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Kenneth S. Resnick
305 Brownell Howland Road
Santa Fe, New Mexico 87501
Email: ken.resnick@gmail.com

November 30, 2019

Sent via Email to: ethics.commission@state.nm.us

The New Mexico State Ethics Commission
UNM Science and Technology Park
800 Bradbury Drive SE, Suite 217
Albuquerque, NM 87106

RE: SEC Rulemaking R19-01

Dear State Ethics Commission:

Thank you for the opportunity to comment and make observations on the State Ethics Commission's (the "Commission") rule-making with respect to the proposed rules for: 1) "Administrative Hearings" and 2) "General Provisions." I do not have any comments on the proposed rule pertaining to "Recusal and Disqualification of Commissioners."

Before commenting, I summarize my background and experience as context for my comments. I moved permanently to Santa Fe more than 5 years ago following a career as a partner in the private practice of law, a white collar crime prosecutor for the State of Ohio, the general counsel of a \$17 billion dollar global business, and a professor of business ethics at the graduate and undergraduate levels. I am the founder of a New Mexican based consulting firm that advises US and global corporate clients on matters of governance, business ethics and related regulatory matters. I recently graduated from the Graduate Institute at St John's College in Santa Fe with a Master of Arts in Liberal Arts. <https://www.sjc.edu/news/courtroom-classroom> and currently serve on the college's Board of Visitors and Governors. I am admitted to practice law in the states of Ohio (active) and Georgia (inactive).

During my career, I have been involved in or oversaw hundreds of internal investigations into allegations of ethical issues and corporate wrongdoing, including those relating to corruption, bribery, conflicts of interests, discrimination, kickbacks, government fraud and similar issues. In each instance, I had the ultimate responsibility to ensure that these investigations were conducted fairly, that the individuals in these matters were treated

with respect and that the investigations were complete and thorough. These investigations involved low-level employees to very high-level executives, and frequently, I was called upon to recommend appropriate disciplinary and corrective actions. In my consulting business, I have also advised companies on setting up proactive corporate ethics/compliance systems and codes of conduct consistent with federal and state law to prevent wrongdoing and fraud. All of these compliance systems rely upon the good will of employees and others to come forward to report internally instances of potential violations of law or company policy. I have also taught courses in business ethics for the last 20 plus years at Xavier University in Cincinnati, Ohio and Syracuse University that focus on the causes and consequences of organizational ethical failures.

I have no interest in the Commission's activities or operations other than as a citizen of the State of New Mexico who hopes that the Commission will be successful in its mission in improving the public ethics environment in our great state.

1. Administrative Hearings

Section 1.8.3.9 A(1)(a): In this section, the proposed rule indicates that the complainant must have "actual knowledge of the alleged violation of such laws or constitutional provisions." This comment seeks to clarify what might later, in practice, prove to be problematic in terms of communicating to the public the level of knowledge and belief a person must have to file an ethics complaint with the Commission. In summary, both the State Ethics Commission Act (the "Act") and the proposed "Administrative Hearings" rule use the terms "verified complaint" and "actual knowledge" without any corresponding definitions of those terms in the Act or in the proposed rule. To ensure that these terms are construed consistently with each other and to establish sound policy with respect to the level of knowledge required to file a complaint, the Commission should consider adding a definition or prescribing a template form as to what constitutes a "verified complaint" so that it is clear that the complainant need not have "actual knowledge" (in the sense of direct, first-hand and personal knowledge) of all the factual elements of the alleged violation before filing a complaint.

The Act defines "Complainant" as a "person who files a verified complaint with the commission." (Section 10-16G-2C). Elsewhere, the Act indicates that a complaint may be filed "with the commission by a person who has actual knowledge of the alleged ethics violation." (Section 10-16G-10A). The Act does not provide the form or language of what constitutes a "verified complaint," nor does it provide a definition of the term "actual knowledge."

The Act authorizes the Commission to "prescribe the forms on which complaints are to be filed" and states that the "complaint form shall be signed and sworn by the

complainant and notarized.” (Section 10-16G-10B). In other legal contexts in New Mexico, a “verified complaint” means that the complainant must certify that she or he has “read the complaint and all supporting documents/exhibits submitted with this complaint and that the information provided in the complaint and all documents and materials being provided with this complaint are true and correct to the best of the complainant’s knowledge, information and belief.” (State of New Mexico, Judicial Standards Commission, Form of Verified Complaint, Rev 4/10, <https://www.nmjsc.org/wp-content/uploads/2016/06/complaintform-2.pdf>). Such a certification or verification makes it clear that the complainant does not need to have “actual knowledge” of all the factual elements of the alleged violation before filing a verified complaint with the Commission, but rather “best knowledge,” i.e., to the best of the complainant’s knowledge, information and belief.

