

SEC Office  
800 Bradbury Dr. SE,  
Suite 215  
Albuquerque, NM 87106



Hon. William F. Lang  
Jeff Baker  
Stuart M. Bluestone  
Hon. Garrey Carruthers  
Ron Solimon  
Judy Villanueva  
Frances F. Williams

## STATE ETHICS COMMISSION

**Commission Meeting Minutes of August 7, 2020 | 9:00am-2:00pm**

Virtually Via Zoom  
[View Recording Here](#)

### [SUBJECT TO RATIFICATION BY COMMISSION]

The meeting began with introductions from public attendees.

**1. CALL TO ORDER AND ROLL CALL:**

The meeting was called to order by Chair Lang. The roll was called. The following Commissioners were present:

Jeffrey Baker, Commissioner  
Stuart Bluestone, Commissioner  
Hon. Garrey Carruthers, Commissioner  
Judy Villanueva, Commissioner  
Frances Williams, Commissioner  
Hon. William Lang, Chair

Commissioner Ron Solimon was absent.

**2. AMENDMENT OF AGENDA:**

- Chair Lang moved to amend the agenda to replace reference to the public rule hearing portion of the meeting to an "opportunity for public comment on the proposed rules under consideration." When making the motion, Chair Lang explained that the Commission would conduct a properly-noticed public rule hearing at a subsequent meeting, so that the Commission may maintain compliance with the State Rules Act and the Default Procedural Rule for Rulemaking. Commissioner Villanueva seconded the motion to amend the agenda; Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the agenda was amended as proposed.

**3. APPROVAL OF AGENDA:**

Chair Lang sought a motion to approve the agenda as amended. Commissioner Williams moved to approve the agenda as amended; Commissioner Baker seconded. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the agenda was approved.

**4. APPROVAL OF JUNE 5, 2020 COMMISSION MEETING MINUTES:**

- Chair Lang sought a motion to approve the minutes of the June 5, 2020 meeting. Commissioner Bluestone moved to approve the minutes; Commissioner Williams seconded. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative, and the minutes were approved unanimously.

## 5. OATH FOR COMMISSIONER BAKER

SEC General Counsel Walker Boyd administered the oath of office to Commissioner Baker. GC Boyd also stated that he would reach out to Commissioner Solimon at a later date to administer his oath. (GC Boyd administered Commissioner Solimon's oath on the following Monday, August 10, 2020).

## 6. ADVISORY OPINION 2020-05.

- Director Farris provided an overview of Advisory Opinion 2020-05.
  - o Advisory Opinion 2020-05 responds to the following question:
    - *Two companies, which are separately registered as suppliers to the State, share the same office address. Each company separately submitted an identical twenty-item bid in response to an invitation to bid. Do the identical bids of these two companies constitute price fixing or collusion or violate the Procurement Code?*
  - o The advisory opinion concludes:
    - *Under the facts presented, and assuming there are no other relevant facts, the bids that GM Emulsion and GME General Building submitted would violate the Procurement Code.*
- Chair Lang sought a motion to approve Advisory Opinion 2020-05. Commissioner Baker moved to approve advisory opinion as written; Commissioner Bluestone seconded. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative, and the advisory opinion was approved unanimously.

## 7. ADVISORY OPINION 2020-06.

- Director Farris provided an overview of Advisory Opinion 2020-06.
  - o Advisory Opinion 2020-06 responds to the following question:
    - *Under the Governmental Conduct Act, may a cabinet secretary or another state employee work remotely from outside of the state on a permanent or near-permanent basis, when their job duties are ordinarily based in New Mexico?*
  - o The advisory opinion concludes:
    - *Subsection 10-16G-3(A) of the Governmental Conduct Act prohibits an out-of-state telework accommodation that either inhibits a state employee's duties or otherwise obstructs the public interest. Beyond this general statement, the Commission does not have enough information about the specific telework accommodations of the Secretary of Education or the former DFA PIO to provide an opinion as to whether those arrangements violate the Governmental Conduct Act.*
- Chair Lang sought a motion to approve Advisory Opinion 2020-06 as written. Commissioner Baker moved to approve the Advisory Opinion as written; Commissioner Carruthers seconded. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative, and the advisory opinion was approved unanimously.

**BEGINNING OF OPPORTUNITY FOR PUBLIC COMMENTS.** NMSA 1978, § 14-4-5.3(A); 1.24.25.12(A) NMAC.

GC Boyd stated that written public comments were received regarding amendments to 1.8.1.9-10 NMAC (informal advisory opinions); 1.8.1.16 NMAC (Commission meetings); and proposed 1.8.4 NMAC (code of ethics). **(All written public comments are appended to the end of these minutes. See Appendix 1, Open Meeting Materials).**

Representatives of organizations that submitted pre-filed written public comments presented summaries of submitted comments, and other members of the public provided comments not previously submitted to the staff:

- a. Lily Irvin-Vitela (New Mexico First) provided an overview of written public comments from New Mexicans for Ethics Coalition, New Mexico Ethics Watch, the League of Women Voters, the New Mexico Press Association, and New Mexico Foundation for Open Government previously submitted to the commission. *See Appendix 1.*
- b. Tony Ortiz (New Mexico Ethics Watch) provided a summary of the written comments submitted.
- c. Gabriela Ibanez Guzman (Somos Un Pueblo Unido) Provided a summary of the written comments submitted.
- d. Paul Biderman (Contractor with SEC working on development of the proposed model code) provided an update on the Commission's proposed model code and provided feedback in relation to public comments.
- e. Melanie Majors (New Mexico Foundation for Open Government) provided a summary of written comments submitted and NM sunshine laws.
- f. Ken Resnick provided comments on the implementation of proposed code of ethics and suggested an emphasis on trainings.
- g. Chris Mechels provided comments on the Commission's jurisdiction and advocated for expanded jurisdiction for the Commission to address more widespread instances of corruption at the local level.
- h. Heather Rindels (Los Lunas School District) inquired whether the proposed model code would apply to local government jurisdictions and advocated for the Commission's jurisdiction to be expanded to local governments.
- i. Mark Hayden (State Purchasing Agent) provided comments in support of expanding the Commission's jurisdiction to local government entities.

**END OF OPPORTUNITY FOR PUBLIC COMMENT.**

**8. EXECUTIVE SESSION**

- Chair Lang sought a motion to enter a closed executive session to discuss pending administrative complaints and potential litigation pursuant to the Open Meetings Act, NMSA 1978, § 10-15-1(H)(3), and the State Ethics Commission Act, NMSA 1978, § 10-16G-10 & 13(B). Commissioner Bluestone moved to enter executive session; Commissioner Villanueva seconded. Chair Lang conducted a roll-call vote. All commissioners voted in the affirmative, and the Commission entered executive session.
- The Commission discussed the following administrative complaints:
  - o Administrative Complaint No. 2020-007

- Administrative Complaint No. 2020-015
  - Administrative Complaint No. 2020-016 & 2020-017
  - Administrative Complaint No. 2020-018
  - Administrative Complaint No. 2020-020
  - Administrative Complaint No. 2020-029
- The Commission discussed the referral by Secretary of State of arbitrator's award in The Matter of the Arbitration of the Office of the Secretary of State and Cowboys for Trump.
  - The matters discussed in the closed meeting were limited only to those specified in the motion to enter executive session. After concluding its discussion of these matters, the Commission resumed public session.

## 9. ACTIONS ON ADMINISTRATIVE COMPLAINTS

- **Administrative Complaint No. 2020-007**
  - Director Farris requested a motion to enter an order of dismissal for the complainant's claims against the entity respondent for lack of personal jurisdiction and other claims for lack of subject matter jurisdiction, while maintaining other claims in Administrative Complaint No. 2020-007.
  - Chair Lang sought a motion to issue the order of dismissal as stated above. Commissioner Carruthers moved to issue the order of dismissal; Commissioner Williams seconded. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the order of dismissal was issued.
  - Director Farris requested a motion for the Commission's authorization for staff to seek subpoenas related to the remaining claims in administrative case No. 2020-007.
  - Chair Lang sought a motion to authorize staff to petition the state district court for subpoenas as stated above. Commissioner Bluestone moved to grant the authorization; Commissioner Williams seconded. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the authorization was granted.
- **Administrative Complaint No. 2020-015**
  - Director Farris requested a motion to enter an order of dismissal for all claims in Administrative Complaint No. 2020-015 for lack of jurisdiction.
  - Chair Lang sought a motion to issue the order of dismissal. Commissioner Baker recused himself from the vote. Commissioner Bluestone moved to issue the order of dismissal; Commissioner Williams seconded. Chair Lang conducted a roll-call vote. All remaining Commissioners voted in the affirmative, and the dismissal was issued.
- **Administrative Complaint Nos. 2020-016 & 2020-017**
  - Director Farris requested a motion to enter an order of dismissal for all claims in Administrative Complaint Nos. 2020-016 and 2020-017 for lack of jurisdiction.
  - Chair Lang sought a motion to issue the order of dismissal. Commissioner Villanueva moved to issue the order of dismissal; Commissioner Williams seconded. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the dismissal was issued.
- **Administrative Complaint No. 2020-018**

- Director Farris requested a motion to enter an order of dismissal of all claims in Administrative Complaint No. 2020-018 for lack of personal jurisdiction.
  - Chair Lang sought a motion to issue the order of dismissal. Commissioner Carruthers moved to issue the order of dismissal; Commissioner Williams seconded. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the dismissal was issued.
- **Administrative Complaint No. 2020-020**
- Director Farris requested a motion to enter an order of dismissal for all claims in Administrative Complaint No. 2020-020 for lack jurisdiction.
  - Chair Lang sought a motion to issue the order of dismissal. Commissioner Villanueva moved to issue the order of dismissal; Commissioner Williams seconded. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the dismissal was issued.
- **Administrative Complaint No. 2020-029**
- Director Farris requested a motion to enter an order of dismissal of all claims in Administrative Complaint No. 2020-029 for lack of jurisdiction.
  - Chair Lang sought a motion to issue the order of dismissal. Commissioner Carruthers moved to issue the order of dismissal; Commissioner Baker seconded. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative; and the dismissal was issued. Commissioner Bluestone’s explained his vote, noting his view that the Commission had jurisdiction for the claim the complainant asserted.

**10. ACTION ON REFERRAL BY SECRETARY OF STATE OF ARBITRATOR’S AWARD IN THE MATTER OF THE ARBITRATION OF THE OFFICE OF THE SECRETARY OF STATE AND COWBOYS FOR TRUMP.**

- Chair Lang sought a motion for the Commission to refrain from enforcing the SOS’s arbitration award and have staff provide the basis for the Commission’s decision to the SOS. Commissioner Bluestone so moved; Commissioner Carruthers seconded. Chair Lang conducted a roll-call vote. All Commissioners voted in in the affirmative, and the motion passed unanimously.
- Commissioner Bluestone moved to direct the staff to seek a subpoena regarding Cowboys for Trump’s compliance with the Campaign Reporting Act; Commissioner Williams seconded the motion. Chair Lang conducted a roll-call vote. The Commissioners voted as follows:
  - Commissioner Baker, against
  - Commissioner Bluestone, for
  - Commissioner Carruthers, against
  - Commissioner Villanueva, against
  - Commissioner Williams, for
  - Chair Lang, against
- The motion failed for lack of the concurrence required by Section 10-16G-3(H).

**11. DISCUSSION OF NEXT MEETING**

- Commissioner Williams moved to meet monthly or every six weeks by default; Commissioner Baker seconded. After discussion among the Commissioners, Commissioner Williams withdrew her motion.

- The Commissioners decided to meet next on Friday, August 28, 2020, at 9:00am, to review and approve the budget for FY22

**12. PUBLIC COMMENTS**

Members of the public were invited to provide comments to the Commission. No additional public comments were made.

**13. ADJOURNMENT**

Chair Lang sought a motion to adjourn. Commissioner Carruthers moved to adjourn; Commissioner Bluestone seconded. All Commissioners voted in the affirmative, and the meeting was adjourned.

**[SUBJECT TO RATIFICATION BY COMMISSION]**



## STATE ETHICS COMMISSION

Hon. William F. Lang, Chair  
Jeff Baker, Member  
Stuart M. Bluestone, Member  
Hon. Garrey Carruthers, Member  
Ronald Solimon, Member  
Dr. Judy Villanueva, Member  
Frances F. Williams, Member

August 7, 2020, 9:00 a.m. to 2:00 p.m.

