, Z, and are not "related persons". Receipts from transactions between these two divisions are activities within Z and do not constitute gross receipts.

(8) Example 7: P, an individual, operates two businesses as sole proprietorships. One of P's businesses transfers tangible personal property to the other. Since both businesses and P are the same person, they are not "related persons" and the transaction does not constitute gross receipts.

~~[S-]~~ R. Owner's receipts from transactions with owned entity are gross receipts

(1) Except as provided in Paragraph (2) of this Subsection, when a person who owns all or part of an entity has receipts from the sale of property in New Mexico to, the lease of property employed in New Mexico to or the performance of services in New Mexico for the entity, the person's receipts are gross receipts except when the transaction may be characterized for federal income tax purposes as a contribution of capital. The person's receipts include the actual amount of money received by the person plus the value of any additional consideration. Additional consideration includes forbearance of charges against the person's ownership interest. These gross receipts are subject to the gross receipts tax unless an exemption or deduction applies.

(2) When a partner or interest holder in an entity is allocated profits or receives a guaranteed payment or other distributions for activities undertaken as a partner on behalf of the partnership such as administrative services done solely for the benefit of the partnership or for activities for third-parties transacting business with the partnership, these receipts of the partner are not gross receipts and are not subject to the gross receipts tax. When a partner engages in business separately from the partnership any transactions of that partner with the partnership, where the partner is not acting as a partner on behalf of the partnership, are gross receipts. Indicia that a partner is not acting as a partner on behalf of the partnership may include:

- (a) that the partner engages in similar transactions with third parties other than the partnership;
- (b) that the allocation, payment, or distribution made by the partnership is not made under the partnership agreement;
- (c) that the partner's transaction(s) with the partnership involve the sale or lease of goods or the sale of services not provided by the partnership to third parties.

(3) For the purposes of Subsection S of Section 3.2.1.14 NMAC, an "entity" means any business organization or association other than a sole proprietorship.

(4) Example: C is a corporation and S is C's wholly owned subsidiary corporation. C and S create L, a limited liability company; C and S each own fifty percent of L. L purchases a twenty percent interest in P, a limited partnership. C sells goods to P. P pays the amount charged. C has gross receipts from this transaction equal to the amount received for the goods.

[9/29/1967, 12/5/1969, 3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1982, 5/4/1984, 4/2/1986, 4/20/1990, 11/26/1990, 9/20/1993, 2/22/1995, 11/15/1996, 5/31/1997, 6/15/1999; 3.2.1.14 NMAC - Rn & A, 3 NMAC 2.1.14, 4/30/2001; A, 12/30/2003; A, 9/25/2018; A, xx/xx/xxxx]

### **3.2.1.15. GROSS RECEIPTS; TANGIBLE PERSONAL PROPERTY**

A. Lease purchase agreement as a sale. The receipts from a two party "lease-purchase" or "paid-out lease" agreement for tangible personal property will be treated as receipts from the sale of tangible personal property under the Gross Receipts and Compensating Tax Act if the lessee-buyer treats the property as an asset and depreciates the property pursuant to generally accepted accounting practices.

B. Consignment sales. Receipts of both a consignor and a consignee from the sale of tangible personal property handled on consignment are subject to the gross receipts tax.

C. Delivery expenses.

(1) Receipts from charges by a seller of tangible personal property for delivery costs, including postage and transportation charges, paid by the seller and passed on to the buyer, are an element of the sales price of the property.

(2) Example: X sells tangible personal property in the state of New Mexico and transports property to buyers located in New Mexico in its own equipment from its factory and warehouse. In some instances the contracts of sale which X has with its buyers stipulate that title passes on completion of manufacturing; in other cases there is no stipulation regarding passage of title. On its billing to buyers, X separately states amounts categorized as "warehouse charges" and "delivery charges". These separately stated charges are elements of the sale price of the property.

D. Freight charges.

(1) Transportation costs that are paid by the seller to the carrier are an element of the sales price of the property.

(2) Transportation costs that are paid to the carrier by the buyer are not an element of the sales price of the property. If the buyer transports the property with the buyer's own equipment, the cost of the transportation does not increase the value of the property.

(3) If the seller transports the property with its own equipment, and the cost of the transportation is already included in the price of the property, it is considered as an element of the sales price of the property. If extra separate charges are made, receipts from such charges are gross receipts.

E. Refundable deposits. Amounts received in the form of refundable deposits on bottles, cartons, cases and the like are to be included in gross receipts of the seller or lessor and are subject to the gross receipts tax.