The language of the verification is critically important. In the absence of a definition, a requirement of “actual knowledge” may erroneously signal to a potential complainant that he or she must have direct, personal and first-hand knowledge of all the factual elements of the alleged violation as a necessary precondition to be eligible to file a verified complaint. In my experience, it is extremely rare that a complainant has “actual knowledge” of all the factual elements of the alleged violation. Imposing such a requirement on potential complainants would likely prevent or chill persons who have a reasonable and good faith basis for alleging a violation from coming forward and reporting a violation to the Commission. Moreover, even where the complainant has “actual knowledge” of many of the factual elements of an alleged violation, it is not likely that such a complainant would have “actual knowledge” of all the factual elements of the alleged violation.

Based on my experience, there will be numerous instances where the person who has the most “actual knowledge” of an alleged violation will not desire or be motivated to come forward and file a complaint. It is frequently the case that such a person with the most “actual knowledge” is willing to and does relate the factual information with respect to the suspected violation to a second person or work colleague who does not have “actual knowledge.” The second person will therefore only have derivative knowledge but may have—based on the first person’s reputation for honesty, inherent credibility or specificity of information—a reasonable and good faith basis for believing that there has been a violation. A requirement of “actual knowledge” may dissuade the second person from coming forward, even where the second person can identify in the complaint specific facts and list potential witnesses with “actual knowledge.” Conversely, a verification form that allows the second person to certify that “that the information provided in the complaint and all documents and materials being provided with this complaint are true and correct to the best of the complainant’s knowledge, information and belief” will provide a solid basis for the person with credible and specific to come forward in good faith and file a complaint with the Commission.

The Commission, consistent with its delegated authority to prescribe the forms on which complaints are to be filed, should consider adopting a verification template consistent with other New Mexican verification templates that permit a complainant to certify that the complaint and supporting documents are "true and correct to the best of the complainant's knowledge, information and belief." Such a certification form would eliminate potential confusion about the use of these two terms in the Act and the proposed rule and would further the Commission's express objectives by removing unnecessary obstacles for persons who have a reasonable, credible and good faith basis to believe a violation has occurred in coming forward to file a verified complaint.

Any system that relies in substantial part on persons to report potential or suspect violations is of course subject to abuse. However, in my experience, the sounder policy is to encourage those who do have reasonable and good faith information about potential violations of law to come forward to report, and to deal with any instances of abuse of the reporting process on a case by case basis. The Act expressly states that "nothing in the States Ethics Commission Act precludes civil or criminal actions for libel or slander or other civil or criminal actions against a person who files a false claim." (10-16G-16C).

Section 1.8.3.13A: This section authorizes individual Commissioners to be hearing officers (without compensation other than per diem and mileage) in cases that may be appealed to the full Commission. While this section indicates that a Commissioner who serves as a hearing officer shall be recused from presiding over any such appeal, this comment questions the wisdom and appearance of having members of the Commission authorized to serve as hearing officers, particularly where the Act does not appear to expressly permit or authorize such service¹.

Successful and credible ethics investigation, ethics adjudication and ethics appeal processes are built on a public perception of utmost trust and fairness in the system. In other words, it is important to avoid a cynical public perception that the system is subject to bias, favoritism, cronyism or other improper influences. To be clear, this is not a comment on the integrity of the current or future Commissioners, but rather an observation based upon decades of experience that a potential complainant's willingness to come forward and participate in an ethics process is based principally upon a perception that the process will be fair, impartial and not subject to improper influence.

¹ One might argue that by negative implication, the Act does not permit individual Commissioners to serve as hearing officers. Even though the Act enumerates many specific grounds for recusal, such as prior service as a witness, attorney or consultant in the matter (10-16G-7B(3)), the Act does not cite prior service as a hearing officer as a basis for recusal of a Commissioner. Hence, the legislature may not have contemplated individual Commissioners serving as hearing officers in Commission matters. Regardless, the thrust of this comment is that from a public policy and good government standpoint, having individual Commissioners serve as hearing officers may not be the best path forward.

Individual Commissioners may be extremely well-qualified to be hearing officers. However, the Commission should seriously consider whether having the Commissioners sit in judgment of a fellow Commissioner's ruling as a hearing officer builds the type of confidence in the impartiality of the process that is needed for the entire system to function effectively. Recusal of a Commissioner who served as a hearing officer may not be sufficient to dispel the perception issue at stake. Will the public perceive in the appeal process in such cases a natural and understandable temptation for Commissioners not to upset or be critical of the judgments of their colleagues, particularly in a body that will presumably work in a collaborative fashion? This potential perception issue can be eliminated by establishing in New Mexico a panel of well-qualified, reputable hearing officers that are independent and objective so that there is no need for one Commissioner to question the judgment and findings of another Commissioner.