### Zoom Meeting

Join Zoom meeting through internet browser:

<https://us02web.zoom.us/j/89205033496?pwd=SzN6cWxZaHAxVWJ3MW82bDc1cktXdz09>

Join Zoom meeting telephonically: 1-669-900-9128

Meeting ID: 892 0503 3496

Meeting Passcode: 1GsXpc

### **COMMISSION MEETING & PUBLIC RULE HEARING**

Chairman Lang Calls the Meeting to Order

1. Roll Call
2. Approval of Agenda
3. Approval of Minutes of June 5, 2020 Commission Meeting

#### Commission Meeting Items

#### Action Required

- |   |     |
|---|-----|
| 4. Oath for Commissioners Baker and Solimon<br>(Boyd) | Yes |
| 5. Advisory Opinion 2020-005                          | Yes |

(Farris)

6. Advisory Opinion 2020-006  
(Farris)

Yes

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**Beginning of Public Rule Hearing**

NMSA 1978, § 14-4-5.3 & 1.24.25.13 NMAC

7. General Counsel presents (i) any written public comments received regarding amendments to Rules 1.8.1.9-10 (informal advisory opinions) and 1.8.1.16 (Commission meetings) and proposed Rule 1.8.4 (code of ethics); and (ii) Commission staff recommended amendments to proposed rules No
8. Public comment on amendments to Rules 1.8.1.9-10 (informal advisory opinions) and 1.8.1.16 (Commission meetings) and proposed Rule 1.8.4 (code of ethics) No

**End of Public Rule Hearing & Continuation of Commission Open Meeting for Actions on Rules and Other Matters**

1.24.25.14(D) NMAC

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**Upon applicable motion, Commission goes into Executive Session under NMSA 1978, §§ 10-15-1(H)(3) (administrative adjudicatory proceedings) & 10-15-1(H)(7) (attorney client privilege pertaining to litigation)**

9. Discussions regarding Administrative Complaints  
(Farris & Boyd)
1. Administrative Complaint No. 2020-007
  2. Administrative Complaint No. 2020-015
  3. Administrative Complaint No. 2020-016 & 2020-017
  4. Administrative Complaint No. 2020-018
  5. Administrative Complaint No. 2020-020
  6. Administrative Complaint No. 2020-029
10. Discussion regarding referral by Secretary of State of arbitrator's award in *The Matter of the Arbitration of the Office of the Secretary of State and Cowboys for Trump*  
(Farris & Boyd)

**Upon applicable motion, Commission returns from Executive Session**

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|--|-----|
| 13. Actions on Administrative Complaints<br>( <i>Farris</i> )  | Yes |
| 1. Administrative Complaint No. 2020-007   |     |
| 2. Administrative Complaint No. 2020-015   |     |
| 3. Administrative Complaint No. 2020-016 & 2020-017  |     |
| 4. Administrative Complaint No. 2020-018   |     |
| 5. Administrative Complaint No. 2020-020   |     |
| 6. Administrative Complaint No. 2020-029   |     |
| 14. Action on referral by Secretary of State of arbitrator's award in<br><i>The Matter of the Arbitration of the Office of the Secretary of State<br/>and Cowboys for Trump</i><br>( <i>Farris</i> ) | Yes |
| 15. Frequency of Commission meetings<br>( <i>Williams</i> )  | Yes |
| 16. Determination of next meeting<br>( <i>Lang</i> )   | No  |
| 17. Public comment   | No  |
| 18. Adjournment  |     |

*For inquires or special assistance, please contact Sonny Haquani at  
[Ethics.Commission@state.nm.us](mailto:Ethics.Commission@state.nm.us)*



## STATE ETHICS COMMISSION

### **ADVISORY OPINION NO. 2020-05**

August 7, 2020<sup>1</sup>

### **QUESTION PRESENTED**

Two companies, which are separately registered as suppliers to the State, share the same office address. Each company separately submitted an identical twenty-item bid in response to an invitation to bid. Do the identical bids of these two companies constitute price fixing or collusion or violate the Procurement Code?<sup>2</sup>

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<sup>1</sup>This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C).

<sup>2</sup>The Commission will address only the Procurement Code question. Beyond their service to that inquiry, the questions regarding price fixing and collusion are beyond the Commission's remit. Under NMSA 1978, Section 10-16G-8(A), the Commission may issue advisory opinions "on matters related to ethics." Such "matters related to ethics" are both informed and circumscribed by the nine laws that the Commission currently may enforce. *See, e.g.*, NMSA 1978, § 10-16G-9(A) & (F) (providing the nine laws that the Commission may enforce). Those nine laws include the Procurement Code, NMSA 1978, §§ 13-1-28 to -199, but exclude the Antitrust Act, NMSA 1978, §§ 57-1-1 to -15. Under the later statute, "[e]very contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is unlawful." NMSA 1978, § 57-1-1. All contracts in violation of this provision are void. *See* NMSA 1978, § 57-1-3(A). The Attorney General has the authority to investigate and enforce violations of New Mexico's Antitrust Act. *See generally* NMSA 1978, §§ 57-1-5 to 57-1-8. The State Ethics Commission does not.

## FACTS<sup>3</sup>

Roads inevitably crack. To prevent water from entering and causing further damage, cracked roads must be sealed. The New Mexico Department of Transportation (DOT) sought to procure and to establish a price agreement for the sealing of cracks and joints in hot mix asphalt and concrete pavements.

The price agreement contemplated twenty separate items, including materials, labor, and equipment related to crack sealing. DOT divided the twenty items into two groups: Items one through fifteen, relating to routed and non-routed joint and crack sealing, comprised one group; items sixteen through twenty, relating to sealing of concrete pavement, comprised the other. DOT sought to award the price agreement to multiple, but at most three, vendors for each group of items. DOT's multiple awards were subject to the final approval of the State Purchasing Agent.

Once a vendor entered the price agreement with DOT, DOT would establish a purchase order utilizing the awarded vendor's price information. A DOT district engineer could then select the vendor to perform specific crack-sealing projects, subject to myriad DOT specifications. The price agreement had a one-year term with an option to extend for up to three additional one-year periods by mutual agreement.

To establish the price agreement, DOT issued an invitation to bid. Bidders had to submit prices for all items in a group. Five vendors submitted bids for the first group of items: Dismuke Construction Company, GM Emulsion LLC, GME General Building LLC, Interstate Pavement Resurfacing LTD (IPR), and Sunland Asphalt. The first four vendors also submitted bids for the second group. After tabulating and analyzing the bids, DOT awarded a price agreement, No. 00-80500-20-16825, to Dismuke Construction Company, GM Emulsion LLC, and GME General Building LLC. IPR was the next lowest bidder; however, given DOT's limitation that the price agreement would be awarded to three vendors at most, DOT did not select IPR for an award. IPR formally protested DOT's award of a contract

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<sup>3</sup>The State Ethics Commission Act requires a request for an advisory opinion to set forth a "specific set of circumstances involving an ethics issue." *See* NMSA 1978, § 10-16G-8(A)(2) (2019). "When the Commission issues an advisory opinion, the opinion is tailored to the 'specific set' of factual circumstances that the request identifies." State Ethics Comm'n, Advisory Op. No. 2020-01, at \*1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). On July 8, 2020, the Commission received a request for an advisory opinion that detailed facts as presented herein. The request was submitted by a public official who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1).

to GM Emulsion and GME General Building, alleging that the companies had colluded in their bids.

GM Emulsion and GME General Building submitted identical bid amounts, across all twenty items. Each company figured that it could supply, for example, 60,000 pounds of routed joint and crack sealing type I at \$2.00 per pound. Each figured that it could supply 20,000 pounds of routed joint and crack sealing type II at \$2.25 per pound and 100,000 pounds of the same at \$1.75 per pound. Each calculated it could supply 600 hours of nighttime traffic control at \$100 per hour. And so on, across twenty distinct items.

Further, while GM Emulsion and GME General Building are separately registered as suppliers to the State, and while the Internal Revenue Service (IRS) issued them separate employer identification numbers (EINs), both IRS records and the procurement documents attached to the request show that the two companies share the same physical address. They have the same telephone number. To some extent, their back-office operations are consolidated: the same staff member, having a GM Emulsion email address, accessed the IRS letters indicating each company's respective EIN and provided those letters to the State upon request. The request for an advisory opinion also states that both companies are "allegedly owned" by the same individual.<sup>4</sup>

## ANSWER

Under the facts presented, and assuming there are no other relevant facts, the bids that GM Emulsion and GME General Building submitted would violate the Procurement Code.

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<sup>4</sup>The request for an advisory opinion does not say that GM Emulsion and GME General Building are owned by the same individual, only that they "allegedly owned" by the same individual. Indeed, IPR makes that allegation in its protest, which the requester attached to the request for an advisory opinion along with other documents relating to the procurement. In this advisory opinion, we will not assume that the companies are jointly owned; however, we will indicate how the allegation of shared ownership, if true, would impact our analysis. We presume not only that GM Emulsion and GME General Building are separate legal entities, but also that, as distinct legal entities, they are each separate from their owners or shareholders. *See Scott v. AZL Resources, Inc.*, 1988-NMSC-028, ¶ 6, 107 N.M. 118, 753 P.2d 897 ("A basic proposition of corporate law is that a corporation will ordinarily be treated as a legal entity separate from its shareholders. . . . A subsidiary and its parent corporation are also viewed as independent corporations.") (citation omitted).

## ANALYSIS

### I.

The Procurement Code establishes default rules by which state agencies can procure goods and services. These default rules are found at sections 13-1-102 through 13-1-110, and they define and control several steps of the procurement process, including the invitation to bid, public notice, bid opening, bid evaluation, and the award of the contract. The statutory provisions are supplemented by regulations promulgated by the General Services Department's State Purchasing Division (SPD) and, for highway construction procurements, DOT. *See* 1.4.1 NMAC (SPD's procurement code regulations); 18.27.5 NMAC (DOT's contractor prequalification regulation).

While the Procurement Code and related regulations can be technical, procurement law begins with a simple and clear requirement: “[a]ll procurement shall be achieved by *competitive* sealed bid . . . .” NMSA 1978, § 13-1-102 (emphasis added). This requirement is subject to several exceptions not at issue here, *see* § 13-1-102(A)-(G), but where it applies it matters: A bid that is not “competitive” cannot be the basis for a procurement.

While the Procurement Code does not define the terms “competitive” or “competitive sealed bid,” it instructs us to apply its terms “to promote its purposes and policies.” NMSA 1978, § 13-1-29(A). Those purposes are “to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity.” NMSA 1978, § 13-1-29(C).<sup>5</sup> There is no interpretive struggle. The ordinary, dictionary meaning of “competitive” reflects the Procurement Code’s purposes. “Competitive” means “relating to, characterized by, or based on competition.” *Merriam-Webster’s Collegiate Dictionary* 235 (10th ed. 1999). “Competition,” in turn, means “the effort

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<sup>5</sup>New Mexico courts have confirmed and amplified these goals. *See, e.g., Morningstar Water Users Ass’n, Inc. v. Farmington Mun. Sch. Dist. No. 5*, 1995-NMSC-052, ¶ 41, 120 N.M. 307, 901 P.2d 725 (“The purpose of the Procurement Code is to insure [*sic*] fairness when a public entity makes a purchase from a private entity.”); *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, ¶ 8, 118 N.M. 707, 885 P.2d 628 (citing *John J. Brennan Constr. Corp. v. City of Shelton*, 187 Conn. 695, 448 A.2d 180, 184 (1982)) (concluding that the Procurement Code “protects against the evils of favoritism, nepotism, patronage, collusion, fraud, and corruption in the award of public contracts.”).

of two or more parties acting independently to secure the business of a third party by offering the most favorable terms.” *Id.*

A bid is “competitive” under section 13-1-102, therefore, if the bid is the bidder’s *independent* effort to offer the most favorable terms. Independence is the key. To be competitive, a bidder must formulate and submit its bid independently of the decisions and actions of other companies. *See, e.g.*, Department of Justice, “Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For: An Antitrust Primer” (“DOJ Antitrust Primer”), at 1, <https://tinyurl.com/yclqkpeq> (last accessed July 11, 2020) (“Public and private organizations often rely on a competitive bidding process . . . . The competitive process only works, however, when competitors set prices honestly and independently.”).

There are countless ways in which bids can fail to be independent and, thus, competitive. A bid is not competitive if it is the result of an agreement between two or more bidders, as to either the price offered or which bidder will or will not submit a bid.<sup>6</sup> Nor is a bid “competitive” under section 13-1-102 if it is submitted by a

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<sup>6</sup>Such agreements are often referred to as “bid-rigging.” *United States v. Mobile Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989) (“Any agreement between competitors pursuant to which contract offers are to be submitted or withheld from a third party constitutes bid rigging per se violative of 15 U.S.C. section 1.”) (citations omitted); *but cf. United States v. Heffernan*, 43 F.3d 1144, 1149-50 (7th Cir. 1994) (Posner, J.) (interpreting the reference in U.S.S.G. § 2R1.1, the federal antitrust sentencing guideline, to “bid-rigging” to mean bid rotation as opposed to simple price-fixing among bidders). Bid-rigging agreements are per se illegal under the Sherman Antitrust Act, 15 U.S.C. § 1, *Mobile Materials, Inc.*, 881 F.2d at 869, and are likely also per se illegal under New Mexico’s Antitrust Act, *see* NMSA 1978, § 57-1-15 (“Unless otherwise provided in the Antitrust Act, the Antitrust Act shall be construed in harmony with judicial interpretation of the federal antitrust laws.”). Commonly understood, bid-rigging amounts to the noncompetitive formulation and submission (or nonsubmission) of bids, and it can take many forms. For example, Pennsylvania’s Antibid-Rigging Act, 62 Pa. Stat. and Cons. Stat. Ann. §§ 4501–4509, provides a useful, nonexhaustive definition of “Bid-rigging” to include:

- (1) Agreeing to sell items or services at the same price.
- (2) Agreeing to submit identical bids.
- (3) Agreeing to rotate bids.
- (4) Agreeing to share profits with a contractor who does not submit the low bid.
- (5) Submitting prearranged bids, agreed-upon higher or lower bids or other complementary bids.
- (6) Agreeing to set up territories to restrict competition.

bidder who formulates and submits the bid based on knowledge of other bids. (Hence, section 13-1-102 also requires that bids be “sealed.”) Nor is a bid competitive if a public official or employee has preselected the bidder for an award or otherwise manipulates the bid-evaluation process to favor the bidder. In each example, the procurement would not result from the bidder’s independent effort to offer the best terms; accordingly, in each example, the Procurement Code would prohibit the procurement. § 13-1-102.

## II.

Under the request’s facts (and assuming there are no other relevant facts), are the bids of GM Emulsion and GME General Building “competitive” under section 13-1-102? We think not. Together, the facts establish sufficient circumstantial evidence to conclude that GM Emulsion and GME General Building did not independently formulate and submit their respective bids.

The request posits that GM Emulsion and GME General Building submitted bids that were identical across twenty items. Although identical bids are not necessarily collusive,<sup>7</sup> the identity of the two twenty-part bids raises concerns. In a small procurement with few bidders, it is unlikely that two companies separately and

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(7) Agreeing not to submit bids.

