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Chapter No. 6

SB 3

AN ACT

RELATING TO PUBLIC FINANCE; ENACTING THE SMALL BUSINESS RECOVERY ACT OF 2020; CREATING THE SMALL BUSINESS RECOVERY LOAN FUND; PROVIDING SMALL BUSINESS RECOVERY LOANS FOR CERTAIN BUSINESSES; ESTABLISHING TERMS FOR SMALL BUSINESS RECOVERY LOANS; REQUIRING REPAYMENT; PROVIDING FOR THE INVESTMENT OF THE SEVERANCE TAX PERMANENT FUND IN CERTAIN LOANS; PROVIDING TERMS; REQUIRING A CERTAIN AMOUNT OF THE SEVERANCE TAX PERMANENT FUND TO BE INVESTED IN LOANS FOR LOCAL GOVERNMENTS THAT EXPERIENCE A DECLINE IN REVENUE DUE TO THE CORONAVIRUS DISEASE 2019 PANDEMIC; ALLOWING FOR AN INCREASE IN THE INVESTMENT OF THE SEVERANCE TAX PERMANENT FUND IN NEW MEXICO PRIVATE EQUITY FUNDS OR NEW MEXICO BUSINESSES; ESTABLISHING REPORTING REQUIREMENTS; OMITTING DATA FROM MARCH 1, 2020 THROUGH JUNE 30, 2021 FROM THE CALCULATIONS OF EMPLOYER CONTRIBUTIONS TO THE UNEMPLOYMENT COMPENSATION FUND, EXCESS CLAIMS PREMIUMS AND EXCESS CLAIMS RATES; USING THE 2019 COMPUTATION DATE RESERVE FACTOR FROM JANUARY 1, 2020 THROUGH JUNE 30, 2021; REPEALING LAWS 2020, CHAPTER 75, SECTION 1 TO MAKE CONFORMING TECHNICAL CHANGES; MAKING AN APPROPRIATION; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. SHORT TITLE.--Sections 1 through 7 of this act may be cited as the "Small Business Recovery Act of 2020".

SECTION 2. DEFINITIONS.--As used in the Small Business Recovery Act of 2020:

A. "authority" means the New Mexico finance authority;

B. "average adjusted monthly business expenses" means an amount equal to the quotient of:

(1) a business's total expenses for taxable year 2019, excluding expenses deducted pursuant to Section 179 of the United States Internal Revenue Code of 1986, as that section may be amended or renumbered, and expenses for depreciation and bonus depreciation deducted pursuant to the United States Internal Revenue Code of 1986, as determined from the business's federal income tax return for taxable year 2019, less the amount of any loan obtained by the business pursuant to Section 1102 of the federal Coronavirus Aid, Relief, and Economic Security Act; and

(2) twelve;

C. "community development financial institution" means a legal entity operating within the state that is certified as a community development financial institution by the federal community development financial institutions fund;

D. "loan servicer" means a federally insured depository institution or community development financial institution that assembles and submits the small business recovery loan documents to the authority;

E. "New Mexico resident" means an individual who is domiciled in this state during any part of the year or an individual who is physically present in this state for one hundred eighty-five days or more during the taxable year;

F. "ordinary and necessary business expenses" means all expenses, including expenses and capital expenses incurred to operate the business in compliance with a public health order;

G. "qualifying small business" means a business or nonprofit corporation that:

(1) has closed or reduced operations due to the public health order issued by the secretary of health on March 23, 2020;

(2) had an annual gross revenue of less than five million dollars ($5,000,000) as determined from the business's federal income tax return for taxable year 2019;

(3) during the months of April and May 2020, experienced one of the following:

(a) for a business entity other than a nonprofit corporation, a decline in the business's monthly gross receipts by more than thirty percent from the business's monthly gross receipts for that month in 2019, as reported monthly by the business to the taxation and revenue department; or

(b) for a business entity that is organized and operated as a nonprofit corporation, a decline in the business's monthly revenue by more than thirty percent from the business's monthly revenue for that month in 2019, as determined through accounting information that is provided by the business and certified to be accurate and information reported by the business to the federal internal revenue service for the previous year; and

(4) is organized and operated as a nonprofit corporation or is owned as follows:

(a) for a sole proprietorship, one hundred percent of the assets of the business are owned or leased by a New Mexico resident; and

(b) for a corporation, partnership, joint venture, limited liability company, limited partnership or other business entity, at least eighty percent of the total voting power of the entity and at least eighty percent of the total value of the equity is owned by one or more New Mexico residents; and

H. "service provider" means a nonprofit or governmental organization that provides interactive, technical assistance to small businesses, including:

(1) developing sustainable business practices;

(2) training in marketing, administration and financial management; and

(3) complying with legal requirements, licensing requirements and tax liabilities; and

I. "nonprofit corporation" means an entity organized pursuant to Section 501 (c)(3) or 501 (c)(6) of the Internal Revenue Service Code.

