O'Neill Consulting LLC
P.O. Box 7156
Albuquerque NM 87194-7156
505 228-8563, 505 243-6565
July 19, 2021

The Honorable Stephanie Schardin Clarke
Secretary of Taxation and Revenue
PO Box 630
Santa Fe NM 87504-0630

Dear Secretary Schardin Clarke:

These comments are submitted for the record at the hearing to be held August 10, 2021 on proposed revision of 3.2.1.18 NMAC and other regulations under the Gross Receipts and Compensating Tax Act.

I wish to commend the Department for not only offering the necessary updates to these rules due to recent statutory changes but also to rethink and re-organize the definitions. My suggestions regarding 3.2.1.18 NMAC urge you to go a little further down this path.

I comment mainly on the proposed rules proposed you have set out as new material. I will show my suggested changes through additions (blue) or deletions (~~red~~) to the TRD draft, which serves as the base document.

Comments regarding 3.2.1.18 NMAC:

My comments on 3.2.1.18 NMAC are in two segments. The first proposes modification to TRD's slimmed down version and the second discusses the possible (modified) reinstatement of some of the elements TRD proposes for deletion from the existing 3.2.1.18 NMAC.

1) Proposed "new" 3.2.1.18 NMAC.

Section 7-9-3 NMSA 1978 and rule 3.2.1.18 NMAC lay out the definition of terms used throughout the Act and 3.2 NMAC—here specifically what constitutes gross receipts from performance of a service. 3.2.1.18 NMAC should confine itself to that; it is a big enough task. Whether some receipts are actually taxable is quite another question, which should be answered elsewhere.

I agree there needs to be a clear statement linking gross receipts to gross receipts tax due. But, to avoid accidentally opening legal loopholes and stuffing unnecessary repetition into the regulations, that statement should be complete, clear and made just once. I propose deleting all mentions of this issue within the definitional rules, including 3.2.1.18 NMAC, and replacing them with this one proclamation:

3.2.4.12 **Application of Tax**. The gross receipts tax is imposed on all gross receipts except those which New Mexico is prohibited from taxing by federal law or to which an exemption or deduction of the Gross Receipts and Compensating Tax Act or other New Mexico law has been properly applied. The gross receipts tax is not imposed on receipts which are not gross receipts.
[3.2.4.12 NMAC - N, XX/XX/XXXX]

The following also includes some editorial revisions.

3.2.1.18 **Gross Receipts: Services Generally**

A. [~~Receipts from performing a service in New Mexico or performing a service outside New Mexico the product of which is initially used in New Mexico.~~] Receipts derived from performing a service in New Mexico or performing a service outside New Mexico the product of which is initially used in New Mexico are [~~subject to the~~] gross receipts [~~tax unless a specific exemption or deduction provided for in the Gross Receipts and Compensating Tax Act applies~~].

Actually, as amended this just repeats the law and could be deleted.

B. Sales of state licenses by nongovernmental entities.

(1) Amounts retained by nongovernmental entities as compensation for services performed in selling state licenses are gross receipts.

(2) Example: G owns and operates a small grocery store in rural New Mexico which is located near a popular fishing area. As a convenience to the public, G sells New Mexico Department of Game and Fish licenses. For its services in selling these licenses, G retains a small percentage of the total license fee. The amounts retained are gross receipts because they are receipts derived from services performed in New Mexico. [~~G may not deduct the amounts retained pursuant to Section 7-9-66 NMSA 1978 which deals with commissions derived from the sale of tangible personal property not subject to the gross receipts tax. A New Mexico game and fish license is not tangible personal property pursuant to [Subsection [J of Section 7-9-3 NMSA 1978~~].

Explanation: The deleted matter deals with a deduction, not defining "gross receipts. A better place for it would be as an example under Subsection A of 3.2.225.8 NMAC. Also, Subsection J, now Subsection N, does not define "tangible personal property".

C. Stockbrokers' commissions. Gross receipts include commissions received by stockbrokers for handling transactions. The commissions are gross receipts from performing a service.

D. Directors' or trustees' fees. Receipts from attending a board of directors or board of trustees meeting in New Mexico are gross receipts from performing services in New Mexico. Receipts from attending a board of directors or board of trustees meeting outside New Mexico are not gross receipts because the initial use of the product of the service is not in New Mexico.

E. Racing receipts.

(1) Unless the receipts are exempt under Section 7-9-40 NMSA 1978:

(a) the receipts of vehicle or animal owners from winning purse money at races held in New Mexico are gross receipts from performing services in New Mexico [~~and are subject to the gross receipts tax~~] if any charge is made for attending, observing or broadcasting the race.

(b) receipts of vehicle drivers, animal riders and drivers and other persons from receiving a percentage of the owner's purse are gross receipts from performing services in New Mexico [~~and are subject to the gross receipts tax~~], unless the person receiving the percentage of purse money is an employee, as that term is defined in 3.2.105.7 NMAC, of the owner.

(2) Where there is an agreement between the driver, rider or other person and the owner for distribution of the winning purse, then only the amount received pursuant to the agreement is gross receipts of the driver, rider or other person receiving the distribution.

