

**CHAPTER 37**

**MUNICIPAL, COUNTY AND AUTHORITY  
EMPLOYEES DEFERRED  
COMPENSATION PLANS**

**Authority**

N.J.S.A. 43:15B-1 et seq.

**Source and Effective Date**

R.1994 d.578, effective November 21, 1994.  
See: 26 N.J.R. 2708(a), 26 N.J.R. 4600(a).

**Executive Order No. 66(1978) Expiration Date**

Chapter 37, Municipal, County and Authority Employees Deferred Compensation Plans, expires on November 21, 1999.

**Chapter Historical Note**

Chapter 37, originally Municipal and County Employees Deferred Compensation Programs, was adopted as emergency new rules R.1980 d.456, effective October 16, 1980. See: 12 N.J.R. 633(b). Emergency amendments were adopted as R.1980 d.557, effective December 29, 1980. See: 13 N.J.R. 71(b). An amendment was adopted as R.1984 d.297, effective July 16, 1984, but operative January 1, 1985. See: 16 N.J.R. 784(a), 16 N.J.R. 1969(a).

Pursuant to Executive Order No. 66(1978), Chapter 37 expired on October 16, 1985. A new Chapter 37, Municipal, County and Authority Employees Deferred Compensation Programs, was adopted as R.1985 d.598, effective November 18, 1985. See: 17 N.J.R. 1960(a), 17 N.J.R. 2749(b). Pursuant to Executive Order No. 66(1978), Chapter 37 expired on November 18, 1990, and subsequently was adopted as new rules by R.1991 d.19, effective January 7, 1991. See: 22 N.J.R. 3076(a), 23 N.J.R. 57(c).

Chapter 37 was repealed and new rules regarding Deferred Compensation Plans were adopted as R.1994 d.578. See: Source and Effective Date.

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## SUBCHAPTER 1. DEFINITIONS

## 5:37-1.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

“Accounting date” means the annual date at the close of the fiscal year when the employer provides an accounting of its deferred compensation plan and apprises all participants of the value of their accounts.

“Administrator” means the person or group of local public officials or employees, including the local governing body, appointed by the governing body of the local unit as fiduciary responsible for the administration of the deferred compensation plan and for the investments and the accounting of funds maintained under the plan.

“Approved plan” means a deferred compensation plan which has been approved by the Director.

“Beneficiary” means the person, persons or legal entity designated by a participant to receive any undistributed deferred compensation which becomes payable in the event of the participant’s death.

“Complete application package” means the documentation to be submitted to the Director by an employer for approval of a self-administered deferred compensation plan or by a contractor for a prototypical deferred compensation plan which may include, but not be limited to, the deferred compensation plan document, service agreement and resolution.

“Contractor” means any organization, firm, corporation, partnership, or individual, whether profit making or non-profit, which is not a governmental entity and provides a deferred compensation plan or administers it for an employer.

“Deferred compensation” means future benefits for present services payable pursuant to a contract with an employee.

“Deferred compensation plan” or “plan” means a document consistent with the requirements of Section 457, as amended, of the United States Internal Revenue Code under which an employee may defer payment of a specified amount of compensation until the future receipt thereof.

“Director” means the Director of the Division of Local Government Services in the Department of Community Affairs.

“Employee” means any person, including elected, appointed and salaried persons working for the employer.

“Employer” means a local unit, either municipal, county, or an authority created by one or more counties or municipalities.

“Independent auditor” means a registered municipal accountant for a municipality or county pursuant to N.J.S.A. 40A:5-4 or a registered municipal accountant or a certified public accountant for an authority or fire district pursuant to N.J.S.A. 40A:5A-15.

“Joinder agreement” means the agreement signed by an employee to become a participant in the deferred compensation plan.

“Participant” means a local unit employee who is participating in a deferred compensation plan.

“Pay period” means the period of time for which the employer computes compensation for the employee.

“Prototypical plan” means a deferred compensation plan prepared by a contractor and approved by the Director.

“Self-administered plan” means a deferred compensation plan prepared and administered by the local unit and approved by the Director.

“Service agreement” means a contract between the employer and a third party for the administration of the employer’s deferred compensation plan.