SECTION 3. SMALL BUSINESS RECOVERY LOAN FUND--CREATED--FUNDING SCHEDULE.--

A. The "small business recovery loan fund" is created in the authority. The fund consists of appropriations, gifts, grants, deposits, transfers and donations to the fund. Money in the fund is appropriated to the authority to administer the provisions of the Small Business Recovery Act of 2020. The authority shall administer the fund. Balances remaining in the fund at the end of fiscal year 2022 shall revert to the severance tax permanent fund. The authority may expend no more than one percent of the balance of the fund for administering the Small Business Recovery Act of 2020.

B. Upon the effective date of this 2020 act, the authority and the state investment council shall coordinate to develop a funding schedule to ensure that sufficient funding, as provided for in Section 10 of this 2020 act, is made available to the authority to carry out the provisions of the Small Business Recovery Act of 2020.

SECTION 4. LOANS--TERMS.--

A. The authority shall receive and review applications for small business recovery loans pursuant to the Small Business Recovery Act of 2020. The authority shall review all small business recovery loan applications in the order in which the completed applications were received and shall provide a determination to the applicant as soon as practicable. The authority shall make loans to qualifying small businesses; provided that funds are available and the qualifying small business meets the requisite creditworthiness, as determined by the authority. The authority shall adopt rules to govern the application procedures and requirements for disbursing loans under the Small Business Recovery Act of 2020, including requirements consistent with the purpose of that act for determining the eligibility of qualifying small businesses for loans; provided that the authority shall not create additional requirements for eligibility other than those provided by that act.

B. The authority shall evaluate the creditworthiness of an applicant based on information received from the applicant, which may include an independent credit reporting agency report when available.

C. The authority may use funding made available for the Small Business Recovery Act of 2020 to contract with a loan servicer to assist in carrying out the provisions of the Small Business Recovery Act of 2020, including determining:

(1) whether an entity meets the requirements to be considered a qualifying small business;

(2) whether a qualifying small business is eligible for a small business recovery loan; and

(3) the amount that the qualifying small business is eligible to receive for a small business recovery loan.

D. The authority shall make small business recovery loans in accordance with the following:

(1) the loan amount shall be in an amount equal to two hundred percent of the qualifying small business's average adjusted monthly business expenses from the previous calendar or fiscal year; provided that the maximum loan amount shall be no greater than seventy-five thousand dollars ($75,000);

(2) the terms of the loan shall require that the loan recipient:

(a) use a minimum of eighty percent of the proceeds of the loan for ordinary and necessary business expenses, including capital expenses, other than compensation for employees who own equity in the business;

(b) provide a written certification signed by an appropriate officer of the qualifying small business that certifies that: 1) the officer understands that the business is receiving a loan under the Small Business Recovery Act of 2020 that must be repaid by the business with interest under the terms of the loan agreement; 2) all documents submitted in support of the loan application are true and accurate to the best of the officer's knowledge; 3) the officer has a reasonable basis to believe that, as of the date of origination of the loan and receipt of the loan proceeds, the business does not expect to permanently cease business operations or file for bankruptcy; 4) prior to the issuance of the public health order issued by the secretary of health on March 23, 2020, the business was current on all obligations pursuant to the Income Tax Act, the Corporate Income and Franchise Tax Act, the Withholding Tax Act, the Gross Receipts and Compensating Tax Act and the Unemployment Compensation Law applicable to the business's operations; and 5) all loan proceeds will be used for purposes as provided in the Small Business Recovery Act of 2020, including that no more than twenty percent of the proceeds may be used as compensation for employees who own equity in the business; and

(c) provide the authority with ongoing information relevant to the reporting requirements of the authority provided in Section 7 of the Small Business Recovery Act of 2020;

(3) the terms of the loan shall not require that the qualifying small business provide a personal guarantee or collateral to secure the loan; and

(4) the application for a loan must be received no later than December 31, 2020.

E. The authority may exercise any power provided to the authority in the New Mexico Finance Authority Act to assist in the administration of this; provided that the power is consistent with the provisions of this act.

SECTION 5. REPAYMENT.--

A. Small business recovery loans shall be made for an initial loan period of three years. The loans shall bear an annual interest rate equal to one-half of the *Wall Street Journal* prime rate on the date the loan is made.

B. Payment of the interest accrued on a small business recovery loan shall be due in annual installments, with the first interest payment due on the first anniversary of the funding date of the loan, and with each subsequent interest payment due on each subsequent anniversary of the funding date of the loan thereafter until the loan is paid in full. Payment on the outstanding principal of a small business recovery loan may be made on the third anniversary of the funding date of the loan, or the outstanding principal and interest on the loan may be converted to a loan, at the request of the borrower and with the consent of the authority, to be paid in monthly installments over a period of three additional years.

C. Receipts from the repayment of principal or interest accrued on the loans made pursuant to the Small Business Recovery Act of 2020 shall be deposited in the severance tax permanent fund.

D. No provision in a small business recovery loan or the evidence of indebtedness of the loan shall include a penalty or premium for prepayment of the balance of the indebtedness.