(3) Racetrack operators. Receipts of operators of racetracks other than horse racetracks, from gate admission fees and entrance fees paid by drivers are [~~subject to the~~] gross receipts [~~tax~~]. Any portion of these fees paid out by the operator as prizes are not exempt or deductible since the payments are part of the operator's cost of doing business.

F. Advertising services. The service of advertising is performed and initially used at the location of the intended recipient or viewer regardless of where related services may be performed or the location of the advertiser who purchases the advertising services.

(1) Advertising receipts of a newspaper or broadcaster. The receipts of a New Mexico newspaper or a person engaged in the business of radio or television broadcasting from performing advertising services in New Mexico do not include the customary commission paid to or received by a nonemployee advertising agency or a nonemployee solicitation representative, when said advertising services are performed pursuant to an allocation or apportionment agreement entered into between them prior to the date of payment.

(2) Advertising space in pamphlets. Receipts from selling advertising service to New Mexico merchants in a pamphlet printed outside New Mexico and distributed wholly inside New Mexico are gross receipts from performing an advertising service in New Mexico. [~~Such receipts are subject to the gross receipts tax.~~]

(3) Billboard advertising. Receipts derived from contracts to place advertising on outdoor billboards located within the state of New Mexico are gross receipts from performing an advertising service in New Mexico [~~Such receipts are subject to the gross receipts tax~~], regardless of the location of the advertiser.

F. Day care centers.

(1) Receipts from providing day care are gross receipts from performing a service [~~and are subject to the gross receipts tax~~].

(2) Receipts from providing day care for children in a situation where a commercial day care center provides day care for the children and the expenses of the care for some of these children is paid for by the state of New Mexico are [~~subject to the~~] gross receipts [~~tax~~].

(3) Receipts from providing day care for children in a situation where a person provides day care for children in a residence and the care for all these children is paid for by the state of New Mexico are [~~subject to the~~] gross receipts [~~tax~~].

(4) Receipts from providing day care for children in a situation where a person provides day care for children in the children's home and the care for all of these children is paid for by the state of New Mexico are [~~subject to the~~] gross receipts [~~tax~~].

G. Child care.

(1) Receipts derived by a corporation for providing child care facilities for its employees are [~~subject to the~~] gross receipts [~~tax~~] on the amount received from its employees.

(2) Example: The X corporation operates a licensed child care facility to accommodate dependent children of its employees. In order to defray a portion of the cost of the facility, the corporation charges each employee two dollars ($2.00) per child per week for the use of the facility. All receipts from the two-dollar charge per child per week are [~~subject to the~~] gross receipts [~~tax~~].

H. Service charges; tips.

(1) Except for tips, receipts of hotels, motels, guest lodges, restaurants and other similar establishments from amounts determined by and added to the customer's bill by the establishment for employee services, whether or not such amounts are separately stated on the customer's bill, are gross receipts of the establishment.

(2) A tip is a gratuity offered to service personnel to acknowledge service given. An amount added to a bill by the customer as a tip is a tip. Because the tip is a gratuity, it is not gross receipts.

(3) Amounts denominated as a "tip" but determined by and added to the customer's bill by the establishment may or may not be gross receipts. If the customer is required to pay the added amount and the establishment retains the amount for general business purposes, clearly it is not a gratuity. Amounts retained by the establishment are gross receipts, even if labeled as "tips". If the customer is not required to pay the added amount and any such amounts are distributed entirely to the service personnel, the amounts are tips and not gross receipts of the establishment.

(4) Examples:

(a) Restaurant R has a policy of charging parties of six or more a set percentage of the bill for food and drink served as a tip. If a customer insists on another arrangement, however, the set amount will be removed. R places all amounts collected from the set tip percentage into a pool which is distributed to the service staff at the end of each shift. The amounts designated as tips and collected and distributed by R to the service staff, are tips and not gross receipts. If R retains any amounts derived from the set tip percentage, the amounts retained are gross receipts.

(b) Hotel H rents rooms for banquets and other functions. In addition to the rental fee for the room, H also charges amounts for set-up and post-function cleaning. H retains these amounts for use in its business. These amounts are gross receipts. They are gross receipts even if H denominates them as "tips".

I. Entertainers. The receipts of entertainers or performers of musical, theatrical or similar services in New Mexico are [~~subject to the~~] gross receipts [~~tax~~].

J. Data access charges. Receipts from fees or charges made in connection with property owned, leased or provided by the person providing the service are [~~subject to the~~] gross receipts [~~tax~~] when the information or data accessed is utilized in this state. Similarly, receipts of a software provider from allowing a customer to access and use that software through the Internet are gross receipts from providing a service in New Mexico when access to the software is provided from a point in New Mexico or the customer is located in New Mexico.

Explanation: Opportunity to address cloud computing.