## SUBCHAPTER 2. THE DIRECTOR

## 5:37-2.1 Approving plans and service agreements

(a) The Director shall approve or reject any deferred compensation plan or service agreement or amendment thereto prior to its implementation by an employer.

(b) The Director shall approve or reject a self-administered plan or prototypical plan or service agreement or any amendment thereto within 20 working days of receipt of a complete application package. The Director shall explain in writing, the reasons for rejection. Any modifications required by the Director shall be made within 60 days from the time of notification. Failure to submit the modifications within the time provided shall result in the plan being disapproved.

**5:37-2.2 Review investments**

Any investments made pursuant to an approved deferred compensation plan are subject to review by the Director. With the exception of investments made by domestic insurance companies licensed to sell life insurance and annuities in this State and subject to review by the Commissioner of the Department of Insurance pursuant to Chapter 20 of Title 17B of the New Jersey Statutes, the Director may review and reject any such investment. In making such determinations, the Director shall utilize the standards applicable to the prudent investor as provided in Section 13 of P.L. 1981, c.405 (N.J.S.A. 3B:20-13).

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**SUBCHAPTER 3. DEFERRED COMPENSATION PLAN**
**5:37-3.1 Prototypical plans and service agreements**

(a) A contractor shall submit to the Director for approval a prototypical plan or service agreement and any amendment thereto to be made available to employers. The plan and service agreement shall contain, but not be limited to, the policies and procedures to be used in operating a deferred compensation plan as set forth in these rules.

(b) The Director shall assign a separate identifier to each approved prototypical plan and service agreement and any amendment thereto. This identifier shall appear in a prominent position on each plan and agreement offered to an employer.

(c) The approval of a prototypical plan or a service agreement by the Director shall not constitute an endorsement of the plan or service agreement.

**5:37-3.2 Self-administered plan**

The employer may prepare and administer a deferred compensation plan. The plan shall contain, but not be limited to, the policies and procedures to be used in operating a deferred compensation plan as set forth in these rules. Such a plan may be prepared in consultation with representatives of the potential participants.

**5:37-3.3 Uniform system of accounting**

The plan shall provide for a uniform system of accounting for each participant and for the investment of the deferred compensation funds.

**5:37-3.4 Certification of Internal Revenue Service compliance**

The resolution of an employer adopting a self-administered plan or a prototypical plan shall certify that an application has been filed with the Internal Revenue Service for a private letter ruling that the plan meets the requirements of Section 457 of the Internal Revenue Code, as amended,

and that such ruling will be forwarded to the Director when received.

**5:37-3.5 Alternative certification of Internal Revenue Service compliance**

As an alternative to the Internal Revenue Service private letter ruling required pursuant to N.J.A.C. 5:37-3.4, the resolution of an employer adopting a prototypical plan shall certify that the employer is adopting a plan substantially similar to one on which a satisfactory Internal Revenue Service private letter ruling has been obtained. The certification shall also indicate the use of the ruling is for guidance only and the realization that for Internal Revenue Service purposes, the ruling of another employer is not to be considered precedent.

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**SUBCHAPTER 4. AMENDMENTS OF PLAN**
**5:37-4.1 Reasons for amendment**

The employer may amend the plan to accommodate changes in the Internal Revenue Code, Federal statutes, State laws or rules or operational experience.

**5:37-4.2 Notification of amendment**

The employer shall notify all participants in writing prior to making any amendment to the plan. The notice shall state that an amendment will be made, what the amendment will be, why the plan is being amended, and what the impact, if any, will be on the participants. The participants shall have the right to modify the joinder agreement to reduce or eliminate any adverse impact on their accounts.

**5:37-4.3 Internal Revenue Service amendment**

(a) An amendment to a deferred compensation plan necessary to maintain the plan as an eligible deferred compensation plan within the meaning of the Internal Revenue Code does not require approval by the Director prior to implementation; however, any such amendment shall be filed with the Director.

(b) The documentation submitted to the Director shall identify the regulatory authority for the amendment and the specific language of the change.

**5:37-4.4 Non-Internal Revenue Service amendment**

(a) An amendment to a deferred compensation plan which is not necessary to maintain the plan as an eligible deferred compensation plan within the meaning of the Internal Revenue Code shall be submitted to the Director for approval prior to implementation.