SECTION 6. SMALL BUSINESS TECHNICAL ASSISTANCE--SERVICE PROVIDERS.--

A. A qualified small business with an annual gross revenue of five hundred thousand dollars ($500,000) or less that applies for and receives a small business recovery loan and that is receiving technical assistance from a service provider is eligible to receive additional funding in the amount of one-half percent of the loan amount to pay the service provider for continued technical assistance during the term of the loan or until the service provider certifies to the authority that the qualified small business no longer needs the assistance of the service provider; provided that the:

(1) additional amount shall not be included in the small business recovery loan and shall not require repayment;

(2) additional amount shall be provided to the service provider; and

(3) authority shall use funding made available for the Small Business Recovery Act of 2020 to provide the service provider with the additional amount.

B. Nothing in this section shall be construed to require a small business with an annual gross revenue of five hundred thousand dollars ($500,000) or less to contract with or use the services of a service provider to meet the qualifications of a small business recovery loan.

SECTION 7. REPORTS--CONFIDENTIALITY.--

A. Prior to October 1, 2021 and each October 1 for the proceeding four years, the authority shall submit a report to the legislature, the legislative finance committee, the New Mexico finance authority oversight committee, the revenue stabilization and tax policy committee and any other appropriate legislative interim committee. The report shall provide details regarding the loans made pursuant to the Small Business Recovery Act of 2020. The report shall include:

(1) the total number of loans made pursuant to that act;

(2) the total number of loan applications;

(3) the average amount of money provided to loan applicants;

(4) the total number of loans and the amount of those loans, if any, in a delinquent status or default;

(5) the total number of loan recipients that are in the process of filing or have filed for bankruptcy;

(6) the total number of employees currently employed by a business that received a loan; and

(7) an overview of the industries and types of business entities represented by loan recipients.

B. Information obtained by the authority regarding individual loan applicants is confidential and not subject to inspection pursuant to the Inspection of Public Records Act; provided that nothing in this section shall prevent the authority from disclosing broad demographic information and information relating to the total amount of loans made, the total outstanding balance of loans made pursuant to the Small Business Recovery Act of 2020 and the names of the loan recipients.

SECTION 8. A new section of the Severance Tax Bonding Act is enacted to read:

"LOCAL GOVERNMENT EMERGENCY ECONOMIC RELIEF.--

A. Within thirty days of the effective date of this 2020 act, the state investment officer shall make a commitment to the authority to invest one percent of the average of the year-end market values of the severance tax permanent fund for the immediately preceding five calendar years for the purpose of making loans to local governments pursuant to this section; provided that investments made pursuant to this section are in compliance with the prudent investor rule set forth in the Uniform Prudent Investor Act.

The authority may expend no more than one percent of the funding made available to it pursuant to this section for administering the provisions of this section.

B. The authority shall receive and review applications for loans from the amount committed pursuant to Subsection A of this section to a local government that can demonstrate that the local government experienced at least a ten percent decline in local option gross receipts tax revenue for the last quarter of fiscal year 2020 due to the economic impacts of the coronavirus disease 2019 pandemic.

The authority shall adopt rules to govern the application procedures and requirements for disbursing the loans.

C. The authority shall make loans from the amount committed pursuant to Subsection A of this section in accordance with the following:

(1) an application for a loan shall be received by the authority no later than December 31, 2020;

(2) the authority shall determine the proper amount for a loan in consultation with the local government division of the department of finance and administration and the local government; provided that:

(a) the authority shall take into consideration the local government's actual decline of local gross receipts tax revenue in the determination of a loan amount; and

(b) a loan shall not exceed fifty percent of the local government's actual decline of local gross receipts tax revenue; and

(3) terms of the loan shall include that:

(a) a local government may use loan proceeds for general operating expenses and revenue replacement;

(b) a local government shall dedicate future local option gross receipts tax revenue to secure the loan at a lien level as determined by the authority;

(c) a loan shall bear an annual interest rate equal to two percent;

(d) a loan shall be structured as an interest-only loan for a period of three years, at which time the local government shall begin making monthly payments on the principal and interest of any balance of the loan;

(e) interest on a loan shall not compound until twelve months following the date the loan proceeds are made available to the local government; and

(f) a loan shall be made for a period of no more than five years.

D. Receipts from the repayment of loans made pursuant to this section shall be transferred to the severance tax permanent fund.

E. No provision in a loan or the evidence of indebtedness of a loan shall include a penalty or premium for prepayment of the balance of the indebtedness.

F. On or before October 1 of a year that a loan made pursuant to this section is outstanding, the authority shall audit the loan program and submit a report of the findings to the New Mexico finance authority oversight committee, the legislative finance committee and the office of the governor. The report shall provide details regarding the loans made pursuant to this section, including:

(1) the name of each local government that received a loan, the loan amount, the balance owed and if the loan is in a delinquent status or default; and

(2) the number of jobs saved that can be attributed to receiving the loan, with evidence of how the loan saved each job.

G. The authority may exercise any power provided to the authority in the New Mexico Finance Authority Act to assist in the administration of section; provided that the power is consistent with the provisions of this section.