K. Allied company underwriting automotive service contracts. When a New Mexico automotive dealer pays an entity which is allied or affiliated with that dealer (allied company) to undertake all of the dealer's obligations under automotive service contracts as that term is defined in Subsection C of 3.2.1.16 NMAC on which the dealer is promisor, the undertaking of the allied company does not involve the sale of property in New Mexico or the lease of property employed in New Mexico. The undertaking principally involves an obligation of the allied company to indemnify the dealer by paying the dealer for furnishing parts and labor to fulfill the dealer's obligation to furnish the parts and labor. However, the undertaking also involves the performance of services by the allied company for the dealer since the allied company undertakes to handle the claims of automotive service contract purchasers and otherwise perform the dealer's task under the contract. Absent a showing of a different value by the allied company or the department, 7.5 percent of the contract amount paid by the dealer to the allied company will be treated as consideration received for services performed in New Mexico.

L. Custom software.

(1) Receipts derived by a person from developing custom software are gross receipts from performing a service.

(2) When custom software is developed by a seller for a customer, but the terms of the transaction restrict the customer's ability without the seller's consent to sell the software to another or to authorize another to use the software, the seller's receipts from the customer are gross receipts from the performance of a service. The seller's receipts from authorizing the customer's sublicensing of the software to another person are gross receipts from granting a license.

M. Check cashing is a service. Receipts from charges made for cashing checks, money orders and similar instruments by a person other than the person upon whom the check, money order or similar instrument is drawn are gross receipts from providing a service, not from originating, making or assuming a loan. Such charges are not interest.

N. Receipts of collection agencies.

(1) The fee charged by a collection agency for collecting the accounts of others is gross receipts [~~subject to the gross receipts tax~~], regardless of whether the receipts of the client are subject to gross receipts tax and regardless of whether the agency is prohibited by law from adding its gross receipts tax amount to the amount collected from the debtor.

(2) Example 1: X is a cash basis taxpayer utilizing the services of Z collection agency for the collection of delinquent accounts receivable. From its New Mexico offices, Z collects from X's New Mexico debtors in the name of X, retains a percentage for its services and turns over the balance to X. The percentage retained by Z is its fee for performing services in New Mexico. The fee [~~is subject to the~~] constitutes gross receipts [~~tax~~]. It makes no difference that federal law prohibits Z from passing the cost of the tax to the debtor by adding it to the amount to be collected. X's gross receipts include the full amount collected by Z.

(3) Amounts received by collection agencies from collecting accounts sold to the collection agency are not gross receipts.

(4) Example 2: X, a cash basis taxpayer, sells its delinquent accounts receivable to Z, a collection agency, for a percentage of the face amount of the accounts. Pursuant to Subsection B of Section 7-9-3.5 NMSA 1978, X's gross receipts include the full amount of the receivables, excluding any time-price differential. The amount subsequently collected by Z from those accounts, however, is not [~~subject to~~] gross receipts [~~tax~~] because the amount is not included within the definition of gross receipts.

In this situation Z is buying and selling intangible property of a type not included within the definition of property in Subsection [~~J~~] N of Section 7-9-3 NMSA 1978.

Explanation: Insert a cross-reference to a not-commonly cited part of 7-9-3 NMSA 1978.

O. Commissions of independent contractors when another pays gross receipts tax on the receipts from the underlying transaction. The following [~~regulations~~] paragraphs address independent contractors, including commissioned sales agents, who are not consignees or marketplace providers.

(1) Commissions and other consideration received by an independent contractor from performing a sales service in New Mexico with respect to the tangible or intangible personal property of other persons are gross receipts whether or not the other person reports and pays gross receipts tax with respect to the receipts from the sale of the property. This situation involves two separate transactions. The first is the sale of the property by its owner to the customer and the second is the performance of a sales service by the independent contractor for the owner of the property. The receipts from the sale of the property are gross receipts of the person whose property was sold. Receipts, whether in the form of commissions or other remuneration, of the person performing a sales service in New Mexico are gross receipts of the person performing the sales service.

(2) Example 1: S is a national purveyor of tangible personal property. S has stores and employees in New Mexico. S also has catalogue stores in less populated parts of New Mexico. Catalogue stores maintain minimal inventories; their primary purpose is to make S's catalogues available to customers, to take orders of merchandise selected from the catalogues, to place the orders with S and to provide general customer service. The catalogue stores are operated by independent contractors and not by S. S pays the contractors commissions based on the orders placed. In charging its customers, S charges the amount shown in the catalogue and does not add any separate amount to cover the cost of the contractors' commissions. S pays gross receipts tax on its receipts from the sale of catalogue merchandise. The contractors contend that the cost of their selling services is included in the amount S charges for its merchandise and so their commissions are not gross receipts. The contention is erroneous. The contractors have gross receipts from performing a service in New Mexico; it is immaterial that S paid the amount of gross receipts tax S owed on S's receipts. [~~See, however, the deduction at Subsection B of Section 7-9-66 NMSA 1978.~~]

Explanation. Deals with a deduction, not defining "gross receipts".

(3) Example 2: M is a nationwide, multi-level sales company with presence in New Mexico. M sells products to households mainly through a network of individual, independent contractors. The network of sellers is controlled by one or more sets of individuals, also independent contractors, who train and supervise the individuals selling the merchandise; these supervisory contractors may also sell merchandise. The sellers display, promote and take orders for M's products. Payment for orders [~~are~~] is sent to M along with the orders. M ships the merchandise directly to the final customers. M has agreed to, and does, pay the gross receipts tax on the retail value of the merchandise sold, whether sold by M or one of the independent contractors. Based on the volume and value of merchandise sold, M pays both the selling and supervisory independent contractors a commission. The commissions received by the independent contractors engaging in business in New Mexico with respect to merchandise sold in New Mexico are gross receipts [~~subject to the gross receipts tax. The commissions are receipts~~] from performing a service in New Mexico. The fact that M pays gross receipts tax on M's receipts from the sale of the property is immaterial in determining the liability of the independent contractors.