(b) The employer shall adopt the amendment by resolution of the governing body. A certified body of the resolution shall be forwarded to the Director.

(c) The documentation submitted to the Director shall identify the specific language of the change.

## SUBCHAPTER 5. THE EMPLOYER

### 5:37-5.1 Institution of plans

(a) The employer shall decide whether to institute a deferred compensation plan for its employees.

(b) An employer may at its option exclude certain classes or types of employees from participation in the plan.

### 5:37-5.2 Plan and service agreement adoption

(a) The employer shall adopt a self-administered plan by resolution. A certified copy of the resolution shall be forwarded to the Director.

(b) The employer shall adopt a prototypical plan by resolution of the governing body. The resolution shall include, but not be limited to:

1. A formal adoption of the plan;
2. A description of the method used to solicit proposals pursuant to N.J.A.C. 5:37-7.1;
3. An identification of a local plan administrator pursuant to N.J.A.C. 5:37-5.4;
4. An authorization to execute a service agreement with the contractor;
5. A statement of non-collusion pursuant to N.J.A.C. 5:37-5.7;
6. Certification of plan compliance with the rules of the Internal Revenue Service pursuant to N.J.A.C. 5:37-3.4 or 3.5 for a prototypical plan adoption only; and
7. The identification of the contractor and the plan or service agreement identifier.

(c) The Director shall make available a sample resolution for use by employers.

(d) A certified copy of the resolution shall be forwarded to the Director.

### 5:37-5.3 Additional service agreement(s)

(a) An employer which has adopted a prototypical plan may award a supplementary service agreement to offer the investment options of another contractor. The service agreement shall be adopted by resolution. The resolution shall include, but not be limited to:

1. A description of the method used to solicit proposals pursuant to N.J.A.C. 5:37-7.1;

2. An authorization to execute a service agreement with the contractor;

3. A statement of non-collusion pursuant to N.J.A.C. 5:37-5.7; and

4. The identification of the contractor and the identifier of the service agreement.

(b) A certified copy of the resolution shall be forwarded to the Director.

### 5:37-5.4 Responsible for administration

The employer shall ensure the sound and proper administration of the plan, which shall include, but not be limited to, the proper, accurate and adequate accounting and reporting of all funds by appointing a plan administrator by resolution.

### 5:37-5.5 Employer retaining assets

Compensation deferred under the plan shall remain the asset of the employer. The obligation of the employer to participating employees shall be contractual only, and no preferred or special interest in the deferred money shall accrue to such participants.

### 5:37-5.6 Conflict of interest

In undertaking any activities related to the establishment or administration of a deferred compensation plan, including but not limited to, any activities related to contracting for the administration of such a plan, local government officers and employees shall be governed by and subject to the requirements of the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., and any county or municipal code of ethics promulgated pursuant thereto.

### 5:37-5.7 Non-collusion

There shall be no collusion, or evidence or appearance of collusion, between any official or employee of the employer and any official or employee or representative of the contractor, vendor, insurance company, bank, consultant, brokerage firm, or any other profit making or non-profit firm in solicitation or award of a service agreement with the employer. The employer shall so certify to the Director in the resolution implementing each service agreement.

### 5:37-5.8 No personal liability

The employer or administrator shall not be held personally liable for any returns on investment of plan funds which are less than any participant or group of participants expected. The employer shall require a hold harmless provision in service agreements with contractors which includes an indemnification of the employer from any cause of action, together with the reasonable costs of litigation from acts or omissions by the contractor.

**5:37-5.9 Administrative expenses**

The employer may charge the plan fund for reasonable administrative expenses in an amount agreed upon between the employer and the employees.

**5:37-5.10 Minimum amounts**

The employer shall establish minimum deferral amounts.

**5:37-5.11 Inactive plan or service agreement**

When an employer terminates a plan or a service agreement with a contractor or plan, such action shall be by resolution. The resolution shall include the name of the contractor and the plan or service agreement identifier. A copy of the resolution shall be filed with the Director.

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**SUBCHAPTER 6. THE ADMINISTRATOR****5:37-6.1 Responsibilities of administrator**

The administrator shall have responsibility for all functions of the plan, including, but not limited to, enrollment, deductions, investments, accounting, reporting, and distribution of compensation.