H. As used in this section:

(1) "authority" means the New Mexico finance authority;

(2) "local government" means a municipality or county; and

(3) "local option gross receipts tax revenue" means:

(a) for a municipality, revenue distributed to the municipality pursuant to Section 7-1-6.4 NMSA 1978 and transferred to the municipality pursuant to Section 7-1-6.12 NMSA 1978; and

(b) for a county, revenue transferred to the county pursuant to Section 7-1-6.13 NMSA 1978."

SECTION 9. Section 7-27-5 NMSA 1978 (being Laws 1983, Chapter 306, Section 7, as amended) is amended to read:

"7-27-5. INVESTMENT OF SEVERANCE TAX PERMANENT FUND.--

A. The severance tax permanent fund shall be invested in separate differential rate and market rate investment classes. "Differential rate investments" are permitted in Sections 7-27-5.3 through 7-27-5.5, 7-27-5.13 through 7-27-5.17, 7-27-5.22, 7-27-5.24 and 7-27-5.26 NMSA 1978 and are intended to stimulate the economy of New Mexico and to provide income to the severance tax permanent fund.

"Market rate investments" are investments that are not differential rate investments and are intended to provide income to the severance tax permanent fund. All market rate investments and differential rate investments shall be invested in accordance with the Uniform Prudent Investor Act and shall be accounted for in accordance with generally accepted accounting principles.

B. In addition to the investment classes described in Subsection A of this section, the severance tax permanent fund shall be invested in loans to provide emergency economic relief to local governments as provided by Section 8 of this 2020 act."

SECTION 10. Section 7-27-5.15 NMSA 1978 (being Laws 1990, Chapter 126, Section 5, as amended) is amended to read:

"7-27-5.15. NEW MEXICO PRIVATE EQUITY FUNDS AND NEW MEXICO BUSINESS INVESTMENTS.--

A. In addition to the investments required by Subsections F and G of this section, no more than eleven percent of the market value of the severance tax permanent fund may be invested in New Mexico private equity funds or New Mexico businesses under this section.

B. In making investments pursuant to Subsection A of this section, the council shall make investments in New Mexico private equity funds or New Mexico businesses whose investments or enterprises enhance the economic development objectives of the state.

C. The state investment officer shall make investments pursuant to Subsection A of this section only upon approval of the council and within guidelines and policies established by the council.

D. As used in this section:

(1) "New Mexico business" means, in the case of a corporation or limited liability company, a business with its principal office and a majority of its full-time employees located in New Mexico or, in the case of a limited partnership, a business with its principal place of business and eighty percent of its assets located in New Mexico; and

(2) "New Mexico private equity fund" means an entity that makes, manages or sources potential investments in New Mexico businesses and that:

(a) has as its primary business activity the investment of funds in return for equity in or debt of businesses for the purpose of providing capital for start-up, expansion, product or market development, recapitalization or similar business purposes;

(b) holds out the prospects for capital appreciation from such investments;

(c) has at least one full-time manager with at least three years of professional experience in assessing the growth prospects of businesses or evaluating business plans;

(d) is committed to investing or helps secure investing by others, in an amount at least equal to the total investment made by the state investment officer in that fund pursuant to this section, in businesses with a principal place of business in New Mexico and that hold promise for attracting additional capital from individual or institutional investors nationwide for businesses in New Mexico; and

(e) accepts investments only from accredited investors as that term is defined in Section 2 of the federal Securities Act of 1933, as amended (15 USCA

Section 77(b)), and rules and regulations promulgated pursuant to that section, or federally recognized Indian tribes, nations and pueblos with at least five million dollars ($5,000,000) in overall investment assets.

E. The state investment officer is authorized to make investments in New Mexico businesses to create new job opportunities and to support new, emerging or expanding businesses in a manner consistent with the constitution of New Mexico if:

(1) the investments are made:

(a) in conjunction with cooperative investment agreements with parties that have demonstrated abilities and relationships in making investments in new, emerging or expanding businesses;

(b) in a New Mexico aerospace business that has received an award from the United States government or one of its agencies or instrumentalities: 1) in an amount, not less than one hundred million dollars ($100,000,000), that is equal to at least ten times the investment from the severance tax permanent fund; and 2) for the purpose of stimulating commercial enterprises; or

(c) in a New Mexico business that: 1) is established to perform technology transfer, research and development, research commercialization, manufacturing, training, marketing or public relations in any field of science or technology, including but not limited to energy, security, defense, aerospace, automotives, electronics, telecommunications, computer and information science, environmental science, biomedical science, life science, physical science, materials science or nanoscience, using research developed in whole or in part by a state institution of higher education or a prime contractor designated as a national laboratory by an act of congress that is operating a facility in the state, or an affiliated entity; and 2) has an agreement to operate the business on state lands;

(2) an investment in any one business does not exceed ten percent of the amount available for investment pursuant to this section; and

(3) the investments represent no more than fifty-one percent of the total investment capital in a business; provided, however, that nothing in this subsection prohibits the ownership of more than fifty-one percent of the total investment capital in a New Mexico business if the additional ownership interest:

(a) is due to foreclosure or other action by the state investment officer pursuant to agreements with the business or other investors in that business;

(b) is necessary to protect the investment; and

(c) does not require an additional investment of the severance tax permanent fund.