62 Pa. Stat. and Cons. Stat. Ann. § 4502. While New Mexico lacks an antibid-rigging statute, section 13-1-102 of the Procurement Code impliedly prohibits procurements based on non-competitive bids, including bids that are the result of bid-rigging (and simple price fixing). We acknowledge that it is often difficult for procurement managers to detect noncompetitive bids. To instruct procurement managers on how to evaluate suspicious bidding behavior (including bid rigging and price fixing) and to determine when to notify government authorities, the Department of Justice has developed a helpful primer. See DOJ Antitrust Primer, <https://tinyurl.com/yelqkpeq> (last accessed July 11, 2020).

<sup>7</sup>It is possible for bidders to independently formulate and to submit identical bids. As such, section 13-1-110 establishes the options available to the state purchasing agent or a central purchasing office “[w]hen competitive sealed bids are used and two or more of the bids submitted are identical in price.” But this provision in no way implies identical bids are permissible bases for procurement; far from it. Section 13-1-110 applies only when independently formulated bids happen to offer the same price. See *id.* (assuming, as a condition for its application, that “competitive sealed bids are used”). If identical bids are not independently formulated and submitted, then section 13-1-110 does not apply.

independently formulated bids that, by pure coincidence, offered identical prices for twenty separate items.

A simple thought experiment is illustrative. Suppose each company had to submit, not a list of twenty prices, but merely a twenty-item list where, for each item, each company had to select one of two letters, “A” or “B.” The likelihood that each company would submit the same twenty-part list is  $1/2^{20}$ , or  $1/1,048,576$ —a one in a million chance. The companies’ selection of prices, of course, entails many more possibilities than two (“A” or “B”), further diminishing the odds that the identical twenty-part bids are the coincidental product of chance. Now, prescinding from the thought experiment and acknowledging the countervailing considerations that more than two firms submitted bids, that firms in the same market confront similar cost constraints, and that pricing of related items involves related decisions, the likelihood that two firms would independently submit identical twenty-item bids remains very slight. A probability model that estimates how unlikely is not necessary. The identity of the twenty-item bids creates the common-sense inference that they were not independently formulated and submitted.

This inference is strengthened where, as here, the two companies share the same physical office address and at least some back-office operations. These facts increase the likelihood that each company had access to and knowledge of the other’s bid. *See* DOJ Antitrust Primer, at 5 (“Collusion is more likely if the competitors know each other well through social connections, trade associations, legitimate business contacts, or shifting employment from one company to another.”).

The inference that the companies colluded on their bids would be further strengthened *if* the two companies submitting the identical bids were owned by the same individual. Shared ownership of two small, closely held companies increases the likelihood that one company knew of the contents of the others’ bid (and *vis-versa*). Furthermore, in the context of the DOT procurement at issue, shared ownership also supplies a motive to submit identical bids in the attempt to garner two of the three available contract awards and, consequently, a larger share of DOT’s crack-sealant purchases.

In sum, the request present facts that GM Emulsion and GME General Building not only submitted identical twenty-part bids but also share a physical office and, to some extent, administrative operations. If admitted by a hearing officer, these facts would be sufficient circumstantial evidence to show that GM Emulsion and GME General Building did not independently propose, but rather



purposefully coordinated, their bids.<sup>8</sup> Their bids were not “competitive” as section 13-1-102 requires; accordingly, the Procurement Code prohibits a procurement based on them.

### III.

There are several reasons why the law prohibits a procurement based on noncompetitive bids.

First, and most fundamentally, when companies coordinate their bids for State contracts, it deprives the public of the benefits of competition. Competition among vendors “maximize[s] the purchasing value of public funds . . . .” § 13-1-29(C). When companies that submit bids or proposals for state contracts avoid competing with each other, the public pays more for goods or services than it otherwise would.

Second, in this particular procurement, GM Emulsion’s and GME General Building’s identical bids unfairly diminished other companies’ chances to be awarded a contract. Recall that DOT announced it would award a price agreement for road-crack sealant goods and services to, at most, three suppliers. Hence, by submitting identical bids, GM Emulsion and GME General Building knew if their identical bids were either the lowest or second-lowest, the companies could secure two of the three available contract awards and, consequently, capture a larger share of DOT’s purchases of road-crack sealant goods and services. By contrast, had the companies competed—formulating and submitting independent (and therefore

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<sup>8</sup>We are aware that, in the context of federal antitrust cases arising under Section 1 of the Sherman Act, parallel business behavior, particularly among firms in a concentrated market that recognize the interdependence of their price and output decisions (i.e., an oligopolistic market), is not conclusive of an agreement to fix prices. *See, e.g., Bell Atlantic v. Twombly*, 550 U.S. 544, 553-54 (2007). In such cases, more than conscious parallel pricing is necessary to support an inference of agreement—namely, some other “plus factor” or evidence of agreement. *See, e.g., Valspar Corp. v. E.I. Du Point De Nemours & Co.*, 873 F.3d 185, 193 (3d Cir. 2017).

But this request does not concern a few dominant firms setting and following prices in an oligopolistic market. Far from it. DOT, which is the dominant buyer in the market for highway-construction goods and services, has approximately 320 prequalified suppliers. *See* New Mexico Department of Transportation, Prequalified Contractors and Subcontractors List (July 10, 2020), available at <https://tinyurl.com/y7597ntx> (last accessed July 12, 2020). Here, two of those suppliers, which share an office and some administrative operations, submitted identical twenty-part bids in an effort to secure two of three available contract awards for DOT’s crack-sealant purchases. Even if the federal courts’ Section 1 analysis for conscious parallelism cases applied (it doesn’t), the presented facts reflect more circumstantial evidence of noncompetitive bids than mere parallel pricing.

likely different) bids—an award to either company would not have necessarily diminished other bidders’ chances of also receiving a contract award. In short, by not competing against each other, GM Emulsion and GME General Building augmented their chances that each would receive a DOT contract, thereby depriving the State the benefit of their competition and diminishing the chances of other bidders to win a contract. Their noncompetitive bids frustrated the Procurement Code’s purpose “to provide for the fair and equitable treatment of all persons involved in public procurement . . . .” § 13-1-29(C).

Third, in the context of highway-construction procurements, coordinated bidding by jointly operated companies frustrates DOT’s purpose in awarding highway-construction contracts to multiple vendors. Ostensibly, when DOT seeks to establish a multiple award price agreement, the department intends to diversify across its supply of prequalified vendors to better ensure completion of ever-present construction projects. This diversification is upended if small, jointly operated, closely held companies are allowed to submit multiple, coordinated, and identical bids, each seeking a part of a multiple award price agreement. The result is that the State would award contracts to fewer independently operated companies (and potentially less diverse and less geographically scattered companies) than the State intended or needs.

## CONCLUSION

Two companies that share a physical address and some back-office operations submit identical twenty-part bids for a procurement in which DOT would award contracts to, at most, three suppliers. These factual assumptions—and, again, assuming further that there are no other relevant facts that bear upon the question—permit the inference that the companies’ bids were not independent and, therefore, not competitive. Accordingly, a procurement based on those bids would violate section 13-1-102.

We do not say that, as a matter of law, GM Emulsion and GME General Building violated the Procurement Code, or any other provision of law. That conclusion would depend upon a record of admissible evidence, which is not before us. For purposes of this advisory opinion, our view is based on those factual assumptions posited by the request; not a record of evidence that a hearing officer admitted. We do not probe the truth of the factual assumptions, and we assume there are no other relevant facts (there normally are). Our view on how the Procurement Code would apply is circumscribed by these caveats.

**SO ISSUED.**

**HON. WILLIAM F. LANG, Chair**

**JEFF BAKER, Commissioner**

**STUART M. BLUESTONE, Commissioner**

**HON. GARREY CARRUTHERS, Commissioner**

**RONALD SOLIMON, Commissioner**

**JUDY VILLANUEVA, Commissioner**

**FRANCES F. WILLIAMS, Commissioner**



## STATE ETHICS COMMISSION

### ADVISORY OPINION NO. 2020-06

August 7, 2020<sup>1</sup>

### QUESTION PRESENTED

Under the Governmental Conduct Act, may a cabinet secretary or another state employee work remotely from outside of the state on a permanent or near-permanent basis, when their job duties are ordinarily based in New Mexico?

### FACTS<sup>2</sup>

The Secretary of Education has worked from Philadelphia, Pennsylvania for most of the past four months. *See* Dillon Mullan, *New Mexico's education secretary working from out of state*, Santa Fe New Mexican, Jul. 20, 2020, <https://tinyurl.com/y2yqsdtd> (last accessed July 29, 2020). During that period, the Secretary worked out of Santa Fe for a few weeks in March and, then, during the five-day special legislative session in June. *See id.* In view of the State's response to the Covid-19 pandemic, like many state employees, the Secretary has carried out his many duties remotely, using web-based video conferencing products and services. *See id.* He can telework equally from Philadelphia as from his apartment

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<sup>1</sup>This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C).

<sup>2</sup>The State Ethics Commission Act requires a request for an advisory opinion to set forth a "specific set of circumstances involving an ethics issue." *See* NMSA 1978, § 10-16G-8(A)(2) (2019). "When the Commission issues an advisory opinion, the opinion is tailored to the 'specific set' of factual circumstances that the request identifies." State Ethics Comm'n, Advisory Op. No. 2020-01, at \*1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). On July 8, 2020, the Commission received a request for an advisory opinion that referenced news reports detailing facts as presented herein. The request was submitted by a public employee who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1).

or office in Santa Fe. *See id.* As a consequence, a public school district superintendent had not noticed—and would have no way of knowing absent the Secretary’s candor—that the Secretary was working from out of state. *See id.*

Years before the current pandemic, a Public Information Officer (PIO) with the Department of Finance and Administration (DFA) worked remotely from Chicago, Illinois for several of the waning months of Governor Richardson’s administration. Like a cabinet secretary, the PIO position was also exempt from the Personnel Act. And, like the current Secretary of Education, the New Mexico news media also covered the story, but with more editorial skepticism about the propriety of the accommodation. *See* KRQE Larry Barker Investigative Report (July 2, 2010), <https://tinyurl.com/yxeyor3b> (last accessed July 29, 2020).

According to the request, these two cases are not isolated incidents; they are simply two incidents that the news media covered. It is the Commission’s understanding that a not insignificant number of state employees have requested out-of-state telework accommodations, both during and before the current health crisis.

## ANSWER

Subsection 10-16G-3(A) of the Governmental Conduct Act prohibits an out-of-state telework accommodation that either inhibits a state employee’s duties or otherwise obstructs the public interest. Beyond this general statement, the Commission does not have enough information about the specific telework accommodations of the Secretary of Education or the former DFA PIO to provide an opinion as to whether those arrangements violate the Governmental Conduct Act.

## ANALYSIS

After the Governor declared a public health emergency on March 11, 2020, the Secretary of Health ordered all public and private employers, including all State agencies, to “limit operations to the greatest extent possible and minimize employee contact.” Public Health Emergency Order Limiting Mass Gatherings and Implementing Other Restrictions Due to COVID-19, ¶ 4, at p. 3 (Dept. of Health, Mar. 19, 2020); *see also* Governor’s Executive Order 2020-004 (Mar. 11, 2020). State agencies have implemented that order, making use of amended telework policies, portable technologies, and web-based video conferencing, and accounting for teleworked hours through the State’s enterprise resource planning system.

The Commission’s opinion does not turn on whether the State’s response to the current public health emergency is appropriate. The Commission’s own staff has transitioned to a default telework arrangement, and the Commission has conducted three “virtual” public meetings. At present, working from home is not only allowed but also necessary for public health. Telework arrangements may well persist after the public health crisis abates. *See, e.g., The Economist*, “What will be the new normal for offices?” (May 9, 2020).

The question, then, is whether a state employee, whose job is ordinarily based in New Mexico, may telework from outside the state on a permanent or near-permanent basis. Working from home is allowed, but is it allowed when the employee’s home is in, say, Chicago or Los Angeles? The request poses this question as an ethics matter and, to the extent it implicates the Governmental Conduct Act, it is.<sup>3</sup> To interpret that Act, we survey other ways that the law regulates the residency of public employees.

There is no generally applicable residency requirement for all public officials and employees. Once, there was. In 1933, the Legislature enacted a statute requiring all employees of the State of New Mexico, including all political subdivisions thereof, to reside in the State and, moreover, to have resided in the State for at least one year prior to the commencement of their employment. 1933 N.M. Laws, ch. 68, § 1. This statute stood unamended for forty-six years, until the Legislature repealed it in 1979. *See* 1979 N.M. Laws, ch. 54, § 1 (repealing NMSA 1978, § 10-1-5).<sup>4</sup> Clear reasons favored repeal: the statute preventing residents of border-state metropolitan areas (e.g., El Paso, Texas) from working as state or local government employees in New Mexico. The statute’s requirement of one year of residency prior to government employment also restricted the ability of state and local governments to recruit beyond state borders. By 1979, the Legislature concluded that the 1933 residency restrictions, on balance, no longer worked to New Mexico’s advantage.

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<sup>3</sup>Under NMSA 1978, Section 10-16G-8(A), the Commission may issue advisory opinions “on matters related to ethics.” Such “matters related to ethics” are both informed and circumscribed by the nine laws that the Commission currently may enforce. *See, e.g.,* NMSA 1978, § 10-16G-9(A) & (F) (providing the nine laws that the Commission may enforce). Those nine laws include the Governmental Conduct Act, NMSA 1978, §§10-16-1 to -18.

<sup>4</sup>We observe that NMSA 1978, sections 10-1-6 to 10-1-9 are vestigial. These provisions served the residency requirement and, now inert, should also be considered for repeal.