Again, this comment is not questioning the ability of the Commissioners to serve as hearing officers or their objectivity and independence in sitting in judgment of another Commissioner's rulings as a hearing officer. The point is that the public and the participants in the ethics process may all too readily question whether having Commissioners sitting in judgment of one another builds the type of confidence in the system to make it work effectively and credibly. As noted above, this potential perception problem is easily avoided by not authorizing Commissioners to serve as hearing officers (as there are in New Mexico pools of qualified individuals that could serve as hearing officers who are independent of the Commission) or, by permitting Commissioners to serve on an exception basis only, where, for example, there are no available hearing officers at the time and there is a deadline approaching.

Section 1.8.3.13A: This section also sets forth the qualifications to serve as a hearing officer. This section states that hearing officers shall be "currently licensed attorneys, or retired judges of the appellate, district or metropolitan courts of New Mexico or any federal court...who are familiar with the ethics and election laws enforced by the commission..." This comment addresses the minimum relevant qualifications of those who may be competent to serve as hearing officers.

As a preliminary matter, a rule that enables the creation of a diverse and large pool of eligible candidates to be qualified as hearing officers serves the public interest. At the same time, given the nuanced and often complex judgments that must be made by hearing officers, the public interest would be also served by requiring some minimum level of relevant experience for a currently licensed attorney before being eligible to serve as a hearing officer. A question that needs to be asked is whether the public will have confidence in the ability and competency of, for example, a recent graduate from law school to adjudicate an ethics complaint as a hearing officer. The Commission may want to consider requiring some minimum level of years of experience as a

"currently licensed" attorney before making such persons eligible to serve as a hearing officer. At the same time, it may be worth clarifying whether such an attorney must be qualified in the State of New Mexico (it is not clear that "currently licensed" means only those licensed in New Mexico).

In addition, while this section does require a "familiar[ity] with the ethics and election laws enforced by the commission," it seems that the duties and the responsibilities of the hearing officers are best suited for attorneys with substantial experience and knowledge of the rules of civil procedure, the rules of evidence and the litigation/trial practice process. The Commission should consider whether the qualifications of the hearing officer should include not only some minimum years of legal experience, but also some minimum relevant subject-matter experience of the type indicated above.

In an age of attorney specialization, one must question whether the public interest is served by having, for example, a corporate attorney who has some familiarity with the ethics laws, but no actual experience with evidentiary rules or trial practice, eligible to become a hearing officer. Again, the integrity of the process is based on the competency and experience of the hearing officers who will, in the first instance, apply the rules of evidence and make the nuanced judgments necessary to ensure fair, transparent outcomes. The Commission should consider whether there ought to be additional--but reasonable--requirements imposed on those who are eligible to serve as hearing officers to further build confidence in the integrity of the system.

Finally, while there are ample provisions relating to the independence, objectivity and impartiality of the Commissioners who hear appeals from the decisions of the hearing officers (see, e.g., Section 1.8.2.6), there does not appear to be any such express requirements for the hearing officers in the proposed rules. Hearing officers need to be independent, disinterested and impartial. The Commission should consider whether there ought to be some minimum standards in this regard to ensure that eligible hearing officers have no actual or apparent conflicts of interest and to avoid a public perception of bias or lack of independence. Likewise, the Commission should consider additional rules or procedures for recusal of hearing officers where a party may have reasonable and good faith grounds to question the impartiality and objectivity of the hearing officer.

Section 1.8.3.13M: This section specifies that the hearing officer will make written a written decision at the conclusion of the hearing. This section further states that "if the hearing officer finds by a preponderance of the evidence that the respondent's conduct...constituted a violation of any law or constitutional provision, the hearing officer, in a written decision, may" (emphasis added): "impose any fines provided for by law;" "recommend to the appropriate authority commensurate disciplinary action..." "state the reasons for the hearing officer's decision;" and, "provide the parties with the notice of the right of appeal to the commission." (Section 1.8.3.13M(1)-(4)). This

comment questions: 1) the use of the permissive "may," particularly with respect to stating the reasons for the hearing officer's decision and providing notice of appeal to the parties; and, 2) the failure to include in the hearing officer's written decision a requirement to make relevant observations or recommendations regarding potential systemic corrective actions or issues, systemic improvements, or similar recommendations that may be considered by the Commission to strengthen the public ethics environment in New Mexico.

The Commission ought to consider whether it should change the word "may" in this section, which by definition is permissive (See Section 1.8.10C, Interpretation of Terms), to "shall," particularly with respect to having the hearing officer "state the reasons for the hearing officer's decision," and providing "the parties with notice of the right to appeal to the commission." Requiring the hearing officer to state the reasons for his or her decision advances the public interest (particularly given the fact that the hearing officer must provide a "written decision" in any event) and facilitates the Commission's review on appeal. Otherwise, the Commission would be reviewing a written decision that—depending on the hearing officer's discretionary choice whether to include the reasons for the decision—would likely be opaque and lack the type of transparency that the Commission should require as a matter of policy. Moreover, the Act states that the "hearing officer shall issue a written decision that shall include the reasons for the decision." (10-16G-12D). As currently drafted, the proposed rule appears to conflict with this requirement of the Act.