F. In addition to the investments required by Subsections A and G of this section, the state investment officer shall make a commitment to the small business investment corporation pursuant to the Small Business Investment Act to invest two percent of the market value of the severance tax permanent fund to create new job opportunities by providing capital for land, buildings or infrastructure for facilities to support new or expanding businesses and to otherwise make investments to create new job opportunities to support new or expanding businesses in a manner consistent with the constitution of New Mexico. On July 1 of each year, the state investment officer shall determine whether the invested capital in the small business investment corporation is less than two percent of the market value of the severance tax permanent fund. If the invested capital in the small business investment corporation equals less than two percent of the market value of the severance tax permanent fund, further commitments shall be made until the invested capital is equal to two percent of the market value of the fund.

G. In addition to the investments provided for in Subsections A and F of this section, the state investment officer shall make a commitment to the New Mexico finance authority to invest the lesser of four hundred million dollars ($400,000,000) or ten percent of the market value of the severance tax permanent fund in investments made pursuant to the Small Business Recovery Act of 2020; provided that:

(1) investments made pursuant to and in compliance with the Small Business Recovery Act of 2020 shall be deemed to be in compliance with the prudent investor rule set forth in the Uniform Prudent Investor Act; and

(2) the New Mexico finance authority shall not be held liable for investments made pursuant to this subsection that do not provide a return on investment that is comparable to other differential rate investments made pursuant to the Severance Tax Bonding Act.

H. The state investment officer shall report semiannually on the investments made pursuant to this section. Annually, a report shall be submitted to the legislature prior to the beginning of each regular legislative session and a second report no later than October 1 each year to the legislative finance committee, the revenue stabilization and tax policy committee and any other appropriate interim committee. Each report shall provide the amounts invested in each New Mexico private equity fund, as well as information about the objectives of the funds, the companies in which each private equity fund is invested and how each private equity investment enhances the economic development objectives of the state. Each report also shall provide the amounts invested in each New Mexico business."

SECTION 11. Section 51-1-11 NMSA 1978 (being Laws 2013, Chapter 133, Section 3, as amended) is amended to read:

"51-1-11. EMPLOYER CONTRIBUTION RATES--BENEFITS CHARGEABLE--UNEMPLOYMENT COMPENSATION FUND ADEQUATE RESERVE-- RESERVE FACTOR--EXCESS CLAIMS PREMIUM--DEFINITIONS.--

A. Benefits paid to an individual shall be charged to the individual's base-period employers on a pro rata basis according to the proportion of the individual's total base-period wages received from each employer, except that no benefits paid to a claimant as extended benefits under the provisions of Section 51-1-48 NMSA 1978 shall be charged to any base-period employer who is not on a reimbursable basis and who is not a governmental entity and, except as the secretary shall by rule prescribe otherwise, in the case of benefits paid to an individual who:

(1) left the employ of a base-period employer who is not on a reimbursable basis voluntarily without good cause in connection with the individual's employment;

(2) was discharged from the employment of a base-period employer who is not on a reimbursable basis for misconduct connected with the individual's employment;

(3) is employed part time by a base-period employer who is not on a reimbursable basis and who continues to furnish the individual the same part-time work while the individual is separated from full-time work for a nondisqualifying reason; or

(4) received benefits based upon wages earned from a base-period employer who is not on a reimbursable basis while attending approved training under the provisions of Subsection E of Section 51-1-5 NMSA 1978.

B. The division shall not charge a contributing or reimbursing base-period employer with any portion of benefit amounts that the division can bill to or recover from the federal government as either regular or extended benefits.

C. The division shall not charge a contributing base-period employer with any portion of benefits paid to an individual for dependent allowance or because the individual to whom benefits are paid:

(1) separated from employment due to domestic abuse, as "domestic abuse" is defined in Section 40-13-2 NMSA 1978; or

(2) voluntarily left work to relocate because of a spouse, who is in the military service of the United States or the New Mexico national guard, receiving permanent change of station orders, activation orders or unit deployment orders.

D. All contributions to the fund shall be pooled and available to pay benefits to any individual entitled thereto, irrespective of the source of the contributions.