F. Buyer's financing costs. In a situation where:

- (1) a lending institution lends money directly to a buyer of tangible personal property;

- (2) the buyer executes a promissory or installment note together with a security agreement or a retail financing agreement directly to the lending institution;
- (3) neither the note nor the agreement is endorsed or guaranteed in any manner by the seller of the property; and
- (4) the lending institution as agent for the buyer, pays the seller by crediting the account of the seller with an amount equal to the loan against the property, with no amount added or later rebated, the receipts of the seller from the sale of the property include any down payment and the amount credited to the account of the seller unless that amount is less than the fair market value of the property sold, in which case the fair market value would be the measure of the seller's gross receipts.

G. Sale of items subject to the state Cigarette Tax Act. The gross receipts from sales of cigarettes include the total amount of money or the value of other consideration received even though this amount includes the excise tax levied by the Cigarette Tax Act.

H. Florist receipts. Receipts of a New Mexico florist are gross receipts when the florist:

- (1) receives an order and payment for flowers under an agreement that the flowers are to be delivered at another location by another florist; and
- (2) uses long distance communication to authorize the other florist to make delivery; and
- (3) pays the other florist for the flowers.

I. Sale of food and beverage at horse racetracks. Receipts from the sale of food and beverage either by a concessionaire or the owner of a New Mexico horse racetrack, including the track at the state fair grounds, are subject to the gross receipts tax. If a concessionaire pays a racetrack owner a consideration for operating a food and beverage concession, the racetrack owner's receipts are subject to the gross receipts tax.

J. Packaged software.

(1) The transaction constitutes a sale of tangible personal property or a digital good, as defined by Reg. 3.2.1.7 when a person sells a packaged software where:

- (a) no extraordinary services are performed in order to furnish the packaged software; and
- (b) the buyer pays a fixed amount for the packaged software and the license to use the software; and
- (c) the buyer is allowed to resell the license to use the software with the packaged software itself.

(2) Sale of such property for resale is subject to the deduction provided in Section 7-9-47 NMSA 1978.

(3) This version of Subsection J of Section 3.2.1.15 NMAC is retroactively applicable to transactions occurring on or after July 1, 1991.

K. Sale of postage stamps.

(1) Receipts in excess of the face value of the postage stamps from reselling uncanceled postage stamps issued by the United States postal service or any foreign government are gross receipts. Receipts in excess of the face value of the postage from imprinting, mechanically or by other means, the amount of postage on documents to be mailed are gross receipts.

(2) Receipts from selling canceled postage stamps issued by the United States postal service or any foreign government are gross receipts.

L. Refined metals. The receipts of a person who sells refined metals in New Mexico are gross receipts subject to the gross receipts tax regardless of whether the seller is a severer or processor as defined in the Resources Excise Tax Act or the Severance Tax Act.  
[12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 3/16/79, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 9/17/91, 10/28/94; 3 NMAC 2.1.15.10, 11/15/96; 4/30/97, 10/31/97, 3.2.1.15 NMAC - Rn & A, 3 NMAC 2.1.15, 10/31/2000; A, xx/xx/xxxx]

### **3.2.1.20. Gross Receipts of Marketplace Providers and Marketplace Sellers**

A. Gross Receipts of Marketplace Providers. Under Section 7-9-3.5 NMSA 1978, the receipts of marketplace providers are defined to include receipts collected by a marketplace provider engaging in business in the state from sales, leases and licenses of tangible personal property, sales of licenses and sales of services or licenses for use of real property that are sourced to this state and are facilitated by the marketplace provider on behalf of marketplace sellers, regardless of whether the marketplace sellers are engaging in business in the state. As used here, the term “collected by a marketplace provider” means amounts paid by the customer directly to the marketplace provider or indirectly through third parties, where the marketplace provider either retains the receipts or transmits all or part of the receipts to the marketplace seller, regardless of whether the marketplace provider retains any portion of the gross receipts as consideration in exchange for the marketplace provider's services. The receipts of the marketplace provider, therefore, include all gross receipts collected from the customer for the sales, leases and licenses, regardless of whether any amount is paid over to the marketplace seller. The gross receipts collected by the marketplace provider are treated as receipts of that marketplace provider from sales, leases and licenses for purposes of the Gross Receipts and Compensating Tax Act, including exemptions and deductions, as though the marketplace provider had gross receipts from selling, leasing or licensing.

