

# Explaining “Take-back Limits”

## **Introduction**

This draft takes a very different approach than all previous efforts. Rather than focus on negatives arising from actions by or with respect to a single taxpayer, it looks first at the aggregate. Further, no determination need be made by the secretary. Instead a process is prescribed applying to all covered distributions and transfers to every municipality or county every month.

Sub-issues abound here: taxes and transfer/distributions covered; replacing the taxpayer-centered adjustment process with a more aggregate approach; lack of pre-deprivation due process under current law; lack of priority ranking among repayment agreements and intercepts under the State Aid Intercept Act or Section 9-6-5.2 NMSA 1978; and local government access to TRD information.

## **Which taxes and transfers/distributions should be covered?**

### **Section 1 (7-1-6.15, Subsection A)**

1. What distributions/transfers are not covered but should be? Easy—the food (7-1-6.46) and medical (7-1-6.47) hold harmless distributions which, under present law, will be with us at least through June 30, 2028. For a number of small jurisdictions, these distributions are the largest single component of the gross receipts tax-related distributions/transfers. They are added to Subsection A of 7-1-6.15.

2. What distributions/transfers do not fit the 7-1-6.15 process? This is a little tougher. The draft deletes only cigarette tax distributions from Subsection A of 7-1-6.15. Currently, no cigarette tax receipts are distributed to local governments, so there is no need to apply the proposed take-back adjustment process to these taxes.

Note: Neither current law nor the proposed process really fit the gasoline tax distributions. Perhaps a separate mechanism should be developed for them but that is not undertaken by this draft.

**A new adjustment process**  
**Section 1 (7-1-6.15, Subsections B and E)**

1. The monthly net receipts for every tax for which the transfer or distribution is being prepared for a municipality or county is to be divided into 2 categories, current month items and prior month items (e.g., refunds processed in the current month but which are adjustments of taxes paid in prior periods).

a. Because this is very useful information and instills some accountability into the system, the totals of each category are to be reported to the municipality or county each month.

b. Examining the total for the prior period category is the first step in determining whether the transfer/distribution amount needs to be adjusted. If the total is positive, no adjustment is required. If the total is negative but less than the greater of \$100 or 10% of the average of the previous 12-months transfers/distributions, no adjustment need be made.

2. The adjustment process applies only if the total of the prior period category is negative and larger than the greater of \$100 or 10% the average transfers/distributions.

a. Adjust the prior period category total by excluding negative amounts related to months prior to the calendar year preceding the year of the current month (the time period in present law) are to be excluded from the category total. This produces an adjusted total. The excluded amounts become an increase to the transfer/distribution amount.

Here a taxpayer-by-taxpayer focus intrudes. It seems only fair that, if a taxpayer has both positive and negative amounts in the time beyond the calendar year preceding the year of the current month, they should be offset. This of course would have the effect of reducing the increase to the transfer/distribution.

b. Is the *adjusted total* larger than the greater of \$100 or 10% of the average? If not, nothing further need be done. If so, then the entire adjusted total also becomes an increase to the transfer/distribution but this amount is recoverable by the state. TRD must notify the municipality or county that it intends to recover the amount by docking future transfers/distributions and give the local government 90 days to examine relevant TRD records, decide how to make repayment or to protest by filing an action with district court. Failing to act within the 90-day window means TRD recovers over a 24-month period, beginning with the first transfer/distribution after expiration of the 90-day period.

c. Adjustment-related definitions (in Subsection E) of “amounts relating to the current period”, “amounts relating to prior periods”, “average distribution or transfer amount” (same as in last version), “current month” and “repayment agreement” are added.

**Priority among claims**  
**Section 1 (7-1-6.15, Subsections C and D)**

Priority is assigned to the competing claims against the transfers/distributions for a municipality or county: first priority, State Aid Intercept Act intercepts; second, repayment agreement amounts; and last, amounts to be withheld pursuant to Section 9-6-5.2 NMSA 1978.

**Access to TRD information.**  
**Section 2 (7-1-8.9)**

1. Inspecting records related to increases or decreases. The 90-day window only provides time to agree on a payment plan if the local governments have no access to TRD records. Without access, the local government cannot determine independently whether TRD's call regarding the rectification has a real basis. Without at least the basic facts, the option to file a challenge with the courts also becomes meaningless.

Subsection C of Section 7-1-8.9 (changed to Paragraph (3) of Subsection A in the draft) currently allows officials of a local government to inspect the TRD records relating to a 7-1-6.15 increase or decrease. In recent years, TRD has consistently refused such access on the grounds that 7-1-6.15 did not apply to their proposed take-backs.

2. TRD has some genuine concerns on maintaining confidentiality, partly because of the terms of its agreements with the IRS. The draft adds a Subsection B that is intended to allay those concerns. (TRD already has authority under 7-1-8.1 to limit access to the information it shares by written agreements with local governments to specific officials or employees of the local government.) The draft allows TRD to require training of those receiving the confidential information and details to whom a recipient of the confidential information may in turn disclose it.

As a possible hedge against some future refusal of TRD to allow inspection of records relating to distribution/transfer increases and decreases because it is argued that somehow 7-1-6.15 does not apply, the list of TRD actions that can trigger access to TRD records expands to include manifestations of the negative adjustment problem without citing 7-1-6.15.

3. Other confidentiality matters. One of TRD's problems in administering the gross receipts tax is the wide dispersal of the taxpayers across the state. Although municipalities and counties are major recipients of the collected tax revenues, they are permitted only a very limited role in enforcing the tax. As a direct result, local officials are seldom in a position to warn TRD when a problem may be at hand regarding local taxpayers.

This draft authorizes routine disclosure of taxable gross receipts of local taxpayers to local officials. Local officials can more easily spot apparent discrepancies between the apparent level of activity in their community with the reported volume of gross receipts. Obviously there could be some false alarms but the present system makes no use of local eyes. It also requires that the agreements under which these disclosures are made be in writing, which invokes the process requirements of Section 7-1-8.1.

**Effective July 1, 2015**