E. In the case of a transfer of an employing enterprise, notwithstanding any other provision of law, the experience history of the transferred enterprise shall be transferred from the predecessor employer to the successor under the following conditions and in accordance with the applicable rules of the secretary:

(1) except as otherwise provided in this subsection, for the purpose of this subsection, two or more employers who are parties to or the subject of any transaction involving the transfer of an employing enterprise shall be deemed to be a single employer and the experience history of the employing enterprise shall be transferred to the successor employer if the successor employer has acquired by the transaction all of the business enterprises of the predecessor; provided that:

(a) all contributions, interest and penalties due from the predecessor employer have been paid;

(b) notice of the transfer has been given in accordance with the rules of the secretary during the calendar year of the transaction transferring the employing enterprise or the date of the actual transfer of control and operation of the employing enterprise;

(c) the successor shall notify the division of the acquisition on or before the due date of the successor's first wage and contribution report. If the successor employer fails to notify the division of the acquisition within this time limit, the division, when it receives actual notice, shall effect the transfer of the experience history and applicable rate of contribution retroactively to the date of the acquisition, and the successor shall pay a penalty of fifty dollars ($50.00); and

(d) where the transaction involves only a merger, consolidation or other form of reorganization without a substantial change in the ownership and controlling interest of the business entity, as determined by the secretary, the limitations on transfers stated in Subparagraphs (a), (b) and (c) of this paragraph shall not apply. A party to a merger, consolidation or other form of reorganization described in this subparagraph shall not be relieved of liability for any contributions, interest or penalties due and owing from the employing enterprise at the time of the merger, consolidation or other form of reorganization;

(2) the applicable experience history may be transferred to the successor in the case of a partial transfer of an employing enterprise if the successor has acquired one or more of the several employing enterprises of a predecessor but not all of the employing enterprises of the predecessor and each employing enterprise so acquired was operated by the predecessor as a separate store, factory, shop or other separate employing enterprise and the predecessor, throughout the entire period of the contribution with liability applicable to each enterprise transferred, has maintained and preserved payroll records that, together with records of contribution liability and benefit chargeability, can be separated by the parties from the enterprises retained by the predecessor to the satisfaction of the secretary or the secretary's delegate. A partial experience history transfer will be made only if the successor:

(a) notifies the division of the acquisition, in writing, not later than the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition;

(b) files an application provided by the division that contains the endorsement of the predecessor within thirty days from the delivery or mailing of such application by the division to the successor's last known address; and

(c) files with the application a form with a schedule of the name and social security number of and the wages paid to and the contributions paid for each employee for the three and one-half-year period preceding the computation date through the date of transfer or such lesser period as the enterprises transferred may have been in operation. The application and form shall be supported by the predecessor's permanent employment records, which shall be available for audit by the division. The application and form shall be reviewed by the division and, upon approval, the percentage of the predecessor's experience history attributable to the enterprises transferred shall be transferred to the successor. The percentage shall be obtained by dividing the taxable payrolls of the transferred enterprises for such three and one-half-year period preceding the date of computation or such lesser period as the enterprises transferred may have been in operation by the predecessor's entire payroll;

(3) if, at the time of a transfer of an employing enterprise in whole or in part, both the predecessor and the successor are under common ownership, then the experience history attributable to the transferred business shall also be transferred to and combined with the experience history attributable to the successor employer.

The rates of both employers shall be recalculated and made effective immediately upon the date of the transfer;

(4) whenever a person, who is not currently an employer, acquires the trade or business of an employing enterprise, the experience history of the acquired business shall not be transferred to the successor if the secretary or the secretary's designee finds that the successor acquired the business solely or primarily for the purpose of obtaining a lower rate of contributions. Instead, the successor shall be assigned the applicable new employer rate pursuant to this section. In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower rate of contribution, the secretary or the secretary's designee shall consider:

(a) the cost of acquiring the business;

(b) whether the person continued the business enterprise of the acquired business;

(c) how long such business enterprise was continued; and

(d) whether a substantial number of new employees was hired for performance of duties unrelated to those that the business activity conducted prior to acquisition;

(5) if, following a transfer of experience history pursuant to this subsection, the department determines that a substantial purpose of the transfer of the employing enterprise was to obtain a reduced liability for contributions, then the experience rating accounts of the employers involved shall be combined into a single account and a single rate assigned to the combined account;

(6) the secretary shall adopt such rules as are necessary to interpret and carry out the provisions of this subsection, including rules that:

(a) describe how experience history is to be transferred; and

(b) establish procedures to identify the type of transfer or acquisition of an employing enterprise; and

(7) a person who knowingly violates or attempts to violate a rule adopted pursuant to Paragraph (6) of this subsection, who transfers or acquires, or attempts to transfer or acquire, an employing enterprise for the sole or primary purpose of obtaining a reduced liability for contributions or who knowingly advises another person to violate a rule adopted pursuant to Paragraph (6) of this subsection or to transfer or acquire an employing enterprise for the sole or primary purpose of obtaining a reduced liability for contributions is guilty of a misdemeanor and shall be punished by a fine of not less than one thousand five hundred dollars ($1,500) or more than three thousand dollars ($3,000) or, if an individual, by imprisonment for a definite term not to exceed ninety days or both. In addition, such a person shall be subject to the following civil penalty imposed by the secretary:

(a) if the person is an employer, the person shall be assigned the highest contribution rate established by the provisions of this section for the calendar year in which the violation occurs and the three subsequent calendar years; provided that, if the difference between the increased penalty rate and the rate otherwise applicable would be less than two percent of the employer's payroll, the contribution rate shall be increased by two percent of the employer's payroll for the calendar year in which the violation occurs and the three subsequent calendar years; or

(b) if the person is not an employer, the secretary may impose a civil penalty not to exceed three thousand dollars ($3,000).