B. Gross Receipts of Marketplace Sellers. Under Section 7-9-3.5 NMSA 1978, a marketplace seller that sells, licenses or leases through a marketplace provider to customers in New Mexico has gross receipts in New Mexico from selling, licensing or leasing under Section 7-9-3.5 NMSA 1978. A marketplace seller may be entitled to deduct gross receipts for sales, licenses or leases facilitated on its behalf by a marketplace provider under Section 7-9-117 NMSA 1978. A marketplace seller that is not entitled to deduct gross receipts for sales, licenses or leases facilitated on its behalf by a marketplace provider under Section 7-9-117 may be entitled to other exemptions and deductions under the Gross Receipts and Compensating Tax Act that would otherwise apply to those gross receipts.  
[3.2.1.20 NMAC – N, xx/xx/xxxx]

### **3.2.6.8 - SEPARATELY STATING THE GROSS RECEIPTS TAX**

~~\_\_\_\_\_ A. \_\_\_\_\_ If a seller or lessor separately states the gross receipts tax on the books of original entry, and if the amount of tax separately stated for the reporting period is in excess of that which is payable on transactions for the reporting period, the excess must be included in the seller's or lessor's gross receipts.~~

~~\_\_\_\_\_ B. \_\_\_\_\_ Example: A owns a gas station located where the tax rate is 5%. The price of a car wash at A's station is \$1.00. In the books A shows a sale of \$1.00 and gross receipts tax of \$0.50. Since the amount A collected for gross receipts tax (\$.50) is more than the tax due (\$.05) on the sale of \$1.00, A must recalculate the gross receipts and tax. To do so, A must divide the total income (\$1.50) by one plus the tax rate (1.05). The result is A's gross receipts without tax, which is then multiplied by the tax rate (5%) to determine the tax due amount.~~

~~\$1.00 (receipts from sale)~~

~~\$+.50 (tax collected)~~

~~\$1.50 (total income)~~

~~\_\_\_\_\_ \$1.50/1.05 = \$1.43 (gross receipts)~~

~~\_\_\_\_\_ \$1.43 X 5% = \$ .07 (tax due)~~

\_\_\_\_\_ A. A person who is required to report and pay tax on gross receipts is not required to charge or collect the tax from the customer, but if the person does not separately state the amount of tax on the bill other transactional document provided to the customer, the person must affirmatively state that the gross receipts tax is included in the amount billed. This requirement is met if the person provides a general statement on bills or invoices to customers stating that New Mexico tax is included or if the information generally provided to New Mexico customers at the time of sale or subsequently indicates that the seller has included New Mexico tax in the amount charged.

B. A person who uses reasonable estimates as provided in Reg. 3.1.4.13 to determine the reporting location for reporting gross receipts and related deductions may also use these estimates for the purpose of billing tax to customers.

C. Gross receipts does not include the gross receipts tax, including any local option amount of tax, due. In a case where a person does not separately charge the tax or where the tax is charged at a different rate than the rate actually due, the person shall compute the amount of gross receipts net of tax as follows:

Total Amount Charged Including Any Separately Charged Tax  
Divided by 1 Plus the Tax Rate Expressed as a Decimal  
Equals Gross Receipts

[9/29/67, 12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 3/31/86, 4/2/86, 4/26/90, 11/20/90, 11/15/96; 3.2.6.8 NMAC – Rn, 3 NMAC 2.6.8, 4/30/01; Rp xx/xx/xxxx]

### **[3.2.10.10. The Use In New Mexico of a Service Performed Entirely Outside New Mexico**

A. The use of a service, other than a research and development service, in New Mexico is not subject to the compensating tax when the service is performed entirely outside New Mexico. The use of a service, other than a research and development service, in New Mexico is subject to compensating tax only when the service rendered is a result of a transaction which was not initially subject to the gross receipts tax but should have been subject to the gross receipts tax because of the subsequent use of the service by the buyer. Receipts from performing a service other than research and development service outside New Mexico are not subject to the gross receipts tax regardless of how the buyer subsequently uses the services.

B. Example: The X Company sends rubber lined pipe and pump casings out of state for repairs. Repairs include vulcanizing worn sections of the pipe and pump casings. The out of state vendor does not distinguish between the cost of labor and materials, and transactions are billed only as repairs. In this example, the materials used are incidental to the rendering of the repair service. The use of this service in New Mexico is not subject to the compensating tax when performed entirely outside New Mexico.] [RESERVED]  
[3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96, 3.2.10.10 NMAC - Rn, 3 NMAC 2.7.10, 4/30/01; R, xx/xx/xxxx]

### **3.2.10.23 - Compensating Tax on Services Performed Outside the State**

A. For periods after July 1, 2021, if a purchaser acquires services performed outside the state in a transaction that was not subject to the gross receipts tax and subsequently makes taxable use of that service in New Mexico, the service is subject to the gross receipts tax. For services that were performed outside the state, the taxable use in New Mexico is not subject to compensating tax unless that use is the initial use of the service, as that term is defined under Section 7-9-3.E. NMSA 1978 and applicable regulations.