(4) Commissions and other consideration received by an independent contractor from performing a sales service in New Mexico with respect to a service to be performed by other persons are gross receipts whether or not the other person reports and pays gross receipts tax with respect to the receipts from the performance of the underlying service. This situation involves two transactions. The first is the performance of the underlying service by the other person for the customer and the second is the performance of the sales service by the independent contractor for the performer of the underlying service. The receipts from the performance of the underlying service for the customer are gross receipts of the person performing that service. Receipts, whether in the form of commissions or other remuneration, of the person performing the sales service are gross receipts of the person performing the sales service.

(5) Example 3: P is the publisher of a magazine published in New Mexico. P enters into arrangements with independent contractors to solicit ads to be placed in P's publication. P pays each contractor a percentage of the billings for the ads placed by the contractor as a commission. The independent contractors claim that they owe no gross receipts tax with respect to ads solicited in New

Mexico because P has paid gross receipts tax on P's advertising revenues. The contractors are incorrect. There are two transactions in this situation, P's service of publishing advertisements and the contractors' service of soliciting ads for P. The fact that P paid the amount of gross receipts tax due on P's advertising revenues is immaterial regarding the contractors' gross receipts tax obligations on their receipts. The independent contractors have gross receipts from performing a service.

[~~(6) If the receipts from the underlying sale of the tangible property are exempt or deductible, the commission received by an independent contractor from selling the tangible property of another may be subject to the deduction provided by Section 7-9-66 NMSA 1978.~~]

Explanation. Deals with a deduction, not defining "gross receipts". Point is covered perfectly adequately at 3.2.225.12 NMAC.

P. Consignees and Marketplace Providers. Consignees and marketplace providers have gross receipts from amounts collected by those persons [~~for~~] from the sale, lease or license of property or the sale of services to customers as defined under Section 7-9-3.5 NMSA 1978, regardless of whether the consignee or marketplace provider is obligated to pay the consignor or marketplace seller some part of the amounts collected or whether the contract between the consignee and consignor or the marketplace provider and marketplace seller calls for the consignor or marketplace provider to perform certain services in conjunction with the sale, lease or license of property or the sale of services to the customer. A consignee or marketplace provider will be considered to be selling a separate service for the consignor or marketplace seller only if the contract requires the performance of the service separate and apart from any sale, lease or license of property [~~of stale~~] or sale of a service to the customer.

Q. Receipts from winning contest.

(1) Receipts of a contestant from winning purse money in a rodeo or an athletic game, match or tournament held in New Mexico are gross receipts from performing services if any charge is made for attending, observing or broadcasting the event. [~~Such receipts are subject to the gross receipts tax unless an exemption or deduction applies.~~] Where the contestant is a team and there is an agreement among the team members governing distribution of the purse money, then only the amount received by each team member pursuant to the agreement is gross receipts of the team member.

(2) Subsection [~~H~~] Q of 3.2.1.18 NMAC does not apply to receipts exempt under Section 7-9-40 NMSA 1978 nor does it apply to activities that are primarily or solely gambling.

[9/29/67, 12/5/69, 3/3/71, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 3/16/79, 6/18/79, 11/20/79, 4/7/82, 1/6/84, 5/4/84, 10/16/84, 4/2/86, 10/21/86, 6/28/89, 11/26/90, 11/15/96, 1/31/97, 4/30/97; R, 3 NMAC 2.1.18.28, 4/30/97; 3 NMAC 2.1.18.31, 4/30/97; 10/31/97, 7/31/98; R, 4/30/99, 11/15/99, 3.2.1.18 NMAC - Rn & A, 3 NMAC 2.1.18, 10/31/2000; A, 5/31/02; A, 12/30/03; A, 3/15/10; A, 10/15/10; A, 12/14/12; Rp, xx/xx/xxxx]

2) Reinstatements.

There is a tendency among the taxpaying public to hope that the discontinuance of a statement about the taxability of certain receipts means that those receipts are no longer taxable. You do not want to re-engage in old disputes. Therefore, I suggest re-instatement of the following, as amended:

Current Subsection H (attorney fees): "The source of payment or the fact of court appointment are immaterial to the determination of whether attorneys' fees are gross receipts."

Current Subsection K (athletic officials): "Receipts of a nonemployee referee, umpire, scorer or similar athletic official from refereeing, umpiring, scoring or otherwise officiating at a sporting event located in New Mexico when that sporting event is not sanctioned by the New Mexico activities association are gross receipts derived from the performance of a service."

Current Subsection U (managers/agents of entertainers): "Commissions received by managers or agents of entertainers with respect to the entertainers' services performed in New Mexico are gross receipts."