F. Except as provided in Subsection Q of this section, for each calendar year, if, as of the computation date for that year, an employer has been a contributing employer throughout the preceding twenty-four months, the contribution rate for that employer shall be determined by multiplying the employer's benefit ratio by the reserve factor as determined pursuant to Subsection H of this section and, for each calendar year beginning in calendar year 2017, then multiplying that product by the employer's experience history factor as determined under Subsection I of this section; provided that an employer's contribution rate shall not be less than thirty-three hundredths percent or more than five and four-tenths percent. An employer's benefit ratio is determined by dividing the employer's benefit charges during the immediately preceding fiscal years, up to a maximum of three fiscal years, by the total of the annual payrolls of the same time period, calculated to four decimal places, disregarding any remaining fraction.

G. Except as provided in Subsection Q of this section, for each calendar year, if, as of the computation date of that year, an employer has been a contributing employer for less than twenty-four months, the contribution rate for that employer shall be the average of the contribution rates for all contributing employers in the employer's industry, as determined by administrative rule, but shall not be less than one percent or more than five and four-tenths percent; provided that an individual, type of organization or employing unit that acquires all or part of the trade or business of another employing unit, pursuant to Paragraphs (2) and (3) of Subsection E of Section 51-1-42 NMSA 1978, that has a rate of contribution less than average of the contribution rates for all contributing employers in the employer's industry, shall be entitled to the transfer of the contribution rate of the other employing unit to the extent permitted under Subsection E of this section.

H. The division shall ensure that the fund sustains an adequate reserve. An adequate reserve shall be determined to mean that the funds in the fund available for benefits equal the total amount of funds needed to pay between eighteen and twenty-four months of benefits at the average of the five highest years of benefits paid in the last twenty-five years. Except as provided in Subsection Q of this section, for the purpose of sustaining an adequate reserve, the division shall determine a reserve factor to be used when calculating an employer's contribution rate pursuant to Subsection F of this section by rule promulgated by the secretary. Except as provided in Subsection Q of this section, the rules shall set forth a formula that will set the reserve factor in proportion to the difference between the amount of funds available for benefits in the fund, as of the computation date, and the adequate reserve, within the following guidelines:

(1) 1.0000 if, as of the computation date, there is an adequate reserve;

(2) between 0.5000 and 0.9999 if, as of the computation date, there is greater than an adequate reserve; and

(3) between 1.0001 and 4.0000 if, as of the computation date, there is less than an adequate reserve.

I. Except as provided in Subsection Q of this section, for each calendar year beginning in calendar year 2017, if, as of the computation date for that calendar year, an employer has been a contributing employer throughout the preceding twenty-four months, the employer's experience history factor shall be determined as of the computation date and shall be based on the employer's reserve. The employer's reserve shall be calculated as the difference between all of the employer's previous years' contribution payments and all of the employer's previous years' benefit charges, divided by the average of the employer's annual payrolls for the immediately preceding fiscal years, up to a maximum of three fiscal years.

If an employer's reserve is: The employer's experience history factor is:

6.0% and over 0.4000

5.0%-5.9% 0.5000

4.0%-4.9% 0.6000

3.0%-3.9% 0.7000

2.0%-2.9% 0.8000

1.0%-1.9% 0.9000

0.0%-0.9% 0.9500

Under 0.0% 1.0000.

J. Except as provided in Subsection Q of this section, if an employer's contribution rate pursuant to Subsection F of this section is calculated to be greater than five and four-tenths percent, notwithstanding the limitation pursuant to Subsection F of this section, the employer shall be charged an excess claims premium in addition to the contribution rate applicable to the employer; provided that an employer's excess claims premium shall not exceed one percent of the employer's annual payroll. The excess claims premium shall be determined by multiplying the employer's excess claims rate by the employer's annual payroll. An employer's excess claims rate shall be determined by multiplying the difference of the employer's contribution rate, notwithstanding the limitation pursuant to Subsection F

of this section, less five and four-tenths percent by ten percent.

K. Effective calendar year 2017, any other provision of law notwithstanding, an employer's contribution rate plus the employer's excess claims rate, if any, shall increase by no more than two percentage points from one calendar year to the next.