B. Examples:

(1) X acquires financial advisory services from Y. Y performs the services entirely outside New Mexico, resulting in recommendations for investing in certain assets. Y delivers the recommendations to X in New Mexico and has no reason to believe that X will not make initial use of the recommendations in New Mexico. X does not owe compensating tax on the service. Instead, Y owes the gross receipts tax on that service because it was initially used in New Mexico.

(2) Same facts as example (1) except that Y relies in good faith on X's representation that X will make initial use of the recommendations outside New Mexico. X owes the compensating tax if initial use of the recommendations is made in New Mexico.

(3) Same facts as example (2) except that X makes initial use of the recommendations outside of New Mexico. Subsequently, X makes use of the recommendations in New Mexico. Because that subsequent use is not the initial use, X does not owe compensating tax.

[3.2.10.23 NMAC – N, xx/xx/xxxx]

### **3.2.10.24 - Purchaser Entitled to Rely on Seller's Statement as to Whether Tax Was Charged**

In determining whether compensating tax is owed, the purchaser may rely on the seller's invoice or other written billing or contract documentation that indicates that the seller has charged the gross receipts tax or has included the tax in the amount billed (whether by name or indicating that taxes for the state of New Mexico were charged or included). Under Section 7-9-6 NMSA 1978, the seller need not state the amount of tax charged or paid.  
[3.2.10.24 NMAC – N, xx/xx/xxxx]

### **3.2.13.8. Guidelines for "Activity"**

"Activity" includes engaging in any of the following in New Mexico, directly or by an agent:

\_\_\_\_\_ A. maintaining or utilizing an office, distribution house, sales house, warehouse, service enterprise, or other place of business; or

\_\_\_\_\_ B. maintaining a stock of goods; or

\_\_\_\_\_ C. regularly soliciting orders whether or not such orders are accepted in New Mexico, unless the activity in New Mexico consists solely of soliciting by direct mail; or

\_\_\_\_\_ D. regularly engaging in the delivery of property in New Mexico other than by common carrier or U.S. mail as a consequence of an advertising or other sales program directed at potential customers.] [RESERVED]  
[12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 3/3/86, 4/2/86, 11/26/90, 11/15/96; 3.2.13.8 NMAC – Rn, 3 NMAC 2.10.8, 4/30/01; R, xx/xx/xxxx]

### **3.2.13.9. Third Party Sales by Agents for Collection of Compensating Tax**

When a person registered with the department as an agent for collection of New Mexico compensating tax sells tangible personal property to a customer located outside New Mexico who requests delivery be made to the customer's customer located in New Mexico, the agent for collection of compensating tax may receive a properly executed nontaxable transaction certificate from the out of state buyer.] [RESERVED]  
[6/18/79, 4/7/82, 5/4/84, 3/3/86, 4/2/86, 11/26/90, 11/15/96; 3.2.13.9 NMAC – Rn, 3 NMAC 2.10.9, 4/30/01; R, xx/xx/xxxx]

### **3.2.100.10 Exemptions of Gross Receipts of Marketplace Sellers and Marketplace Providers**

Under Section 7-9-3.5 NMSA 1978, marketplace sellers may have gross receipts from selling, leasing or licensing property or selling services in the state and marketplace providers may have receipts from receipts collected from selling, leasing, licensing property or selling services. The exemptions provided in the Gross Receipts and Compensating Tax Act apply to the gross receipts of marketplace sellers and marketplace providers to the extent that the sale, lease or licensing of property or selling of services would be exempt.  
[3.2.100.10 NMAC – N, xx/xx/xxxx]

### **3.2.203.11 Deductions of Gross Receipts of Marketplace Providers and Marketplace Sellers**

Under Section 7-9-3.5 NMSA 1978, marketplace sellers may have gross receipts from selling, leasing or licensing property or selling services in the state and marketplace providers may have receipts from receipts collected from selling, leasing, licensing property or selling services. The deductions provided in the Gross Receipts and Compensating Tax Act apply to the gross receipts of marketplace sellers and marketplace providers to the extent that the sale, lease or licensing of property or selling of services would be deductible.  
[3.2.203.11 NMAC – N, xx/xx/xxxx]