Comments regarding proposed 3.2.1.21 NMAC

3.2.1.21. [~~Tax on~~] **Gross Receipts [~~from~~]: Services Performed Outside the State.**

A. [~~Beginning July 1, 2021 most services performed outside New Mexico the product of which is initially used in New Mexico are not exempt under Section 7-9-13.1 1978.~~] 3.2.1.21 NMAC applies to receipts from services performed on or after July 1, 2021 other than research and development services exempt under Section 7-9-13.1 NMSA 1978.

B. [~~The term "initial use" is used here as defined in Section 7-9-3 NMSA 1978 and in other regulations under the Gross Receipts and Compensating Tax Act. Gross receipts~~] Receipts from selling services performed outside New Mexico are [~~subject to the~~] gross receipts [~~tax~~] only if the product of the service is initially used in the state. If the product of the service performed outside of New Mexico is delivered in New Mexico but not initially used in the state, receipts from selling the service are not [~~taxable in the state~~] gross receipts.

C. If the product of a service performed outside of New Mexico is initially used in the state, then the business location to which the gross receipts and related deductions are reported and the applicable tax rate will be determined under Section 7-1-14 NMSA 1978, which, depending on the type of service, may look to the location of delivery of the service to the customer.

[3.2.1.21 NMAC – N, xx/xx/xxxx]

Explanation: This, like 3.2.1.18 NMAC, defines the service component of "gross receipts". It replaces existing Subsection B of 3.2.1.18 NMAC and, with a little modification, could be inserted there instead of being presented as a free-standing regulation. Also, there is a difference between "not taxable" and "not gross receipts". In the latter there isn't even a hint that the receipts are reportable to New Mexico. Again, whether the gross receipts are taxable is a question to be determined elsewhere.

Comments regarding proposed 3.2.1.23 NMAC

3.2.1.23 [~~**"Performance of a service," "product of the service,", "initial use" and "delivery"; presumptions.**~~] **Gross receipts: When product of a service is delivered or initially used in this state--Presumptions.**

Explanation: The proposed title is misleading. It suggests that the regulation will define the four terms listed. It doesn't. The regulation is an extended discussion of when the receipts from selling the product of a service are gross receipts based on the location of delivery and initial use of that product, and should be so labelled.

[~~A. Relationship between certain terms and consistency in use of those terms. The terms "sale of a service performed," "performance of a service," "product of the service," "initial use" and "delivery" are defined or used in the Gross Receipts and Compensating Tax Act and regulations in a way that makes them closely related in their application. The terms are used in Section 7-9-3.5, the definition of "gross receipts," to describe gross receipts from performing or selling services that will be subject to tax and in Section 7-9-57 to describe a deduction for sales to out-of-state buyers. Regardless of the context in which they are used, or whether the service is performed inside or outside the state, these terms will be interpreted and applied consistently.~~]

Explanation: All you are doing here is promising to interpret two pieces of the same act consistently. Aren't you supposed to be doing that anyway? The actual problem here is that neither "product of the service" nor "out-of-state buyer" is defined anywhere, including in this proposal. If you need to resolve consistency issues, propose workable definitions for these two terms.

[~~B.~~] A. Delivery and initial use of the product of construction services and construction related services, [~~inperson~~] in-person services, and services which that produce tangible personal property.

(1) The product of a construction service or a construction related service is delivered and initially used in New Mexico if the related construction site is located in New Mexico.

(2) The product of an in-person service is delivered and initially used in New Mexico if the location of the performance of the service is in New Mexico.

(3) The product of a service, the primary purpose of which is to produce tangible personal property, is delivered and initially used in New Mexico if the tangible personal property is delivered in New Mexico to the purchaser or a person designated by the purchaser to receive the property [~~in New Mexico~~].

[~~C.~~] B. Delivery and initial use of the product of a service other than construction services, construction related services, in-person services, or services which produce tangible personal property - generally.

(1) [~~As defined under Section 7-9-3.E, "initial use" or "initially used" means the first employment for the intended purpose and expressly excludes the following:~~

~~(a) observation of tests conducted by the performer of services;~~

~~(b) participation in progress reviews, briefings, consultations and conferences conducted by the performer of services;~~

~~(c) review of preliminary drafts, drawings and other materials prepared by the performer of the services;~~

~~(d) inspection of preliminary prototypes developed by the performer of services; or~~

~~(e) similar activities.~~]

As used in 3.2.1.23 NMAC, "separate service" means a service that would be considered a service under Section 7-9-3 NMSA 1978 and 3.2.1.29 NMAC, but may be sold together with property or other services, and which the seller could have sold separately to the buyer, though it was in fact sold as part of a single transaction or contract along with other services or property.

Explanation: Repeating a statute within a rule does not interpret, exemplify, implement or enforce that statute (see 3.2.1.6 NMAC). Besides, the Legislature specifically discourages that practice, especially for definitions; see 14-4-5.7 NMSA 1978. This is a good place, though, to insert definitions for terms used in this rule.

(2) The location of delivery or initial use of the product of a service is determined based on relevant facts and circumstances, including primarily:

(a) The location of the purchaser or the person to whom the product of the service is intended to be delivered.