While no law generally requires public employees and officials to reside within New Mexico, several laws impose specific requirements. To begin, the state Constitution reflects a clear preference for the residence of public officials, requiring hundreds of state and local government officials to reside in New Mexico.<sup>5</sup> In addition, the Legislature specifically requires residence for many state officials and employees.<sup>6</sup> Neither the Constitution nor any statute expressly requires all cabinet secretaries to reside in New Mexico; however, the Senate must approve these officers' appointments, and the hearing procedures involved in Senate approval might work to ensure that the various cabinet secretaries reside in New Mexico.<sup>7</sup> So, while no law generally requires residency for all public officials and employees, many laws specifically impose that requirement for certain offices and, for others, Senate confirmation makes residency likely.

The request asks us to advise whether the Governmental Conduct Act contributes anything to this subject. The Act does not specifically address residency; rather, it requires public officers and employees to treat their "government

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<sup>5</sup>*See, e.g.*, N.M. Const. art. IV, § 3 (Senators and Representatives); N.M. Const. art. V, § 1 (Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, and Commissioner of Public Lands); N.M. Const. art. V, § 13 (all municipal officers, county commissioners, school board members, and municipal governing body members); N.M. Const. art. V, § 14 (members of the State Transportation Commission); N.M. Const. art. VI, § 24 (District Attorneys); N.M. Const. art. VI, § 8 (Supreme Court Justices); N.M. Const. art. VI, § 14 (District Court Judges); N.M. Const. art. VI, § 26 (Magistrate Court Judges); N.M. Const. art. VI, § 28 (Court of Appeals Judges); N.M. Const. art. VI, § 36 (members of the district court judges nominating committees); N.M. Const. art. VI, § 36 (members of the metropolitan court judges nominating committees); N.M. Const. art. X, § 6(B) (municipal representatives); N.M. Const. art. X, § 7 (county commissioners); N.M. Const. art. X, § 10(D) (urban county representatives); N.M. Const. art. XII, § 6 (members of the Public Education Commission); N.M. Const. art. XII, § 15 (local school board members).

<sup>6</sup>An incomplete survey is illustrative. *See, e.g.*, NMSA 1978, § 6-21-4(B) (certain members of the New Mexico Finance Authority); § 6-24-5(B) (directors of the New Mexico Lottery Authority); § 10-16G-4(A)(1) (members of the State Ethics Commission); § 15-3B-5 (staff architect in Facilities Management Division of the General Services Department); § 18-2-1 (members of the State Library Commission); § 18-3A-5(A) (trustees of the New Mexico Museum of Natural History and Science); § 18-13-4(A)(4)-(5) (trustees of the Historic Landscape Trust).

<sup>7</sup>N.M. Const., art. IV, § 42 (hearings on confirmation of gubernatorial appointees); N.M. Const., art. V, § 5 (providing for the Senate's advice and consent power); *see also, e.g.*, NMSA 1978, § 9-24-5 (requiring Senate confirmation for the secretary of public education).

position[s] as a public trust,” meaning that they may use “the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.” NMSA 1978, § 10-16G-3(A). Furthermore, public officers and employees must conduct themselves “in a manner that justifies the confidence placed in them by the people . . . .” § 10-16G-3(B). Does working remotely from out of state subvert an employee’s treatment of a government position as a public trust? Does it strain the public’s confidence?

The public might reasonably expect state employees to live here, in New Mexico; to contribute to a local tax base here; to send their children to school here; and to have knowledge of public affairs in ways that depend on the thick relation of living in a community, as opposed to the increasingly thin relation of having an employment contract with it. Even so, subsection 10-16G-3(B) does not require state officials and employees to reside in New Mexico. The Legislature expressly requires residency when it sees fit, *see* n.5, *supra*, and we hesitate to read subsection 10-16G-3(B)’s public-confidence provision to imply a duty that the Legislature ordinarily imposes expressly, *see, e.g., State v. Lindsey*, 2017-NMCA-048, ¶ 19, 396 P.3d 199 (“[W]e assume that ‘[t]he Legislature knows how to include language in a statute if it so desires[.]’”) (second alteration original) (citation omitted).

As compared to subsection 10-16G-3(B), subsection (A) is more focused in its application. *See State v. Gutierrez*, 2020-NMCA-\_\_\_, --- P.3d. ---, 2020 WL 2830581, at \*9-\*10 (N.M. Ct. App. May 29, 2020) That statute directs attention to whether the powers and resources that accompany public offices are being used to advance the public interest, or whether they are being used for other ends. The statute’s application requires an analysis of the power or resource at issue and its use.

Remote work implicates the “resources of public office,” §10-16G-3(A), in at least two respects: (i) the public pays for the technologies that enable telework accommodations; and (ii) the public pays for the office space and other resources that are not used as a result of remote work. A public officer or employee can run afoul of subsection (A) by abusing a telework accommodation to further a personal interest at the expense of the public interest. For example, an employee might claim to be working from home (and collect pay) when in fact the employee is attending to personal matters.

At present, teleworking accommodations indubitably advance the public interest; such arrangements allow state employees to continue to discharge their responsibilities while reducing the spread of SARS-CoV-2. The request does not



ask for an opinion about teleworking *tout court*, but teleworking from out of state. It conceivable that an out-of-state telework accommodation could advance the public interest because, in rare cases, the accommodation might enable the State to employ singular talents that it might not otherwise; accordingly, subsection 10-16G-3(A) cannot be read to flat prohibit out-of-state telework. But, if teleworking from out of state specifically impedes a state official's or employee's ability to complete their job duties, then the accommodation does not advance the public interest. Whether an accommodation for a state official or employee to telework from out of state subverts the public interest depends on a fact-based assessment whether their job duties can be completely discharged remotely and from afar.

While the request adverts to the Secretary of Education and a former PIO as examples of this specific accommodation, the request does not present enough facts to conclude whether or not the Secretary of Education can discharge his job duties and exercise the powers of his office while predominantly teleworking from Philadelphia. We observe, however, that the Secretary's statutorily established duties and powers are legion. *See* NMSA 1978, § 9-24-8 (enumerating the Secretary of Education's duties and powers); § 22-2-1(A) ("The secretary is the governing authority and shall have control, management and direction of all public schools, except as otherwise provided by law."); *see generally* NMSA 1978, §§ 22-1-1 to 22-35-5 (relating to the operation of public schools). The Secretary oversees a commensurately large percentage of the State's total expenditure. *See, e.g.*, State of New Mexico Comprehensive Annual Financial Report for FY18, at 16 & 18 <https://tinyurl.com/y52dt4o3> (last accessed July 29, 2020) (showing that education, excluding higher education institution expenditures, approximated \$3.17 billion, or nearly 17% of the State's total expenditures in fiscal year 2018). The Secretary's statutorily defined duties and the expenditure of public funds appropriated for education comprise, at least in part, "the public interest" as it relates to public education. § 10-16G-3(A).

We also observe that, given the pandemic and the public health order requiring a two-week quarantine for individuals entering New Mexico from out of state, *see* Governor's Executive Order 2020-054 (issued July 1, 2020), <https://tinyurl.com/yynbqofc> (last accessed July 29, 2020), the Secretary cannot readily attend any events where his physical attendance might be required (such as an emergency that could not be addressed virtually or telephonically) or beneficial to the public (such as a press briefing). For example, the secretaries of the Department of Health and the Human Services Department routinely accompany the Governor in her press briefings concerning the State's response to the pandemic. While a similar showing from the Secretary of Education might assist press briefings

regarding public school openings and school health measures, the Secretary's out-of-state telework accommodation and the two-week quarantine order prevent his in-person attendance.

The requests' factual presentation and our few additional observations, however, are not enough to form an opinion that the Secretary's out-of-state telework accommodation either accords with or obstructs the public interest. The same applies to an analysis of the PIO position the request also mentioned. Subsection 10-16G-3(A) imposes a duty on public officials and employees to use public resources to advance the public interest only and not to obtain personal benefits. That duty has implications for telework accommodations: if the telework accommodation obstructs, rather than advances, the public interest, then subsection 10-16G-3(A) prohibits it. Without a richer factual description regarding how an out-of-state telework accommodation informs that analysis, we cannot provide further advice on how subsection 10-16G-3(A) applies.

## **CONCLUSION**

Subsection 10-16G-3(A) of the Governmental Conduct Act prohibits an out-of-state telework accommodation that either inhibits the performance of statutorily defined duties or otherwise obstructs the advancement of the public interest. Beyond this general statement, the Commission does not have enough information about the specific telework accommodations of the Secretary of Education or the former DFA PIO to provide an opinion as to whether those arrangements violate the Governmental Conduct Act.

**SO ISSUED.**

**HON. WILLIAM F. LANG, Chair**

**JEFF BAKER, Commissioner**

**STUART M. BLUESTONE, Commissioner**

**HON. GARREY CARRUTHERS, Commissioner**

**RONALD SOLIMON, Commissioner**

**JUDY VILLANUEVA, Commissioner**

**FRANCES F. WILLIAMS, Commissioner**

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# New Mexico Register

The official publication for all official notices of rulemaking  
and filing of proposed, adopted and emergency rules.

**Volume XXXI - Issue 12 - June 23, 2020**

# New Mexico Register

Volume XXXI, Issue 12

June 23, 2020

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On the day of the hearing a division representative shall be stationed at the each of the division offices: Toney Anaya Building, Santa Fe; 5500 San Antonio NE- Suite F Albuquerque and 505 S. Main St – Suite 103 Las Cruces commencing 8:00 a.m. through 9:30 a.m. to receive written comments and to provide for the comments to be admitted into the record during the public hearing. Those desiring to participate in the public video/telephonic hearing process may do so by remote participation through livestreaming the meeting or becoming a participant by following these instructions:

Join via Video:

<https://nmrld.webex.com/nmrld/onstage/g.php?MTID=e31ab358d6ef0f6f289075011347ea0a2>

Once you join through the above link you will be provided instructions for accessing the meeting. Event password not required.

Join via telephone:

+1-415-655-0002

Access Code: 146 632 4326

No password required.

You may also access the division's website at <http://www.rld.state.nm.us/> construction the day of the hearing to locate instructions for participating in the hearing. All persons desiring to make public comment during the hearing shall do so through the webex process notifying the host who shall then ensure the ability for recorded comment. If you have any issues you may contact Kimberly Salazar at (575) 621-8351.

All public comments and documentation will be entered into the record during the public rules hearing. If you require special accommodations to attend the hearing, please notify CID by phone, email, or fax, of such needs as soon as possible to ensure adequate accommodations. Telephone: (505) 476-4616. Email: [mary.james2@state.nm.us](mailto:mary.james2@state.nm.us); Fax No. (505) 476-4702.

## STATE ETHICS COMMISSION

### NOTICE OF RULE MAKING AND PUBLIC RULE HEARING

**Notice of Rulemaking:** The State Ethics Commission [the commission] will hold a public hearing on the proposed adoption of certain rules, as detailed below in the description of Proposed Rules, establishing procedures for requests for advisory opinions and for commission responses; giving notice of and conducting meetings, including virtual meetings, of the commission; and creating a proposed model code of ethics for state officers and employees. These new rules are proposed pursuant to Sections 10-16-11 and 11.1, NMSA 1978; Subsection C of Section 10-15-1, NMSA 1978; Section 10-16G-8, NMSA 1978; and Paragraph 4 of Subsection B of Section 10-16G-5, NMSA 1978. No technical scientific information was consulted in drafting these proposed rules.

Copies of all the proposed rules may be found at the Commission's website, <https://www.sec.state.nm.us>, or at the commission's main office in Albuquerque: the New Mexico Ethics Commission, University of New Mexico Science and Technology Park, 800 Bradbury Drive SE, Suite 215, Albuquerque, NM, 87106. The proposed rules are also provided in this notice.

#### Notice of Public Rule Hearing:

The public rule hearing is currently scheduled to occur on Friday, August 7, 2020 at 9:00 am in UNM's Science and Technology Park's Executive Board Room, 851 University SE, Suite 200, Albuquerque, NM 87106. It is possible that, pursuant to the Public Health Emergency declared by Governor Michelle Lujan Grisham in Executive Order 2020-004, as extended, and in light of the current pandemic, the Commission will decide to conduct this meeting remotely at that time and date rather than in person. In that case,

instructions for public participation will be posted on the Commission's website, <https://www.sec.state.nm.us>. Members of the public are advised to check this website before the meeting to confirm whether it will be held in person or over the internet. The public hearing will be conducted in a fair and equitable manner by the commission and shall be recorded. Any interested member of the public may attend the hearing, in person or remotely, and will be provided a reasonable opportunity to offer public comment, including presentation of data, views, or arguments, on the proposed rules during the hearing. Individuals with disabilities who need any form of auxiliary aid to attend or participate in the public hearing are asked to contact [Sonny.Haquani@state.nm.us](mailto:Sonny.Haquani@state.nm.us). The commission will make every effort to accommodate all reasonable requests, but cannot guarantee accommodation of a request that is not received at least five calendar days before the scheduled hearing.

#### Notice of Acceptance of Written Public Comment:

Written public comments, including presentation of data, views, or arguments about the proposed rules, from any interested member of the public will be accepted until 5:00 p.m. on Wednesday, August 5, 2020, by submitting them via email to [ethics.commission@state.nm.us](mailto:ethics.commission@state.nm.us) with the subject line "SEC Rulemaking R20-01," or via first class mail or by hand delivery to the commission's Albuquerque office: New Mexico Ethics Commission, University of New Mexico Science and Technology Park, 800 Bradbury Drive SE, Suite 215, Albuquerque, NM, 87106.

**Description of Proposed Rules:** In compliance with Section 14-4-5.2 NMSA 1978, this notice includes the following summary of the proposed amendment and the new proposed rule, a short explanation of the purpose of the amendment and new rule, and specific legal authority authorizing the amendment and proposed new rule. The method and manner of public comment and notice

of public hearing on the proposed rules are listed above.