**5:37-6.2 Bonding and evidence of insurance—self-administered plan**

(a) The administrator of a self-administered plan shall post a bond obtained from an organization duly authorized and licensed to provide such bond in the State of New Jersey, to protect the plan and the employer from any loss resulting from fraud or dishonesty. Evidence of such bond or ability to obtain such bond shall be provided to the employer and to the Director.

(b) The amount of the bond shall not be less than 100 percent of the amount of funds managed by the administrator.

**5:37-6.3 Document retention**

The administrator shall retain in a safe place the original policies, contracts or other legal documents executed by the employer and the contractor.

**5:37-6.4 Quarterly report**

The administrator shall make available at least quarterly a report to each participant which shall indicate the value or balance of each participant's account, as well as, the value or balance of the entire plan. This report shall indicate for each participant the balance of the participant's account as of the last accounting date, the amount of compensation deferred and any return on investment credited to the participant's account since the last report or accounting date.

**SUBCHAPTER 7. THE CONTRACTOR****5:37-7.1 Award of service agreements**

(a) In seeking a contractor, the employer shall solicit written proposals from two or more contractors offering prototypical plans or service agreements. After reviewing the proposals, a service agreement shall be awarded by resolution of the governing body. The resolution shall include a description of the method used to solicit proposals, identify the responding vendors and state the rationale for selecting a specific contractor.

(b) The term of the service agreement shall be determined by the employer and the contractor.

**5:37-7.2 Ban on solicitation prior to award of contract**

An organization seeking a contract shall not solicit employee participation in any deferred compensation plan or solicit employees to support the efforts of the organization to secure such a contract. A representative of an organization under contract shall not communicate with any prospective participant without the expressed consent and knowledge of the employer.

**5:37-7.3 Insurance companies**

An insurance company offering deferred compensation plans or investment options to local governments shall be authorized by the Commissioner of Insurance to do business in the State of New Jersey.

**5:37-7.4 Mutual fund companies**

An entity offering a mutual fund or other type of security as part of a deferred compensation plan shall be registered with the Security and Exchange Commission and shall submit to the Director a copy of a "Certification of Good Standing" from the New Jersey Secretary of State.

**5:37-7.5 Non-profit corporations**

A non-profit, tax-exempt corporation offering deferred compensation plans to local governments shall provide to the Director a copy of their Internal Revenue Service tax exemption certification.

**5:37-7.6 Banking institutions**

A banking institution serving as a depository for local government controlled program funds or offering deferred compensation plans to local governments shall be a New Jersey State-chartered bank, savings bank, or savings and loan or Federally-chartered bank, savings bank, or savings and loan located in New Jersey; hereinafter referred to as "banking institution." Such banking institution shall be in compliance with capital requirements for State-chartered banking institutions as set forth in N.J.A.C. 3:4, or capital requirements for Federally-chartered banking institutions as set forth in 12 CFR Part 325.

**5:37-7.7 Non-discrimination**

An organization, person, company, corporation, partnership, or other entity offering deferred compensation plans to local governments shall be in full compliance with all Federal and State laws regarding discrimination in its employment or investment policies and practices and shall so certify to the Director.

**5:37-7.8 Contractor disclosure**

(a) A potential contractor shall fully disclose to the employer in writing at the time a proposal is submitted for consideration, any arrangement it may have to pay endorsement fees to organizations whose membership includes local public employees of the employer.

(b) A potential contractor shall disclose to the employer and to the employees the fees charged, the fee and commission structure, the investment plan offered, and any other pertinent information which the employer may need in evaluating the contractor's fee and service.

(c) All service agreements shall contain termination clauses with respect to transfers of assets or responsibility under the plan.

**5:37-7.9 Bonding and evidence of insurance—prototypical plan**

(a) A contractor who provides a prototypical plan shall post a bond obtained from an organization duly authorized and licensed to provide such bond in the State of New Jersey, to protect the plan and the employer from any loss resulting from fraud or dishonesty by such contractor. Evidence of such bond or ability to obtain such bond if the service agreement is awarded shall be provided to the employer and to the Director.

(b) The amount of bond shall not be less than 100 percent of the amount of funds managed by such contractor.

(c) A contractor providing services in accordance with these rules shall provide the employer and Director with evidence of appropriate liability insurance and errors and omissions insurance.