(b) The terms of the agreement between the parties, as evidenced by any formal writing or documentation as well as the parties' behavior, including, but not limited to, any behavior which constitutes an alteration of the parties' agreement.

(c) The nature of the service and the manner in which similar services are ordinarily delivered and initially used.

(3) The delivery and initial use of the product of a separate service, which is sold with other services or property, will be determined based on the facts and circumstances relating to that separate service. [~~For this purpose, a "separate service" is a service that would be considered a service under Reg. 3.2.1.29, but may be sold together with property or other services, and which the seller could have sold separately to the buyer, though it was in fact sold as part of a single transaction or contract along with other services or property.~~] Similarly, a single contract may involve services that are to be performed in multiple phases, where each phase may constitute a separate service [~~under Reg. 3.2.1.29~~]. The delivery and initial use of the product of each separate service [~~as described in this Paragraph (3)~~] may occur at different locations under the relevant facts and circumstances.

(4) [~~A single or separate service as that term is used in paragraph 3 of this Section C, may, under all the relevant facts and circumstances, appear to have~~] When the product of a service has multiple points of delivery or initial use [~~both inside and outside the state. In particular, this may be the case for services sold to businesses or organizations if~~] and there is a primary location of delivery or initial use, this location will be deemed the location of delivery or initial use for purposes of the Gross Receipts and Compensating Tax Act. The primary location of delivery may be [~~determined by facts and circumstances that show~~] the location of the persons or offices that contracted for or oversee the service, [~~or~~] that approve payment of the service or that determine if the service has been completed properly. The primary location of initial use may be determined by the primary location of delivery or the place in which the most significant portion of initial use takes place.

Explanation: OK as far as it goes. What if there is no primary location? How does the value of the service or the product of the service get apportioned?

[~~D.~~] C. Presumptions as to delivery and initial use of the product of the service in New Mexico; reliance on purchaser representations. Other than services described in [~~Section B above~~] Subsection A of this section, the following presumptions apply to all sales of services unless the seller has information and evidence sufficient to rebut the presumptions:

(1) If the purchaser of the service is an individual, then delivery and initial use of the product of the service are presumed to occur in New Mexico if the seller has information showing a billing address or other primary location for that purchaser in New Mexico;

(2) If the purchaser of the service is a person other than an individual, then delivery and initial use of the product of the service are presumed to occur in New Mexico if that person's domicile or primary place of business or operations is in New Mexico;

(3) If the purchaser of the service is a person other than an individual and the person has its domicile or primary place of business or operations outside New Mexico, then delivery and initial use of the product of the services are presumed to occur in New Mexico if the seller's primary contact for purposes of the contract or the billing address for the services is located in New Mexico; and

(4) In a case where the facts [and circumstances] demonstrate that delivery of the product of the service occurs in New Mexico, initial use of the product of the service is presumed to occur in New Mexico.

D. In order to rebut [~~these~~] presumptions listed in Subsection C of this regulation, the seller must show that delivery [~~and/or~~], initial use or both of the product of the service is not in New Mexico [~~considering the relevant facts and circumstances as generally described in this Regulation _____, Section C.~~] The seller may also rely in good faith on written representations made by the purchaser of the service that the initial use of the service will not be made in New Mexico, provided that the seller has no indication that this representation is untrue.

E. Partial Performance of Service Inside the State. If a seller performs services partially inside and partially outside New Mexico [~~which are delivered~~] delivers the products of those services in New Mexico but those products are initially used outside the state, only the portion of the gross receipts from the service performed inside New Mexico will be [~~subject to the~~] gross receipts [~~under Sections 7-9-3.5 and 57 NMSA 1978. Because the seller delivers the product of the service in New Mexico, the portion of gross receipts from the service performed in the state is not deductible under Section 7-9-57 NMSA 1978.~~] The seller may apportion the gross receipts from the service performed inside and outside the state using the relative direct costs incurred or any other reasonable method approved by the department.

Explanation: 2nd sentence stricken because it deals with a deduction, not defining "gross receipts". Perhaps it could be the basis for a rule or example under 7-9-57 NMSA 1978.

F. [~~Change in facts and circumstances during the performance of a service and incomplete services. A change in facts and circumstances during the performance of a service may change the delivery or initial use of the product of a service. Likewise, the failure to complete the performance of a service may change the delivery or initial use of the product of a service.~~] A change in the place of delivery or initial use of the product of the service during the performance of the service or as a result of failure to complete performance may alter the determination of whether the receipts are gross receipts.

G. No effect on compensating tax due. The provisions of this regulation apply only to a seller's determination of whether the delivery or initial use of the product of a service are in New Mexico. A purchaser who makes a taxable use of a service in New Mexico may owe the compensating tax even if the seller was not required to pay tax on the gross receipts from the performance or sale of that service.

H. Examples:

(1) A lawyer in New Mexico and [~~her~~] the lawyer's New Mexico client, with a New Mexico billing address, agree that the lawyer will perform the legal service of drafting a will. The lawyer charges [~~for her service~~] on an hourly basis. The lawyer reviews the client's finances and other information. The lawyer completes the will and provides it to the client. After reviewing the will, the client executes the will. Under [~~Section D of this Regulation _____~~] Subsection C of this regulation, delivery and initial use of the product of the service are presumed to be in New Mexico. Nor would the lawyer be able to rebut these presumptions since under [~~all the~~] these facts [~~and circumstances~~] delivery of the product of the service occurs in New Mexico when the client receives the draft will from the lawyer and initial use of the product of the service occurs in New Mexico when the client executes the will.