L. Except as provided in Subsection Q of this section, the division shall promptly notify each employer of the employer's rate of contributions and excess claims premium as determined for any calendar year pursuant to this section. Such notification shall include the amount determined as the employer's annual payroll, the total of all of the employer's contributions paid on the employer's behalf for all past years and total benefits charged to the employer for all such years. Such determination shall become conclusive and binding upon the employer unless, within thirty days after the mailing of notice thereof to the employer's last known address or in the absence of mailing, within thirty days after the delivery of such notice, the employer files an application for review and redetermination, setting forth the employer's reason therefor. The employer shall be granted an opportunity for a fair hearing in accordance with rules prescribed by the secretary, but an employer shall not have standing, in any proceeding involving the employer's rate of contributions or contribution liability, to contest the chargeability to the employer of any benefits paid in accordance with a determination, redetermination or decision pursuant to Section 51-1-8 NMSA 1978, except upon the ground that the services on the basis of which such benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to such determination, redetermination or decision, or to any other proceedings under the Unemployment Compensation Law in which the character of such services was determined. The employer shall be promptly notified of the decision on the employer's application for redetermination, which shall become final unless, within fifteen days after the mailing of notice thereof to the employer's last known address or in the absence of mailing, within fifteen days after the delivery of such notice, further appeal is initiated pursuant to Subsection D of Section 51-1-8 NMSA 1978.

M. The division shall provide each contributing employer, within ninety days of the end of each calendar quarter, a written determination of benefits chargeable to the employer. Such determination shall become conclusive and binding upon the employer for all purposes unless, within thirty days after the mailing of the determination to the employer's last known address or in the absence of mailing, within thirty days after the delivery of such determination, the employer files an application for review and redetermination, setting forth the employer's reason therefor. The employer shall be granted an opportunity for a fair hearing in accordance with rules prescribed by the secretary, but an employer shall not have standing in any proceeding involving the employer's contribution liability to contest the chargeability to the employer of any benefits paid in accordance with a determination, redetermination or decision pursuant to Section 51-1-8 NMSA 1978, except upon the ground that the services on the basis of which such benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to such determination, redetermination or decision, or to any other proceedings under the Unemployment Compensation Law in which the character of such services was determined. The employer shall be promptly notified of the decision on the employer's application for redetermination, which shall become final unless, within fifteen days after the mailing of notice thereof to the employer's last known address or in the absence of mailing, within fifteen days after the delivery of such notice, further appeal is initiated pursuant to Subsection D of Section 51-1-8 NMSA 1978.

N. The contributions and excess claims premiums, together with interest and penalties thereon imposed by the Unemployment Compensation Law, shall not be assessed nor shall action to collect the same be commenced more than four years after a report showing the amount of the contributions was due. In the case of a false or fraudulent contribution report with intent to evade contributions or a willful failure to file a report of all contributions due, the contributions and excess claims premiums, together with

interest and penalties thereon, may be assessed or an action to collect such contributions may be begun at any time. Before the expiration of such period of limitation, the employer and the secretary may agree in writing to an extension thereof and the period so agreed on may be extended by subsequent agreements in writing. In any case where the assessment has been made and action to collect has been commenced within four years of the due date of any contribution, excess claims premium, interest or penalty, including the filing of a warrant of lien by the secretary pursuant to Section 51-1-36 NMSA 1978, such action shall not be subject to any period of limitation.

O. The secretary shall correct any error in the determination of an employer's rate of contribution during the calendar year to which the erroneous rate applies, notwithstanding that notification of the employer's rate of contribution may have been issued and contributions paid pursuant to the notification. Upon issuance by the division of a corrected rate of contribution, the employer shall have the same rights to review and redetermination as provided in Subsection L of this section.

P. Any interest required to be paid on advances to this state's unemployment compensation fund under Title 12 of the Social Security Act shall be paid in a timely manner as required under Section 1202 of Title 12 of the Social Security Act and shall not be paid, directly or indirectly, by the state from amounts in the state's unemployment compensation fund.

Q. The secretary shall omit data for March 1, 2020 through June 30, 2021 from calculations of an employing enterprise's experience history, excess claims premiums and excess claims rates. The secretary shall use the 2019 computation date reserve factor from January 1, 2020 through June 30, 2021.

R. As used in this section:

(1) "annual payroll" means the total taxable amount of remuneration from an employer for employment during a twelve-month period ending on a computation date;

(2) "base-period employers" means the employers of an individual during the individual's base period;

(3) "base-period wages" means the wages of an individual for insured work during the individual's base period on the basis of which the individual's benefit rights were determined;

(4) "common ownership" means that two or more businesses are substantially owned, managed or controlled by the same person or persons;

(5) "computation date" for each calendar year means the close of business on June 30 of the preceding calendar year;

(6) "employing enterprise" means a business activity engaged in by a contributing employing unit in which one or more persons have been employed within the current or the three preceding calendar quarters. An "employing enterprise" includes the employer's workforce;

(7) "experience history" means the benefit charges and payroll experience of the employing enterprise;

(8) "knowingly" means having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibition involved;

(9) "predecessor" means the owner and operator of an employing enterprise immediately prior to the transfer of such enterprise;

(10) "successor" means any person that acquires an employing enterprise and continues to operate such business entity; and

(11) "violates or attempts to violate" includes an intent to evade, a misrepresentation or a willful nondisclosure."

SECTION 12. REPEAL.--Laws 2020, Chapter 75, Section 1 is repealed.

SECTION 13. EMERGENCY.--It is necessary for the public peace, health and safety that this act take effect immediately.

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