**5:37-7.10 Provisions for rule to be part of service agreement**

A service agreement entered into by an employer shall contain a provision that the service agreement is subject to the rules of the Division of Local Government Services and the rules are made a part thereof.

**SUBCHAPTER 8. ENROLLMENT****5:37-8.1 Joinder agreement**

(a) An eligible employee may enroll in the plan by executing a joinder agreement.

(b) The amount to be deferred shall be specified in the joinder agreement. The amount deferred may be changed by the participant with prior notice to the administrator at times designated by the employer.

(c) Once a joinder agreement is signed, the participant and beneficiary waive all claims and rights to commute, sell, assign, or otherwise use or transfer rights to receive any payments under the plan, which payments and rights are expressly declared to be non-assignable and non-transferable.

(d) The employer and a participant may execute only one joinder agreement for the purpose of enrolling in a plan during any one calendar year. The joinder agreement expires upon termination of service or a revocation of deferrals.

**5:37-8.2 Leave of absence**

A participant on an authorized leave of absence remains a participant.

**SUBCHAPTER 9. INVESTMENT POLICIES****5:37-9.1 Eligible investments**

(a) The funds deferred shall be invested in one or more of the following types of investments to the exclusion of all others:

1. Interest bearing accounts or securities, in which savings banks of New Jersey are authorized to invest their funds;
2. State of New Jersey Cash Management Fund;
3. Individual or group annuity contracts, whether fixed or variable;
4. Mutual fund shares; or
5. Life insurance contracts, whether fixed or variable.

**5:37-9.2 Choice of investments**

It shall be at the option of the employer to include in the plan as many of the investment choices identified in N.J.A.C. 5:37-9.1 as deemed prudent.

**5:37-9.3 Investment certification**

(a) A contractor providing deferred compensation services to an employer shall file with the Director in a form prescribed by the Director on or before the 15th day of January of each year a certification that the investment options offered comply with N.J.S.A. 43:15B-3c.

(b) The chief financial officer of a local unit with a self-administered plan shall file with the Director in a form prescribed by the Director on or before the 15th day of January of each year a certification that the investment options offered comply with N.J.S.A. 43:15B-3c.

**5:37-9.4 Timing of investments**

All funds from amounts deferred other than those needed to pay benefits shall be invested by the administrator or contractor responsible for investments within 72 hours, exclusive of Sundays and holidays, from the time the administrator or contractor receives the funds or is notified that the funds are available for investment or is in any other manner aware that the amounts deferred have been made and are available for investment.

**SUBCHAPTER 10. ACCOUNTING PROCEDURES****5:37-10.1 Pooling of funds**

Except for individual annuities and life insurance contracts, the plan shall provide for investments in authorized investment options by pooling the amounts deferred. The return on investments shall be apportioned on a prorated basis among all participants in the plan after deductions for reasonable administrative costs.

**5:37-10.2 Audit or review**

(a) The employer shall have an audit of all plan funds for a self-administered plan or a review of a contractor administered prototypical plan submitted as part of the annual audit of its books, accounts and financial transactions.

(b) The initial audit or review of the plan shall cover the period from plan initiation to the end of the fiscal year for the local unit and thereafter, the fiscal year of the plan shall conform to the fiscal year of the local unit.

**5:37-10.3 Review of prototypical plan**

(a) The review of a plan shall be made in accordance with the AICPA's Statements on Standards for Accounting and Review Services, subject to such qualitative inquiry and analytical procedures selected and performed, causing attention to questionable items, procedures or practices of a

material nature, constituting a need for balances to be adjusted or creating a need for further auditing.

(b) The contractor shall transmit to the employer a compilation of financial data in statement form providing a full accounting of all plan transactions occurring during the employer's fiscal year, including beginning transactions and ending fund balance. The accounting for the transactions must reflect each participant's amount and date of each contribution received, the beginning fund balance by investment option, earnings or losses incurred, administrative charges and fees assessed, any transfers made among funds, all deposits and withdrawals, and the ending fund balance, including any and all adjustments made to such plan. The contractor must also submit to the employer applicable plan statements together with the opinion from its latest firm audit report prepared by its independent public accountant.

(c) The contractor shall furnish a letter to the Director, from its independent accountant attesting to the adequacy of the contractor's internal controls.