Explanation: We don't have to be woke, do we? Employing gender-neutral terms avoids annoying everyone. I confess I am also trying to purge this document of lawyerly cant like "facts and circumstances".

(2) Same facts as in example (1) except that before the will is finally drafted, the client tells the lawyer [~~she has changed her mind and will not need~~] the will is no longer needed. The lawyer and the client agree that the lawyer will not provide any documentation of advice or a draft of the will based on the work done, even though the client will pay for the hours already worked. As in example (1), under [~~Section D of this Regulation~~] Subsection C of this regulation, delivery and initial use of the product of the service are presumed to be in New Mexico. Nor would the lawyer be able to rebut this presumption since under the product of this incomplete service is the work done by the lawyer for the client in New Mexico and there are no facts that would rebut the presumption that delivery and initial use of this product occur in New Mexico.

(3) Same facts as in example (1) except the client is outside New Mexico and the lawyer delivers the will to the client outside New Mexico where the client executes the will. In this case, there is no presumption under [~~Section D of this Regulation~~] Subsection C of this regulation that delivery or initial use of the product of the service is in New Mexico. Under the facts [~~and circumstances~~] presented, the product of the service, the will, is delivered and initially used outside New Mexico. Therefore, the lawyer will be entitled to a deduction under Section 7-9-57 NMSA 1978 provided the lawyer has evidence required to support the deduction.

??? Aren't examples (3)and (4) better placed under 7-9-57 and 7-1-14 NMSA 1978, respectively?

(4) Same facts as in example (1) except the lawyer performs the service outside New Mexico and the lawyer delivers the will to the client in New Mexico, where the client executes the will. As in example (1), under [~~Section D of this Regulation~~] Subsection C of this regulation, delivery and initial use of the product of the service are presumed to be in New Mexico. Nor would the lawyer be able to rebut this presumption since under the facts [~~and circumstances~~] presented, the product of the service, the will, is delivered and initially used in New Mexico. Note that while lawyer in this case would have gross receipts subject to tax because the service is initially used in the state, under Regulation 3.1.4.13 NMAC, because the service is a professional service, the gross receipts would be sourced to the state reporting location and subject to tax at the state rate.

(5) Same facts as in example (2) except the lawyer is outside New Mexico. As in example (2), under [~~Section D of this Regulation~~] Subsection C of this regulation, delivery and initial use of the product of the service are presumed to be in New Mexico. In this case, however, the product of this incomplete service is the work done by the lawyer for the client outside New Mexico and the lawyer may, therefore, be able to rebut the presumption that delivery or initial use of this product occurs inside New Mexico. Assuming the lawyer can rebut the presumption and show that initial use of the product of the service occurs outside New Mexico, the lawyer would have no gross receipts [~~subject to tax~~] from this transaction.

(6) A New Mexico seller agrees to provide a consulting service to a federal government agency, contracting and overseeing the performance of the service at an out-of-state location. The contract for the service provides that the seller is required to prepare a report summarizing the work and deliver that report to the out-of-state location. The contract also provides that the government will use the report to select products for purchase at facilities outside New Mexico. During the contract, the government agency, which has offices in New Mexico, answers questions posed by the New Mexico seller and responds to requests for data. Here, there is no presumption [~~in this case~~] under [~~Section D of this Regulation~~] Subsection C of this regulation that the delivery or initial use of the product of the service are in New Mexico. Furthermore, [~~under all the facts and circumstances~~] the product of the service, the report, is delivered and initially used outside the state.

???. Nothing in the fact statement describes where the report is prepared. If outside New Mexico, then the example is probably correct. If the report is prepared in New Mexico, then this example needs reworking and belongs under 7-9-57 NMSA 1978. Also, what if the agency office in New Mexico selects the products; does that change any of the conclusions?

(7) A seller performs website design services outside New Mexico for a client that has business locations inside and outside the state. The seller works with and responds to the client's technology manager located at the client's out-of-state office. The seller and the client agree that the

seller will make a demo of the proposed website for the technology manager to test. After the test, the seller will finish the website, with any necessary changes, and will give the client access to operating the website. The operation of the website will be done primarily at offices of the client outside the state, although some operations will also be done in the New Mexico office. Here, there is no presumption under [~~Section D of this Regulation~~] Subsection C of this regulation that the product of the service is delivered or initially used in New Mexico. Furthermore, under [~~all the facts and circumstances~~] the facts presented, the product of the service, the final website, will be delivered and initially used outside the state.

(8) A seller of medical testing services performed outside New Mexico has a client in New Mexico who purchases the services for its own medical facilities both inside and outside the state. The seller of testing services charges by the test. The results of tests are sent to the client's medical facilities in New Mexico where they are reviewed and then made available to doctors and patients. Each testing service is a separate sale of a service. Here, for each service, the product of the service is presumed to be delivered and initially used in New Mexico under [~~Section D of this Regulation~~] Subsection C of this regulation. The seller in this case will not be able to rebut the presumption because, under the facts [~~and circumstances~~], the product of these services are the results which are delivered to New Mexico and initially used at facilities where they are reviewed.