**1.8.1.1 NMAC (“General Provisions”); proposed amendments:**

This rule currently ensures that the state ethics commission is administered so that it works effectively, efficiently and fairly to achieve its constitutional and statutory mission. That mission is to ensure compliance with all applicable public ethics laws by all public officials, employees, candidates, contractors, lobbyists and others subject to the commission’s jurisdiction throughout their employment or dealings with New Mexico state government; and to ensure that the public ethics laws are clear, comprehensive and effective.

The first amendments to this rule proposed in this proceeding, 1.8.1.9 and 1.8.1.10 NMAC, will add two new sections describing the procedure for people to request, and for the commission to issue, advisory opinions, either official or informal. The second amendment to this rule, 1.8.1.16 NMAC, creates rules for convening and managing meetings of the commission. These include rules governing executive sessions, virtual meetings, and maintaining order during meetings.

**The proposed amendments to 1.8.1 NMAC are as follows: amendments to Sections 1, 3, and renumbered 14, adding new Sections 9, 10 and 16 and renumbering subsequent existing sections, effective xx/xx/2020.**

**1.8.1.1 ISSUING**

**AGENCY:** State ethics commission (the commission), 800 Bradbury Dr. SE, Ste. 21[7]5, Albuquerque, NM 87106.

[1.8.1.1 NMAC-N, 1/1/2020; A, xx/xx/2020]

**1.8.1.3 STATUTORY**

**AUTHORITY:** Paragraph 2 of Subsection A of Section 10-16G-5, State Ethics Commission Act, Section 10-16G-1 NMSA 1978; Subsection

(C) of Section 10-15-1, Open Meetings Act, Section 10-15-1 NMSA 1978.

[1.8.1.3 NMAC-N, 1/1/2020; A, xx/xx/2020]

**1.8.1.9 ADVISORY**

**OPINIONS:**

**A.** The commission may issue advisory opinions on matters related to ethics. Advisory opinions shall:

(1) be requested in writing by a public official, public employee, candidate, person subject to the Campaign Reporting Act, government contractor, lobbyist or lobbyist’s employer;

(2) identify a specific set of circumstances involving an ethics issue;

(3) be issued within sixty days of receipt of the request unless the commission notifies the requester of a delay in issuance and continues to notify the requester every thirty days until the advisory opinion is issued; and

(4) be published after omitting the requester’s name and identifying information.

**B.** A request for an advisory opinion shall be confidential and not subject to the provisions of the Inspection of Public Records Act.

**C.** Unless amended or revoked, an advisory opinion shall be binding on the commission in any subsequent commission proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory opinion.

[1.8.1.9 NMAC-N, xx/xx/2020]

**1.8.1.10 INFORMAL**

**ADVISORY OPINIONS:**

**A.** A person authorized to request an advisory opinion who desires a response in fewer than 60 days for the purpose of deliberation and decision making may submit the request for an informal advisory opinion to the director or general counsel, who may answer the request. An informal advisory opinion is specific to the person who requests the advice and the facts presented in

the request. The commission shall treat as confidential the request and the informal advisory opinion issued in response.

**B.** Any informal advisory opinion issued pursuant to this rule is not binding on the commission unless and until the commission votes to adopt the informal advisory opinion as an advisory opinion. If the commission determines that a person committed a violation after reasonably relying on an informal advisory opinion and the violation is directly related to the informal advisory opinion, the commission may consider that the person acted in good faith.

**C.** Before each regular meeting of the commission, the director shall review any informal advisory opinions issued since the last meeting. The director, based on any informal advisory opinion issued, may draft an advisory opinion for the commission to consider for issuance as an advisory opinion.

[1.8.1.10 NMAC-N, xx/xx/2020]

**1.8.1.[12] 14**

**ADDRESS FOR FILING**

**DOCUMENTS:**

**A.** By mail: Director, State Ethics Commission, 800 Bradbury Dr. SE, Ste. [217] 215, Albuquerque, NM 87106.

**B.** In person: State Ethics Commission, 800 Bradbury Dr. SE, Ste. [217] 215, Albuquerque, NM 87106.

**C.** By email: ethics.commission@state.nm.us.  
[1.8.14 NMAC-N, 1/1/2020; Rn & A, xx/xx/2020]

**1.8.1.16 COMMISSION**

**MEETINGS:** The commission chair, in consultation with the director, shall determine the time, place, and duration of commission meetings necessary to conduct the commission’s business.

**A. Executive Session.** Upon motion and vote of a quorum, the commission may enter into a closed, executive session to discuss matters that are confidential under the State Ethics Commission Act,

Section 10-16G-1 NMSA 1978, and as otherwise permitted by the Open Meetings Act, Section 10-15-1 NMSA 1978.

**B. Virtual meetings.**

With the consent of the commission chair, the commission may meet virtually via web or teleconference. In the event the commission meets virtually, commission staff shall ensure that the meeting occurs on a platform that allows members of the public to observe and participate. At a virtual or telephonic meeting, each commissioner participating must be identified when speaking and all meeting participants and members of the public attending must be able to hear every person who speaks during the meeting. The commission staff shall record virtual meetings and make the recordings (except for recordings of closed executive sessions) available for public inspection.

**C. Virtual attendance**

by individual commissioners. An individual commissioner may attend a physical commission meeting virtually, through telephone phone or web conference, when it is difficult or impossible for the commissioner to attend the meeting in person, provided that each commissioner participating by conference telephone can be identified when speaking, and all meeting participants and members of the public attending can hear every person who speaks during the meeting.

**D. Maintaining**

order. The commission chair may take reasonable steps to ensure the commission is able to fairly and efficiently conduct its business, including adopting parliamentary procedure, imposing reasonable limitations on public comment, and excluding members of the public who disrupt commission meetings.  
[1.8.1.16 NMAC-N, xx/xx/2020]

**1.8.4.1 NMAC (“Proposed Code of Ethics”):** This new proposed rule will create proposed code of ethics for public officials and public employees, to be submitted to each elected public official and public agency for

adoption, pursuant to Paragraph (4) of Subsection B of Section 10-16G-5 NMSA 1978. The proposed code of ethics will compile in a single rule the ethics provisions of state laws and rules governing the conduct of state officers and employees. Topics to be addressed in the proposed code include the definition of and restrictions on: conflicts of interest, acceptance of gifts, business relations with employees or regulated entities, procurement issues, limitations on former employees, public access to records and meetings of state bodies, allowable political activity and ethical conduct in the workplace, among other subjects.

**The proposed 1.8.4 NMAC is as follows:**

**TITLE 1           GENERAL  
GOVERNMENT  
ADMINISTRATION  
CHAPTER 8       STATE ETHICS  
COMMISSION  
PART 4           CODE OF  
ETHICS**

**1.8.4.1           ISSUING**  
**AGENCY:** State Ethics Commission, 800 Bradbury Dr. SE, Ste. 215, Albuquerque, New Mexico 87106.  
[1.8.4.1 NMAC-N, xx/xx/2020]

**1.8.4.2           SCOPE:** This part contains a proposed code of ethics for officers and employees of executive and legislative state agencies and other institutions and instrumentalities of the state. Elected statewide executive branch officers and other state agencies must consider this proposed code when adopting either a code of conduct under Subsection C of Section 11 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978, or a code of ethics under Paragraph 4 of Subsection B of Section 5 of the State Ethics Commission Act, Section 10-16G-1 NMSA 1978, for employees subject to the adopting agencies’ control. If adopted, this code will apply to all officers and employees of the adopting agency, as well as other persons working for the agency, such

as contractors.  
[1.8.4.2 NMAC-N, xx/xx/2020]

**1.8.4.3           STATUTORY AUTHORITY:** Sections 11 and 11.1 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978; and Paragraph 4 of Subsection B of Section 5 of the State Ethics Commission Act, Section 10-16G-1 NMSA 1978.  
[1.8.4.3 NMAC-N, xx/xx/2020]

**1.8.4.4           DURATION:** Permanent.  
[1.8.4.4 NMAC-N, xx/xx/2020]

**1.8.4.5           EFFECTIVE DATE:** January 1, 2021, unless a later date is cited at the end of a section, in which case the later date is the effective date.  
[1.8.4.5 NMAC-N, xx/xx/2020]

**1.8.4.6           OBJECTIVE:** The objective of this part is to provide the executive and legislative branch agencies of state government and other institutions and instrumentalities of the state with a proposed code of ethics to consider when agencies adopt either a code of ethics under Paragraph 4 of Subsection B of Section 5 of the State Ethics Commission Act, Section 10-16G-1 NMSA 1978, or a code of conduct under Sections 11 and 11.1 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978. If adopted, this Code will furnish standards of conduct for the adopting agency’s officer’s and employees, the violation of which could form the basis for discipline by the adopting agency.  
[1.8.4.6 NMAC-N, xx/xx/2020]

**1.8.4.7           DEFINITIONS:** The following terms apply to this part unless their context clearly indicates otherwise:

- A.           “Agency”** or “this Agency” means the agency that has adopted this proposed code of ethics.
- B.           “Business”** means an entity other than this agency.
- C.           “Code”** means this proposed code of ethics.
- D.           “Commission”** means the State Ethics Commission.

**E. “Financial interest”** means an ownership interest in a business or property; or employment or prospective employment for which negotiations have already begun.

**F. “Gift”** has the same meaning as defined by Subsection B of Section 2 of the Gift Act, Section 10-16B-1 NMSA 1978, namely, any donation or transfer without commensurate consideration of money, property, service, loan, promise or any other thing of value, including food, lodging, transportation and tickets for entertainment or sporting events, but does not include:

(1) any activity, including but not limited to the acceptance of a donation, transfer or contribution, or the making of an expenditure or reimbursement, that is authorized by the Campaign Reporting Act or the Federal Election Campaign Act of 1971, as amended;

(2) a gift given under circumstances that make it clear that the gift is motivated by a family relationship or close personal relationship rather than the recipient’s position as a state officer or employee or candidate for state office;

(3) compensation for services rendered or capital invested that is:

(a) normal and reasonable in amount;

(b) commensurate with the value of the service rendered or the magnitude of the risk taken on the investment;

(c) in no way increased or enhanced by reason of the recipient’s position as a state officer or employee or candidate for state office; and

(d) not otherwise prohibited by law;

(4) payment for a sale or lease of tangible or intangible property that is commensurate with the value of the services rendered and is in no way increased or enhanced by reason of the recipient’s position as a state officer or employee or candidate for state office;

(5) a commercially reasonable loan made in the ordinary course of the lender’s business on terms that are available to all similarly qualified borrowers;

(6) reimbursement for out-of-pocket expenses actually incurred in the course of performing a service for the person making the reimbursement;

(7) any gift accepted on behalf of and to be used by the state or a political subdivision of the state, including travel, subsistence and related expenses accepted by a state agency in connection with a state officer’s or employee’s official duties that take place away from the state official’s or employee’s station of duty;

(8) anything for which fair market value is paid or reimbursed by the state officer or employee or candidate for state office;

(9) reasonable expenses for a bona fide educational program that is directly related to the state officer’s or employee’s official duties; or

(10) a retirement gift.

**G. “Indirectly”** means in a roundabout manner; coming about or resulting otherwise than directly or immediately, as effects or consequences.

**H. “Market value”** means the amount for which a good or service can be sold on the relevant market.

**I. “Official act”** means any act or omission to act that would not be possible but for the actor’s official position or state employment.

**J. “Public officer or employee”** means any elected or appointed official or employee of a state agency who receives compensation in the form of salary or is eligible for per diem or mileage, but excludes legislators.

**K. “Restricted donor”** has the same meaning as defined by Subsection D of Section 2 of the Gift Act, Section 10-16B-1 NMSA 1978, namely, a person who:

(1) is or is seeking to be a party to any one or any combination of sales, purchases, leases or contracts to, from or with the agency in which the donee holds office or is employed;

(2) will personally be, or is the agent of a person who will be, directly and substantially affected financially by the performance or nonperformance of the donee’s official duty in a way that is greater than the effect on the public generally or on a substantial class of persons to which the person belongs as a member of a profession, occupation, industry or region;

(3) is personally, or is the agent of a person who is, the subject of or party to a matter that is pending before a regulatory agency and over which the donee has discretionary authority as part of the donee’s official duties or employment within the regulatory agency; or

(4) is a lobbyist or a client of a lobbyist with respect to matters within the donee’s jurisdiction.

**L. “Shall”** means must, and “must” means shall.

**M.** Any other terms shall be defined for purposes of this rule as they are defined in Section 2 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978. [1.8.4.7 NMAC-N, xx/xx/2020]

**1.8.4.8 STRUCTURE OF THIS CODE AND CORRESPONDING COMMENTARY:**

**A.** This Code is organized by subject area rather than by the statutes that concern the various subject matters of this code.

**B.** The Commission publishes and updates extensive commentary and examples corresponding to this Code on the Commission’s website. An official or employee of this agency dealing with an ethical issue should identify and consult the relevant sections of this Code. If this Code does not resolve the issue, further guidance might be found in the Commission’s separately



published commentary.  
[1.8.4.8 NMAC-N, xx/xx/2020]

**1.8.4.9 PRINCIPLES OF PUBLIC ETHICS:** This Code is based on, and should be interpreted to advance, the following principles of public ethics:

**A. Honest services.**  
An officer or employee shall conduct government functions in accordance with the law and free from conflicts of interest. Public office is a public trust; as such, an official or employee must take care to ensure that every official act and decision affecting the rights or interests of individuals is based in law and the public interest.

**B. Proportionality.**  
When committing an official act or making a decision, an officer or employee shall ensure that the action taken is proportional to the goal being pursued. The officer or employee shall avoid restricting the rights of New Mexicans or imposing burdens on them when those restrictions or burdens are not justified by a public interest.