(d) The contractor shall certify to the Director that the annual accounting data supplied to the employer is accurate and complete.

(e) The independent auditor of the employer shall then evaluate the employer payroll records and joinder agreements against the information transmitted by the contractor.

(f) The independent auditor of the employer shall make an appropriate statement and express limited assurances thereon. These assurances shall be made part of the employer's annual audit, pursuant to N.J.S.A. 40A:5-4 or N.J.S.A. 40A:5A-15. The expense of the review shall be incurred by the employer or contractor as agreed upon at the time the service agreement is drawn.

**5:37-10.4 Audit of a self-administered plan**

If the plan is self-administered, the employer shall conduct an audit of all plan funds. The audit shall be performed pursuant to N.J.S.A. 40A:5-4 or N.J.S.A. 40A:5A-15. A copy of each audit report shall be transmitted to the Director in accordance with N.J.A.C. 5:37-10.2.

**5:37-10.5 Deferrals**

(a) The amount of compensation deferral specified by each participant in the joinder agreement shall be deferred by the employer at the end of each pay period.

(b) The amount deferred shall not be treated as compensation subject to Federal income tax withholding, but shall be treated as compensation subject to withholding for New Jersey Gross Income Tax, pensions, social security, insurance, and other fringe benefits, except to the extent that applicable law may provide.

**5:37-10.6 Credit to accounts**

The administrator shall credit to the plan and to each participant's account the return or loss on investment no less than once per month, except for annuity programs.

**5:37-10.7 Return to participants**

(a) Plan funds, less administrative expenses, including all amounts deferred and any and all return on investment of the plan funds shall be credited to the participants' accounts. Such credit shall be made in a manner that is prorated in a non-discriminatory manner. After the first year of program operation, the administrator shall not permit the cumulative plan balance to be less than the total cumulative sum of all amounts deferred by all participants, or any participant's account to have a balance less than the cumulative sum of all of the individual participant's deferrals since participation in the plan commenced. The only exceptions to this last statement shall be:

1. Variable annuities which guarantee that during the first three years of fund accumulation a participant will have distributed, upon withdrawal from the plan, an amount equal to the amount deferred;
2. A variable annuity with no such guarantee which is offered as part of a fixed and variable product line; and
3. Life insurance contracts.

**5:37-10.8 Participant records confidential**

All records regarding participation, amounts deferred, account balances, withdrawals, and any other information regarding a participant's account shall be held confidential by the administrator or the contractor.

**5:37-10.9 Plan records**

The administrator shall make available upon a written request from a participant or the Director, all records, reports or other information relating to the plan as a whole, including, but not limited to cash flow analysis, investment reports, audits and quarterly reports.

**SUBCHAPTER 11. ENFORCEMENT****5:37-11.1 Compliance**

The employer and contractor shall comply with the provisions of this chapter. Any employer or contractor deemed by the Director to be in noncompliance shall be notified by certified mail to appear before the Director, or designee. Notice shall be given at least 14 days prior to the date of the appearance and shall detail the nature of the alleged non-compliance. Failure to appear shall result in appropriate penalties pursuant to N.J.A.C. 5:37-11.4.

**5:37-11.2 Director determination**

No later than 10 days after an appearance required by N.J.A.C. 5:37-11.1, the Director shall issue a written determination on the issue of regulatory compliance. A copy of the determination shall be forwarded by certified mail to the employer or contractor, as appropriate.

**5:37-11.3 Grace period**

A Director determination of non-compliance shall result in the immediate commencement of a 60 day grace period. During this time, the employer or contractor shall rectify all items of non-compliance to the satisfaction of the Director.

**5:37-11.4 Penalties**

Failure to satisfactorily address non-compliance during the grace period shall result in the immediate ineligibility of a contractor to qualify for Division approval of any additional deferred compensation plans. In addition, the Director may take such other actions as provided for by law.

**SUBCHAPTER 12. PLAN VERIFICATION****5:37-12.1 Plan list**

(a) Each January the Director shall prepare and distribute to the appropriate contractor a list of its approved local units. The list shall clearly identify local units and the date of approval.

(b) The contractor shall have 30 days from the date of mailing of the list by the Director to confirm in writing that the list is accurate.