(9) A seller of payroll services performed outside New Mexico has a business client which has offices both inside and outside New Mexico. The seller's contact is with the business's headquarters, outside the state, and the seller obtains information to perform the payroll service from the business's chief accountant located in that office. Each pay period, the seller transmits funds electronically drawing on the business's accounts to pay employees and to submit tax returns and also transmits reports to the business at the headquarters office. This information is reviewed by the headquarters office and any mistakes are communicated by the business to the seller. Each year the seller also transmits W-2s and other tax information by mail. Here, there is no presumption under [~~Section D of this Regulation~~] Subsection C of this regulation that the product of the service is delivered or initially used in New Mexico. It may appear that the product of the service is delivered and initially used both in and outside New Mexico. [~~Under Section C paragraph 4 of this Regulation and under all the relevant facts and circumstances, the product of the service, payroll information, is deemed delivered to the primary location of delivery outside the state and the initial use of the product of the service is, likewise, deemed delivered to occur at the primary location of initial use outside the state.~~]

Explanation: Payroll information is not the primary product of this service; getting the employees paid is (perhaps illustrating that not all services have tangible products). Payroll information is generated as a by-product. Waving the magic "deeming" wand does not do the trick. On what basis is the deeming done—and who does the deeming? By viewing the primary service as paying employees, then part of that service happens in New Mexico. I think a better answer is that the payroll service has gross receipts in the proportion that the New Mexico payroll (or employees) are to the total payroll (or employees), as an illustration of Subsection E.

(10) Same facts as example (9) except that the seller of payroll services performs those services in New Mexico. Again, as in example (9), while the product of the service may appear to be delivered and initially used both inside and outside New Mexico, under [~~Section C paragraph 4 of this Regulation~~] Subsection C, Paragraph (4) of this regulation and under [~~all the relevant facts and circumstances~~] the facts presented, the product of the service, [~~payroll information, is deemed delivered to the primary location of delivery outside the state and the initial use of the product of the service is, likewise, deemed to occur at the primary location of initial use outside the state.~~}

Explanation: Same problem as with (9), paying employees is the main service. Because a portion of that service is initially used in New Mexico, the seller has gross receipts in proportion that the New Mexico payroll (or employees) are to the total payroll (or employees). Why would New Mexico want to forego tax on services performed in NM for New Mexicans or give an out-of-state company a tax advantage?

(11) A seller of video editing services performed inside New Mexico [~~are sold~~] sells the services to an out-of-state customer who posts the edited video on-line for use by its customers throughout the United States. After the edited video is delivered and posted on the customer's website, the customer then asks the seller in New Mexico to test access to the video, and the seller agrees to do so. The fact that the final action related to the service, the testing of the access to the video, occurs in

New Mexico does not change the result [~~under all the relevant facts and circumstances~~] that the delivery and initial use of the product of the service, the edited video, occurs outside New Mexico when the video is delivered to and posted by the customer on its website. Seller has no gross receipts from this transaction.

(12) Same facts as example (11) except that the seller in New Mexico agrees to both edit the video and provide data from a survey of other websites. The seller charges separately for these services, which it also regularly sells on a separate basis, but the contract and billing information for the two services are combined. These services would be separate services under [~~Reg. 3.2.1.29.~~] 3.2.1.23 NMAC and the delivery and initial use of the product of each service would be determined based on the relevant facts [~~and circumstances~~] for each service.
[3.2.1.23 NMAC – N, xx/xx/xxxx]

Comments regarding proposed 3.2.300.9 NMAC

This proposed rule adds nothing to what Section 7-9-79.1 NMSA 1978 says; do not adopt it.

The more important practical question is how does TRD propose to deal with local option taxes? Suppose the State Z's sales tax rate is 4.5% and one of its political subdivisions also imposes a 0.5% add-on tax. The total rate – 5% --is less than New Mexico's 5.125%. May the taxpayer claim a 7-9-79.1 NMSA 1978 credit for the amount of local option tax charged and paid? 7-9-79.1 NMSA 1978 seems to say YES. May any amount (up to 5.125%) of combined state and local tax imposed by another state be credited against New Mexico's gross receipts tax? Again, the answer seems to be YES. It would be useful to explain how much local option tax can be claimed. Since neither 7-9-79.1 NMSA 1978 nor any provision of our municipal or county local option taxes permits applying the cost of any such credit against the amount of New Mexico local option tax due, any amount of credit granted comes out of the state general fund's hide. No amount of credit can be granted for any amount of combined foreign state and local tax over 5.125%. It would be useful to say that, too. Don't surprise the taxpayers—who, under current law, are going to be liable for paying the local option taxes of both states when the other state's total tax exceeds 5.125%. [This implicates a constitutional issue that should be resolved in the next Legislature.]

I do hope these comments are of use to you and that they will be seriously considered for inclusion in the final version of these rules.

Sincerely,

James P. O'Neill