Similarly, the Commission should consider requiring the hearing officer to provide the parties with the notice of the right of appeal to the commission in the written decision. As this section is currently worded, the hearing officer is not required to do so because of the use of the permissive "may" that prefaces the enumeration of items that can be included in the written decision.

This section is also unclear as to what happens if the hearing officer does not find by a preponderance of the evidence that the respondent's conduct constituted a violation of any law or constitutional provision. Currently, this section only addresses what happens in the event a violation is found, and what the hearing officer may include in a written decision that finds a violation. If the hearing officer does not find a violation, it seems appropriate to have the hearing officer in such a case state the reasons for his or her decision, just as the hearing officer would do in the event a violation is found. Again, the Act appears to require the hearing officer to issue a written decision with the reasons for the decision regardless of whether a violation is found or not.

Likewise, this section does not appear to require the hearing officer to provide the parties with notice of the right to appeal to the Commission in the event the hearing officer finds no violation. The Act does not make any distinction with respect to a party's right of appeal based on whether the hearing officer finds a violation or not. (10-

16G-12E). Hence, the Commission should consider clarifying its proposed rule to indicate that a party may also appeal a finding of no violation by the hearing officer and require the hearing officer to provide notice of such a right to appeal to the parties.

Finally, the Commission's objective of "ensur[ing] compliance with all applicable public ethical laws by all public officials, employees, candidates, contractors, lobbyists and others subject to the commissions jurisdiction...and to ensure that the public ethics laws are clear, comprehensive and effective," (Section 1.8.1.6 Objective, General Provisions), should be kept in mind in connection with all of the Commission's investigations and hearings. Consistent with these objectives, it would serve the public interest to have the hearing officer in the written decision make any observations or recommendations with respect to any perceived gaps, weaknesses, ambiguities in the public ethics regulations (substantive or procedural) or other constructive suggestions for systematic improvements in the public ethics sphere.

The Commission will be expending substantial time and valuable resources in the investigation and adjudications of these matters, and it should consider requiring the hearing officer---who will have had the unique opportunity to listen to all of the witnesses and review all of the evidence in the context of a specific application of ethics laws and rules--to make any applicable observations on any weaknesses in such laws and how they may be improved. Such observations or recommendations, if found by the Director and Commission to be constructive, may be included by the Commission in its reports to the legislature and to the public. In this fashion, the Commission will be aided in fulfilling its statutory duties to "submit an annual report of its activities, including any recommendations regarding state ethics laws or the scope of its powers and duties..." as set forth in the Act. (Section 10-16G-5B(5)). Similarly, such observations and recommendations may assist the Commission in its drafting and updating of "a proposed code of ethics for public officials and public employees..." as required by the Act. (Section 10-16G-5B(4)).

2. General Provisions

Section 1.8.1.8D: This section generally provides the Director with various powers to carry out the operational functions of the Commission. In this sub-section D, the Director is authorized to "enter into contracts on behalf of the commission, including, with the commissions approval, joint powers agreements." In subsection J, the Director is authorized to "prepare annual budgets and appropriation requests for commission approval." This comment seeks to clarify the operation of these two sections.

Effective checks and balances between management and a board serve the ends of good governance. The Director ought to have broad powers to enter into contracts on

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behalf of the Commission, but this does not mean that the Director should have unlimited powers. The Commission should consider whether some reasonable limitation on the Director's powers to enter into contracts on behalf of the Commission makes sense and furthers the interest of the public in good governance. For example, it may make sense to limit the Director's authority to enter into contracts on behalf of the Commission to those that fall within the scope of the budget or appropriation that the Commission has already expressly approved. In addition, with regard to extraordinary matters, it may make sense to limit the Director's authority to enter into contracts above a certain amount and reserve approval for such extraordinary matters to the Commission. Having a clear and express delegation of authority from the commission will provide notice to those who contract with Commission of the actual authority of the Director to enter into contracts and help avoid any questions or doubts of the Director's apparent or actual authority. There does not appear to be anything in the Act that would prevent the Commission from establishing such clear limitations on the authority of the Director to enter into contracts on behalf of the Commission.

Again, thank you for the opportunity to comment. Weather and time permitting, I plan to attend the meeting in Albuquerque on December 4, 2019 and would be happy to answer any questions or provide any needed clarifications to these comments.

Yours very truly

A handwritten signature in dark ink, appearing to read 'Resnick', followed by a long, sweeping horizontal line that extends to the right.

Kenneth S. Resnick