**C. Impartiality and fairness.** The conduct of an officer or employee shall never be guided by:  
**(1)** personal, family or financial interests;  
**(2)** a motivation to benefit or empower an elected official, a candidate for office, or a political party or its members; or  
**(3)** a motivation to disadvantage or disempower an elected official, a candidate for office, or a political party or its members.

**D. Consistency.** Like cases shall be treated alike. An officer or employee shall behave consistently with the agency's normal practices, unless there is a legitimate basis for departing from those practices in an individual case and that basis is documented in writing. An officer or employee shall respect the reasonable expectations of the public that the agency will continue to act as it has acted in similar circumstances unless there is a rational basis for the change.

**E. Diligence.** An officer or employee shall ensure that

every decision on a matter is made with care and adequate understanding of the issue, within a reasonable time, and without unnecessary delay.

**F. Respect.** An officer or employee shall be courteous and accessible to members of the public, co-workers, and their colleagues.

**G. Transparency.** The official acts and decisions of officers and employees shall be made openly and with adequate opportunity for public review and comment.

**H. Fallibility and reversibility.** Individuals not only err in judgment but also act in ways that unconsciously benefit some and burden others; accordingly, an officer or employee shall endeavor to take official acts and make decisions in ways that are deliberative, open to review and, where appropriate, reversible.

[1.8.4.9 NMAC-N, xx/xx/2020]

**1.8.4.10 HONEST SERVICES; AVOIDING CONFLICTS OF INTEREST**

**A. Outside employment.**  
**(1) Duty**  
to avoid conflicts from outside employment. An officer or employee of this agency engaged in paid employment for a business shall ensure that the employment does not conflict with the duties of state employment.

**(2) Disclosure of outside employment.** An officer or employee having permissible outside employment shall:  
**(a)** file with the employee's supervisor, or other officer or employee that this agency designates, a signed statement explaining the outside employment and why it does not create a conflict;

**(b)** the disclosure statement shall include the name of the officer or employee, the name and general nature of the business, the hours that the officer or employee will work, and the reasons why the work does not create a conflict of interest with the officer's or employee's public duties;

**(c)** in the disclosure statement, the officer or employee shall additionally commit to disclose any potential conflict of interest that may arise during the officer or employee's work with the business.

**B. Disclosure of potential conflicts of interest and disqualification.**

**(1) Disclosure of financial interests.**

**(a)** Mandatory financial disclosure by officers and agency heads. An officer or head of this agency must disclose financial interests to the Secretary of State on the form provided by the Secretary of State.

**(b)** Disclosure of financial interests: contents; when filed. The disclosure required by 1.8.4.10.B(1)(a) NMAC shall be filed within thirty days of taking office and each January thereafter and shall disclose the following financial interests of the filing individual and the filing individual's spouse, for the prior calendar year:

**(i)** current employer and the nature of the business or occupation;

**(ii)** all sources of gross income over \$5,000, identified by category;

**(iii)** real estate owned in the state other than the personal residence;

**(iv)** other business interests of \$10,000 or greater value;

**(v)** memberships on for-profit boards;

**(vi)** New Mexico professional licenses held;

**(vii)** sales to state agencies exceeding \$5,000 for the prior year; and

**(viii)** state agencies before which clients were represented or assisted during the prior year.

**(c)** Officers and employees required to disclose potentially conflicting financial interests; when filed. An

officer or employee of this agency must file a disclosure of financial interests when the officer or employee believes, or has reason to believe, that their financial interest may be affected by their official acts or actions of the state agency that employs them. The disclosure must be filed before entering state employment or within ten days of the date when the officer or employee knows, or should know, that a potential conflict has arisen and thereafter each subsequent January, so long as the conflict or potential conflict continues to exist.

**(d)**

Financial disclosure statements are public records. All disclosures required under this subsection are public records.

**(2)**

Disqualification from acts affecting financial interests.

**(a)**

An officer or employee of this agency may not take official acts for the purpose of enhancing their financial interests. An officer or employee must be disqualified from any matters that could directly enhance or diminish the officer's or employee's financial interest. If disqualified, then the officer or employee shall refrain from acting on a matter involving the disqualifying financial interest.

**(b)**

An officer or employee of this agency is not disqualified from taking an official action under 1.8.4.10(B)(2)(a) NMAC if the benefit of the official act to the officer's or employee's financial interest is proportionately equal to or less than the benefit to the general public.

**C. Business with regulated entities.****(1) Sales**

to regulated persons. An officer or employee of this agency may not directly or indirectly sell goods or services to, or profit from a transaction with, a business or individual over whom this agency has regulatory authority.

**(2) No**

acceptance of job or contract offers from regulated entities. An officer or employee of this agency may not

accept an offer of employment from, or a contract to provide goods or services to any entity that this agency regulates. An officer or employee shall disqualify themselves from any official act or decision involving a business in which an immediate family member is employed or in which the officer or employee seeks employment.

**(3) Ordinary**

transactions at market rates allowed. Nothing in this rule prevents an officer or employee from purchasing or contracting for services or goods from a regulated entity on the same bases that are available to other members of the public.

**D. Accepting or Giving Gifts.****(1) Gifts**

from restricted donors. An officer or employee of this agency may not, directly or indirectly, solicit a gift from, and shall decline any gift offered by, a restricted donor or by any person who gives a gift because of the donee's status as an officer or employee of this agency.

**(2) Gifts and**

business from subordinates. An officer or employee of this agency may not, directly or indirectly:

**(a)**

accept a gift from an employee having a lower rank or receiving less pay, unless the donor and donee are not in a subordinate-superior relationship and there is a personal relationship between the donor and recipient that would justify the gift.

**(b)**

solicit business from a supervised employee where the business redounds to the financial interest of the officer or employee or an immediate family member.

**(3) Soliciting**

gifts for charities. An officer or employee of this agency may not solicit or require a charitable donation from any business, or an agent of any business, regulated by or contracting with this agency; nor from any employees that the officer or employee supervises.

**(4) Declining**

permissible gifts. An officer or

employee of this agency shall consider declining an otherwise permissible gift, if they believe that a reasonable person with knowledge of the relevant facts would question the officer or employee's integrity or impartiality as a result of accepting the gift. Among other relevant factors, the officer or employee shall take into account whether:

**(a)**

the gift has a high market value;

**(b)**

the timing of the gift creates the appearance that the donor is seeking to influence an official action;

**(c)**

the gift offered by a person or business entity who has interests may substantially affect the performance or nonperformance of the officer or employee's duties; and

**(d)**

acceptance of the gift would provide the donor with significantly disproportionate access.

**(5) Disclosure**

of offers of gifts from restricted donors. If a restricted donor offers a gift of any value to an officer or employee of this agency, or if an officer or employee of this agency unintentionally receives a gift from a restricted donor, the officer or employee shall report to their supervisor: the date the offer or gift was made or received, the name of the donor and the donor's relationship to the agency, the nature and value of the gift, and whether the officer or employee accepted or refused the gift.

**(6) Certain**

donations of private funds prohibited. No officer or employee of this agency may give:

**(a)**

a gift from their own funds to any person with whom their agency is doing business, or considering doing business, under circumstances which may appear to favor the recipient over other similarly situated persons; or

**(b)**

a gift to any other state officer or employee when the gift may be, or may appear to be, intended to influence any official decision by the recipient.

(7) Certain donations of public funds prohibited. No officer or employee of this agency may give to any person any gift from public funds, unless the gift:

(a) is a service appreciation award of de minimis value; or

(b) does not violate the Anti-Donation Clause, N.M. Const., Article IX, Section 14.

E. Honoraria; no solicitation or acceptance of honoraria permitted for speaking or writing.

(1) An officer or employee of this agency may not request or receive honoraria for a speech or service that relates to the performance of public duties; provided that an officer or employee of this agency may accept reasonable reimbursement for meals, lodging or actual travel expenses incurred in making the speech or rendering the service.

(2) An officer or employee of this agency may accept payment for services rendered in the normal course of a private business pursuit.

F. Timekeeping, reimbursement, and use of state property.

(1) An officer or employee of this agency must work during the hours required and report time accurately.

(2) An officer or employee of this agency shall not claim reimbursement in excess of what is necessary and incidental to an official duty or action.

(3) An officer or employee of this agency shall limit personal use of state office supplies and assigned equipment, such as computers and telephones, and otherwise shall not use state property or expend state funds for private purposes.

G. Procurement.

(1) Fair and equitable treatment of persons involved in public procurement. An officer or employee of this agency shall treat persons involved in public procurement fairly and equitably.

(2) Maximizing the value of public funds. An officer or employee of this agency involved in procurement shall endeavor to maximize the purchasing value of public funds.

(3) Conflicts of interest prohibited; Intra-agency waiver.

(a) An officer or employee of this agency shall not participate directly or indirectly in a procurement when the officer or employee, or their immediate family member, has a financial interest in a business participating in the procurement.

(b) An officer or employee of this agency who is participating directly or indirectly in procuring goods or services for this agency shall not be concurrently employed by any person or business contracting with this agency.

(c) A conflict of interest under subparagraphs (a) or (b) this Paragraph may be waived by this agency, if the contemporaneous employment or financial interest has been publicly disclosed, the officer or employee is able to perform procurement functions without actual or apparent bias or favoritism, and the officer or employee's participation is in the best interests of this agency.

(4) Due diligence by agency.

(a) Participation by person submitting bid or proposal. An officer or employee of this agency, having responsibilities for evaluating or overseeing a bid or proposal shall exercise due diligence in ensuring that any person or parties submitting bids or proposals do not participate or contribute any knowledge, guidance or explanation in the preparation or receive any advance notice of specifications, qualifications or evaluation criteria on which the specific bid or proposal will be based.

(b) Campaign contribution disclosure and prohibition. An officer or employee of this agency who participates, directly

or indirectly, in procuring goods or services for this agency shall exercise due diligence to ensure that the prospective contractor:

(i) does not give a campaign contribution or other thing of value to a person elected to an office or a person appointed to complete a term of elected office who has the authority to award or influence the award of a contract into which the prospective contractor seeks to enter; and

(ii) disclose all campaign contributions, where such contributions in the aggregate exceed over \$250 in the two years before the beginning of the procurement process, given by the prospective contractor or a family member or representative of the prospective contractor to a person elected to an office or a person appointed to complete a term of elected office who has the authority to award or influence the award of a contract into which the prospective contractor seeks to enter.

H. Former officers and employees.

(1) Contracting. This agency may not contract with or take any other favorable action toward a person or business that is:

(a) represented by a person who was an officer or employee of this agency within the preceding year, if the contract or action has a value of \$1,000 or more and is the direct result of the officer or employee's official act; or

(b) assisted by a former officer or employee of this agency whose official act while in state employment directly resulted in the contract or action. This subparagraph applies regardless of the value of the contract or action, or the length of time since the officer or employee left the agency.

(2) Restrictions on former officers or employees representing a person in the person's dealings with this agency.

**(a)**

A former officer or employee of this agency is prohibited from representing anyone in dealings with this agency on any matter in which the officer or employee participated personally and substantially during their employment with this agency.

**(b)**

A former officer or employee of this agency may not, for one year after the termination of their employment with this agency, represent for pay a person on any matter before this agency, regardless of whether they were involved in that matter personally. [1.8.4.10 NMAC-N, xx/xx/2020]

**1.8.4.11 OPEN GOVERNMENT AND FREEDOM OF INFORMATION:**

**A.** An officer or employee of this agency should welcome and encourage the public to attend and participate in public meetings.

**B.** An officer or employee of this agency must permit members of the public to inspect this agency’s records, unless the records are confidential under the law. [1.8.4.11 NMAC-N, xx/xx/2020]

**1.8.4.12 POLITICAL ACTIVITY:**

**A.** An officer or employee of this agency may not use their official position to pressure others to participate in political activities.

**B.** An officer or employee of this agency may not use their official position to influence an election or nomination, or otherwise engage in any partisan political activity while on duty.

**C.** An officer or employee of this agency may not serve as an officer of a political organization.

**D.** An officer or employee of this agency may not use or allow others to use state money or property to promote a political campaign, candidate for elected office, political party, or other partisan political organization.

**E.** An officer or

employee of this agency who becomes a candidate in a partisan election must take a leave of absence upon filing for or accepting the candidacy.

**F.** An officer or employee of this agency may participate in political activities while off duty, including:

**(1)** donating to political candidates;

**(2)** volunteering or working for a political campaign or political organization, so long as the officer’s or employee’s work does not violate any applicable conflict-of-interest provision of this rule or statute; and

**(3)** holding non-partisan political office, such as non-partisan county or municipal office or a seat on a local school board.

[1.8.4.12 NMAC-N, xx/xx/2020]

**1.8.4.13 ETHICAL CONDUCT IN THE WORKPLACE:**

**A.** An officer or employee of this agency with supervisory responsibility shall:

**(1)** manage the hiring of new employees fairly and equitably;

**(2)** diligently investigate allegations of misconduct;

**(3)** refrain from unsolicited private business dealings with supervised employees, either directly or indirectly; and

**(4)** ensure all visitors and staff can access this agency’s services.

**B.** An officer or employee of this agency shall:

**(1)** treat colleagues with respect;

**(2)** learn about what behavior constitutes harassment, and make efforts to remove it from the workplace;

**(3)** report violations of this code of ethics or other laws to responsible authorities within this agency or to the Commission; and

**(4)** learn how to recognize, report and prevent

substance abuse among this agency’s personnel. [1.8.4.13 NMAC-N, xx/xx/2020]

**History of 1.8.4 NMAC: [RESERVED]**

**SUPERINTENDENT OF INSURANCE, OFFICE OF**

**NOTICE OF PROPOSED RULEMAKING**

**NOTICE IS HEREBY GIVEN** that the Superintendent of Insurance (Superintendent), pursuant to the New Mexico Insurance Code, Sections 59A-1 -1 et seq. NMSA 1978 (“Insurance Code”) and 13.1.4 NMAC, proposes to adopt amendments to rule 13.10.10 MEDICAL INSURANCE POOL PLAN OF OPERATION

**PURPOSE OF THE PROPOSED AMENDEMENTS** is to modify the Plan of Operation of the New Mexico Medical Insurance Pool.

**STATUTORY AUTHORITY:** Sections 59A-54-17 and 59A-54-5, NMSA 1978.

Copies of the Notice of Proposed Rulemaking and proposed rules are available by electronic download from the OSI website (<https://www.osi.state.nm.us/index.php/idms/>) or the New Mexico Sunshine portal.

OSI will hold a public video/ telephonic hearing on the proposed rules on July 24, 2020 at 10:00 a.m.

Join via Video:

<https://us02web.zoom.us/j/2916274744>

Join via telephone:

1-346-248-7799  
Meeting ID: 291 627 4744

The Superintendent designates Bryan E. Brock to act as the hearing officer for this rulemaking. Oral comments

SEC Rulemaking R20-01

NM State Ethics Commission,  
UNM Science and Technology Park,  
800 Bradbury Drive SE, Suite 215  
Albuquerque, NM 87106

Dear New Mexico State Ethics Commissioners,

We are writing in response to your request for comments on the proposed adoption of a new Part 4 of Title 1, Chapter 8, of the New Mexico Administrative Code, presenting a model code of ethics for submission to state agencies pursuant to Section 10-16G-5(A)(4) NMSA 1978.

We wholeheartedly support adoption of the proposed code and commend the commission for a thorough job of bringing together into a single compilation all of the various rules of governmental ethics that are scattered throughout the New Mexico statutes. We further applaud the commission for including in the model code provisions by which state agencies could take advantage of their authority to impose ethical constraints on their officials and employees that are more stringent than would be required by a narrow literal construction of the statutes (see §§10-16-11(C) and 10-16-11.1 NMSA 1978).

In particular, we approve of the commission's proposal, in §1.10.4.10(D)(1) of the draft code, for agencies to impose a complete ban on acceptance by their officials and employees of gifts from "restricted donors." We believe such a clear and comprehensive prohibition is both more easily administered and more likely to promote public trust in government than the narrower statutory rule barring acceptance of such unseemly gifts only when they have "a market value greater than \$250" (§10-16B-3(A) NMSA 1978).

In Common Cause,



**Heather Ferguson**  
Executive Director

**New Mexicans for Ethics Coalition Comments**  
**SEC Rulemaking R20-01**

Dear Ethics Commission,

The undersigned members of the New Mexicans for Ethics Coalition have reviewed the proposed rules, including the proposed Code of Ethics, within our coalition. Before delving into specific comments, we submit the following general comments for consideration:

We encourage the commission to take an expansive view of ethics and ethical requirements, throughout the entire proposed code. In several instances, the proposed code contains requirements that go beyond what is found in current statutes. We encourage the commission to take that expansive view throughout the model code, in order to strengthen ethical requirements, and have indicated where we believe that to be appropriate.

We encourage the commission to make the code as user-friendly as possible, including for administrators and employees. This could mean that a digital delivery of the code includes section by section links to the commission's commentary containing additional information, examples, and references to statutory provisions, and that other advanced technological innovations are employed to permit those subject to the code to easily access both the commission's commentary and the relevant statutory sections.

We encourage the commission to take into account the cultural context within New Mexico and abundance of familial and other relationships in adequately describing and limiting the appropriate delivery and receipt of gifts.

**1.8.1.9 ADVISORY OPINIONS**

- Please expand the list of those who can request advisory opinions to members of the public. This will not only address specific concerns, it will contribute significantly to community trust in public institutions and processes.
- Providing clear decision rules or criteria for when an advisory opinion is warranted would provide a public reference and avoid the perception that decisions to review in an advisory way are arbitrary or subjective.
- Clarify in the code why requests for advisory opinions are confidential and how each party benefits from this confidentiality.
- Please determine a concrete timeline cap on the length of time it will take for an advisory opinion to be issued. 60 days is reasonable but delays with a 30 day notice should not extend beyond 4 months.

**1.8.1. INFORMAL ADVISORY OPINIONS**

- It is in the public interest to extend the opportunity to make a request to members of the public.
- Consider staffing a toll-free hotline to provide timely information and support to people who may not be able to reach out during normal business hours.

#### **1.8.1.16 COMMISSION MEETINGS**

- C. Virtual Attendance by individual commissioners- The Commission’s efforts to video record and post meetings is commendable. We recommend that the Commission adopt the clear and transparent protocols and suggest that the Commission should consider doing what the Supreme Court and the legislature do when virtual communications break down..i.e halt proceedings until technology is working again so that the public can hear. In addition, making meetings available on YouTube for viewing later, just as NM Supreme Court. Also consider following the example of the Supreme Court by working with public media such as PBS and other media outlets to provide access to the general public. Please consider a virtual option during Commission meetings regardless of public health orders to make them accessible throughout the state.
- D. Maintaining order: The Commission has done an excellent job of planning in-person and virtual meetings to allow for public comment. While it is reasonable to impose limitations on public comment, having clear guidelines would avoid the perception that limits are set arbitrarily or with the intent to stifle civic engagement. Specifying how time limits will be determined would be useful.

**TITLE 1            GENERAL GOVERNMENT ADMINISTRATION**  
**CHAPTER 8       STATE ETHICS COMMISSION**  
**PART 4            CODE OF ETHICS**

- Please clarify section 1.8.4.6. In this section the Code of Ethics is described as a "standard" which can be "violated" at the risk of "discipline." Does the Code of Ethics carry the weight of a rule which can be violated or is it simply a standard which one may or may not meet?
- Please clarify section **1.8.4.7 DEFINITIONS** – Please elaborate on what is meant by family or close personal relationships. This may become confusing given our highly relational and family-centric cultural norms. Providing guidance on documenting requirements to disclose a relationship might be more manageable than specifying every relationship that does or does not conflict with the intent of the Code of Ethics.
- Providing more clarity about the intent of this document would be helpful. While it’s called the Code of Ethics, it functions as a model which others may use as a basis of developing their own actual Code of Ethics.
- Section 1.8.4.2 needs rewriting to make it consistent. The words “proposed code” must consider.” The code is clearly meant as a requirement, and it should be consistently stated as such. Section 1.8.4.6 again says this is proposed and should be considered. This principle needs to be applied consistently.

- Section 1.8.4.7 seems to mix categories and could be clearer. It refers to both reimbursement for services and compensation for services.
- The financial disclosure forms could be strengthened, especially in section 10. I think the financial disclosure form is weak - at least the ones I've signed. There are several areas in section 10 that could be strengthened. An additional way to strengthen disclosures of consultants is to require that they are bondable.
- 1.8.4.7(D): expand definition of "financial interest" to include holding an ownership stake, investing in, and at risk of losing \$10,000 or more. Ethics Watch has developed an alternative financial disclosure form that provide greater specificity. In addition defining business interest would be helpful.
- 1.8.4.8(B): The Commission and agencies should use whatever technology possible to connect employees easily with the commentary code. This would include section by section links to corresponding commentary within a digital copy of the code of ethics, for ease of access, and any other advanced technological way of connecting people with the commentary.

#### **1.8.4.10 HONEST SERVICES; AVOIDING CONFLICTS OF INTEREST**

- To ensure accountability, each and every contract for public service should have a provision that states all of the records produced by the contractor are subject to the Inspection of Public Records Act. If you are doing work on behalf of government, then that work should be subject to IPRA. In addition, non-disclosure agreements should not be permitted.
- 1.8.4.10 HONEST SERVICES; AVOIDING CONFLICTS OF INTEREST (b) the phrase "proportionately equal to or less than the benefit to the general public" is concerning, especially on multi-million dollars deals as this allows for economic gain beyond what has been earned.
- (4) Declining permissible gifts- this is another area in which cultural and relational practices might not be defined in the same way by "reasonable" people.
- (3) Limit personal use- this section should clarify how surplus materials, equipment, supplies, and art is discarded.
- The Commission should create a model outside employment disclosure form.
- B(1)(b): This tracks with the Financial Disclosure Act (FDA). but Ethics Watch suggests some improvements based recommendations in their report and on the mock form they developed and presented.
- B(1)(b): expansion to include disclosure information for some level of family members, not just spouse, and also include "life partners" or some other title that fits better.
- B(1)(b)(1): "including self-employment information".
- FDA requires the following reporting, which is not captured in (B)(1)(b): "In describing a law practice, consulting operation or similar business of the person or spouse, the major areas of specialization or income sources shall be described, and if the spouse or a person in the reporting person's or spouse's law firm, consulting operation or similar business is or was during the reporting calendar year or the prior calendar year a registered lobbyist under the Lobbyist Regulation Act [Chapter 2, Article 11 NMSA



1978], the names and addresses of all clients represented for lobbying purposes during those two years shall be disclosed.” Section 10-16A-3(D)(2) NMSA 1978.

- B(1)(b)(iv): add “including an ownership stake, investment, financial interest, or when at risk of losing \$10,000 or more”. This could be more elegant way rather than amending definition of “financial interest”. Problem in FDA and here: definition of “financial interest” but not “business interest”, which is term used in FDA and here. So, could replace “financial interest”, 1.8.4.7, with “business interest” and define that.
- B(1)(b)(v): require disclosure of membership on nonprofit boards, as well.

#### **1.8.4.11 OPEN GOVERNMENT AND FREEDOM OF INFORMATION**

This section should comply with IRPA and OMA. Citizens need to know what their government is doing in order to make democracy work. It is only through transparency that citizens can hold elected officials, appointed officials and government employees accountable.

For more than 40 years New Mexico has had some of the most useful tools to ensure citizens know what their government is doing – the Inspection of Public Records Act (IPRA) and the Open Meetings Act. IPRA provides New Mexicans with the power to request and obtain government records – including body-worn camera video, audio records, copies of documents, letters and even emails. The public’s right to know and to hold the government accountable, is not a special interest, it’s a core principle at the very heart of our democracy.

OMA is equally important – a law that requires public bodies post agendas at specific times before meetings, conduct of public officials regarding agenda items so that the public’s business is conducted in the open.

One area of IPRA that continually raises transparency problems is employee disciplinary records. IPRA states that “Factual information or other public information is not protected merely because it is kept in an employee or student files.” Yet, time and again, agencies exempt these records from inspection or the agency will cite collective bargaining agreements that require the information not be made public.

To see the dangers of this practice, one only has to look at the nightly news or the daily newspapers’ headlines. Because these records are not made readily available for inspection, employees have engaged in misconduct making accountability impossible.

It is critical that reforms are necessary to ensure that disciplinary records of all public employees that are currently kept confidential be made public. Transparency, accountability and trust between the government and the public is a high priority.

The issue of trust also extends to open meetings. Transparency is a core value of government meetings including the meetings of the New Mexico Legislature. Yet, year after year, the Legislature conducts budget negotiations behind closed doors. Historically many of those budgetary meetings have shut out not only the public but even legislators from the process.

Why all the secrecy? Lawmakers should be eager, not afraid, to have their constituents view the hard choices that need to be made among competing interests. Openness may breed disappointment about the final decision, but it also breeds trust in government and the democratic process.

Transparency is more than a popular buzzword. In fact, it is much more a verb than a noun, requiring lawmakers to take action – open the doors to committee meetings and eliminate offsite budget strategy meetings. This is not only the right thing to do, but also the legal way to conduct business. NMSA 10-15-2-A *requires all meetings of any committee or policymaking body of the legislature held for the purpose of discussing public business or for the purpose of taking any action within the authority of or the delegated authority of the committee or body are declared to be public meetings **open to the public at all times.***

Another area of concern involving public meetings is that not all Legislative task forces and committees are subject to OMA. Meetings of the task force should be open to the public, subject to the same notice provisions and exceptions provided in the OMA.

The policy behind OMA is to provide the public with access to the *greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.* This policy recognizes that the hallmark of democracy is transparency where citizens can hold their officials accountable. This policy is why it must be mandatory to require that meetings of task forces and working groups be open to the public, and subject to the same notice provisions and exceptions provided in the OMA.

An informed public creates a strong democracy. Citizens have greater faith in their lawmakers when they know what is happening behind closed doors.

Sincerely,

Kathleen Sabo and Tony Ortiz-Zamora, New Mexico Ethics Watch

Lilly Irvin-Vitela and Melanie Sanchez Eastwood, New Mexico First

Melanie Majors, New Mexico Foundation for Open Government

Judy Williams, New Mexico League of Women Voters

Sammy Lopez, New Mexico Press Association

Tsiporah Nephesh, New Mexico Thrives



**STATE OF NEW MEXICO  
OFFICE OF THE SECRETARY OF STATE**

Bureau of Elections, Ethics Administration  
325 Don Gaspar, Suite 300, Santa Fe, New Mexico 87501  
Phone: (505) 827-3600 Toll-Free: (800) 477-3632  
Fax: (505) 827-8403

## 2020 Financial Disclosure Statement

TYPE OF FILING AND CURRENT FILING STATUS				
Please select the appropriate filing and provide all requested information for the <b>prior</b> calendar year. <b>*If filing an amendment, please provide only the amended information.</b>				
<input type="checkbox"/> Filing an annual statement			<input type="checkbox"/> Amendment to annual statement	
<input type="checkbox"/> Filing with declaration of candidacy			<input type="checkbox"/> Amendment to declaration of candidacy filing	
<input type="checkbox"/> Filing within 30 days of appointment			<input type="checkbox"/> Amendment to within 30-days of appointment filing	
Please provide the requested information for the appropriate filing status for the <b>prior</b> calendar year.				
A. Annual filing for legislator, statewide office holder, agency head, senate confirmed member of a board or commission, member of the insurance nominating committee, or certain public officers and employees:	State agency, board, commission, or Legislative or Judicial position	District	Start date of current employment, appointment, or term	Year of initial filing of financial disclosure statement
B. Candidate for legislative or statewide office		Office	District	Date first assumed office
C. Filing within 30 days of appointment (subject to Senate Confirmation)		State agency, board or commission	Length of term	Start date of current employment or appointment
1. Contact Information				
A. Reporting Individual		Please provide all requested information		
Last name	First name		Middle	
Residence Address			Email address	
City	State		Zip	
Mailing address (if different from above)				
City	State		Zip	
B. Spouse – if no spouse, indicate “N/A”		<input type="checkbox"/> Check if you had a spouse during prior calendar year		
Last name	First name		Middle	

<b>2. Employer Information</b>			
Please provide all requested information for each employer including self-employment. <b>*Attach a separate sheet if employer information exceeds space provided below.</b>			
If earn more than \$5,000 from an employer or self-employment, the income must be reported under Section 3, "Sources of Gross Income Over \$5,000."			
A. Reporting Individual		Number of employers (including self-employment):	
Employer Name (indicate if self-employed)		Employer Phone Number	
P.O. Box or Street Address of Employer		City	State      Zip
Title or Position		Nature of Business	
2 <sup>nd</sup> Employer Name		2 <sup>nd</sup> Employer Phone Number	
P.O. Box or Street Address of 2 <sup>nd</sup> Employer		City	State      Zip
Title or Position		Nature of Business	
B. Spouse – if no spouse, indicate "N/A"		Number of Employers (including self-employment):	
Employer Name (indicate if self-employed)		Employer Phone Number	
P.O. Box or Street Address of Employer		City	State      Zip
Title or Position		Nature of Business	
2 <sup>nd</sup> Employer Name		2 <sup>nd</sup> Employer Phone Number	
P.O. Box or Street Address of 2 <sup>nd</sup> Employer		City	State      Zip
Title or Position		Nature of Business	
<b>3. Sources of Gross Income Over \$5,000</b>			
Identify sources of income by the following categories: law practice or consulting operation or similar business; finance and banking; farming and ranching; medicine and healthcare; insurance (as a business); oil & gas; transportation; utilities; general stock market holdings; bonds; government; education; manufacturing; real estate; or consumer goods sales (describe goods with a general description). If "Other" income received, provide a similar general description. You do not need to list the amount received.			
<b>*Attach a separate sheet if sources of gross income over \$5,000 exceed space provided below.</b>			
If income was received jointly, report under "A. Reporting Individual" and mark as joint income.			
A. Reporting Individual		Number of Total Income Sources	
1 <sup>st</sup> Income Source		Brief description if consumer goods sales or "Other" source	
<input type="checkbox"/> Check if income source is jointly received			
2 <sup>nd</sup> Income Source		Brief description if consumer goods sales or "Other" source	
<input type="checkbox"/> Check if income source is jointly received			

3 <sup>rd</sup> Income Source	Brief description if consumer goods sales or "Other" source
<input type="checkbox"/> Check if income source is jointly received	
B. Spouse– if no spouse, indicate "N/A"	Number of Total Income Sources
1 <sup>st</sup> Income Source	Brief description if consumer goods sales or "Other" source
2 <sup>nd</sup> Income Source	Brief description if consumer goods sales or "Other" source
3 <sup>rd</sup> Income Source	Brief description if consumer goods sales or "Other" source

**4. Law Practice, Consulting Operation or similar business**

A. Reporting Individual	Indicate "N/A" if not applicable	<input type="checkbox"/> Check if registered lobbyist
Major area of Specialization	Income Source	
Client Name(s) – if registered lobbyist <b>*Attach a separate sheet if number of clients exceed space below.</b>	Client Address(es) – if registered lobbyist	
B. Spouse– if no spouse, indicate "N/A"	Indicate "N/A" if not applicable	<input type="checkbox"/> Check if registered lobbyist
Major area of Specialization	Income Source	
Client Name(s) – if registered lobbyist <b>*Attach a separate sheet if number of clients exceed space below.</b>	Client Address(es) – if registered lobbyist	

**5. Real Estate Owned in New Mexico (other than personal residence)**

\*If investment property or rental property is producing more than \$5,000 gross income, the income must be reported under Section 3, "Sources of Gross Income Over \$5,000."

A. Reporting Individual	If property is jointly owned, report under "A. Reporting Individual" and mark as joint property.		
General Description <b>*Attach a separate sheet if real estate listings exceed space below.</b>	Indicate with whom the property is jointly owned	County	
<input type="checkbox"/> Check if jointly owned			<input type="checkbox"/> Check if producing gross income greater than \$5,000.
<input type="checkbox"/> Check if jointly owned			<input type="checkbox"/> Check if producing gross income greater than \$5,000.
<input type="checkbox"/> Check if jointly owned			<input type="checkbox"/> Check if producing gross income greater than \$5,000.

B. Spouse— if no spouse, indicate “N/A”		If property is jointly owned, report under “A. Reporting Individual” and mark as joint property.	
General Description <b>*Attach a separate sheet if real estate listings exceed space below.</b>		Indicate with whom the property is jointly owned	County
<input type="checkbox"/> Check if jointly owned			<input type="checkbox"/> Check if producing gross income greater than \$5,000.
<input type="checkbox"/> Check if jointly owned			<input type="checkbox"/> Check if producing gross income greater than \$5,000.
<input type="checkbox"/> Check if jointly owned			<input type="checkbox"/> Check if producing gross income greater than \$5,000.

**6. New Mexico Business Interests**

Not otherwise listed and in which the reporting individual holds an ownership stake, has invested, has a financial interest in, or is at risk of losing \$10,000 or more.

**\*Attach a separate sheet if business interests exceed space below.**

A. Reporting Individual		If business interests are producing gross income over \$5,000, report in Section 3, “Sources of Gross Income Over \$5,000.”	
Name of Business or Entity <b>*Please spell out acronyms</b>		Position Held	General statement of business/entity purpose
	<input type="checkbox"/> Check if business interest produces gross income over \$5,000		
	<input type="checkbox"/> Check if joint interest with spouse		
	<input type="checkbox"/> Check if business interest produces gross income over \$5,000		
	<input type="checkbox"/> Check if joint interest with spouse		
B. Spouse – if no spouse, indicate “N/A”		If business interests are producing gross income over \$5,000, report in Section 3, “Sources of Gross Income Over \$5,000.”	
Name of Business or Entity <b>*Please spell out acronyms</b>		Position Held	General statement of business/entity purpose
	<input type="checkbox"/> Check if business interest produces gross income over \$5,000		
	<input type="checkbox"/> Check if joint interest with spouse		
	<input type="checkbox"/> Check if business interest produces gross income over \$5,000		
	<input type="checkbox"/> Check if joint interest with spouse		

**7. For-Profit Business Board Membership**

A. Reporting Individual	
For-Profit Business Name	
	<input type="checkbox"/> Check if board membership gross income over \$5,000 was received, report in Section 3, “Sources of Gross Income Over \$5,000.”
	<input type="checkbox"/> Check if board membership gross income over \$5,000 was received, report in Section 3, “Sources of Gross Income Over \$5,000.”

B. Spouse – if no spouse, indicate “N/A”	
For-Profit Business Name	
	<input type="checkbox"/> Check if board membership gross income over \$5,000 was received. Report in Section 3, “Sources of Gross Income Over \$5,000.”
	<input type="checkbox"/> Check if board membership gross income over \$5,000 was received. Report in Section 3, “Sources of Gross Income Over \$5,000.”
<b>8. New Mexico Professional License</b>	
A. Reporting Individual	
Type of license (e.g. law, architect, securities broker/dealer, investment advisor, professional engineer, etc.)	
B. Spouse – if no spouse, indicate “N/A”	
Type of license (e.g. law, architect, securities broker/dealer, investment advisor, professional engineer, etc.)	
<b>9. Goods or Services to State Agency in excess of \$5,000</b>	
A. Reporting Individual	
State Agency	
	<input type="checkbox"/> Check if gross income over \$5,000 was received. Report in Section 3, “Sources of Gross Income Over \$5,000.”
	<input type="checkbox"/> Check if gross income over \$5,000 was received. Report in Section 3, “Sources of Gross Income Over \$5,000.”
B. Spouse – if no spouse, indicate “N/A”	
	<input type="checkbox"/> Check if gross income over \$5,000 was received. Report in Section 3, “Sources of Gross Income Over \$5,000.”
	<input type="checkbox"/> Check if gross income over \$5,000 was received. Report in Section 3, “Sources of Gross Income Over \$5,000.”
<b>10. State Agency before which Represented or Assisted Clients</b>	
A. Reporting Individual	
State Agency (other than a court)	
	<input type="checkbox"/> Check if gross income over \$5,000 was received. Report in Section 3, “Sources of Gross Income Over \$5,000.”
	<input type="checkbox"/> Check if gross income over \$5,000 was received. Report in Section 3, “Sources of Gross Income Over \$5,000.”
B. Spouse – if no spouse, indicate “N/A”	
State Agency (other than a court)	
	<input type="checkbox"/> Check if gross income over \$5,000 was received. Report in Section 3, “Sources of Gross Income Over \$5,000.”
	<input type="checkbox"/> Check if gross income over \$5,000 was received. Report in Section 3, “Sources of Gross Income Over \$5,000.”

I hereby swear or affirm under penalty of perjury that the foregoing information is true, accurate and complete to the best of my knowledge.

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Printed Name: \_\_\_\_\_

NEW MEXICO ETHICS WATCH (NMEW) COMMENTS  
SEC RULEMAKING R-20-01

Dear Commissioners and Staff,

New Mexico Ethics Watch (NMEW) has reviewed the proposed rules published in the June 23<sup>rd</sup> issue of the New Mexico Register, including the proposed Code of Ethics. Before delving into specific comments, we submit the following general comments for consideration:

- We encourage the commission to take an expansive view of ethics and ethical requirements, throughout the entire proposed code. In several instances, the proposed code contains requirements that go beyond what is found in current statutes. We encourage the commission to take that expansive view throughout the model code, in order to strengthen ethical requirements, and have indicated where we believe that to be appropriate.
- We encourage the commission to make the code as user-friendly as possible, including for administrators and employees. This could mean that a digital delivery of the code includes section by section links to the commission's commentary containing additional information, examples, and references to statutory provisions, and that other advanced technological innovations are employed to permit those subject to the code to easily access both the commission's commentary and the relevant statutory sections.
- We encourage the commission to take into account the cultural context within New Mexico and abundance of familial and other relationships in adequately describing and limiting the appropriate delivery and receipt of gifts.

**Comments re: Specific Sections of the Proposed Rules:**

**Section 1.8.1.9**

We encourage the list of those who can request an advisory opinion be expanded to include members of the public. We encourage the listing of criteria for when an advisory opinion is to be issued, in order to create an objective basis for the issuance of an advisory opinion.

**Section 1.8.1.10**

If the list of those who can request an advisory opinion is expanded to include members of the public, they will automatically be permitted to request an informal advisory opinion, per Section 1.8.1.10(A). If, however, that list is not expanded, we encourage members of the public be able to request an informal advisory opinion, either through a hotline or through whatever channels are currently being employed by Commission staff.

**1.8.1.16**

We encourage the Commission to expand the rules to conduct virtual meetings and to permit virtual attendance by members of the public, even when the commissioners are once again meeting in person. This will enable people from throughout the state to attend, regardless of



NEW MEXICO ETHICS WATCH (NMEW) COMMENTS  
SEC RULEMAKING R-20-01

the ability to travel and incur costs, and potentially to participate through a public comment portion of a Commission meeting.

**1.8.4.7(E)**

- We encourage the Commission to expand the definition of “financial interest” to include holding an ownership stake, investing in, and at risk of losing \$10,000 or more, or to also define “business interest”, or perhaps “financial or business interest”. While the Financial Disclosure Act, Section 10-16A-2 NMSA 1978 defines “financial interest”, Section 10-16A-3(D)(4) requires the disclosure of “all other New Mexico *business interests* not otherwise listed of ten thousand dollars (\$10,000) or more in a New Mexico business or entity” (emphasis added), yet, there is no definition of “business interest” in the FDA. Additionally, the financial disclosure statement form, Section 9, found on the NM Secretary of State’s website ([https://realfileee3072ab0d43456cb15a51f7d82c77a2.s3.amazonaws.com/4374e725-7ad3-42e1-bde5-77f1386979a4?AWSAccessKeyId=AKIAJBKPT2UF7EZ6B7YA&Expires=1596500845&Signature=GxYKISzso8rD5sE9fMWnPen56vA%3D&response-content-disposition=inline%3B%20filename%3D2020%20Financial%20Disclosure%20Form\\_final.pdf&response-content-type=application%2Fpdf](https://realfileee3072ab0d43456cb15a51f7d82c77a2.s3.amazonaws.com/4374e725-7ad3-42e1-bde5-77f1386979a4?AWSAccessKeyId=AKIAJBKPT2UF7EZ6B7YA&Expires=1596500845&Signature=GxYKISzso8rD5sE9fMWnPen56vA%3D&response-content-disposition=inline%3B%20filename%3D2020%20Financial%20Disclosure%20Form_final.pdf&response-content-type=application%2Fpdf)) requires reporting of “Other Business Interests over \$10,000”. While “financial interest” is defined in both the FDA and the instructions for filling out the financial disclosure statement form, “business interest” is not defined in either place. Again, we encourage the Commission to provide an expansive definition that assists filers and agency employees in knowing what to report, and provides the public (e.g. voters) with adequate information to determine whether a public servant has a conflict of interest sufficient to potentially deter that individual from acting in the public’s behalf, rather than their own.
- We encourage, if warranted, for a definition of “employee” to be included.

**1.8.4.10(A)(2)**

We encourage the Commission to require the creation of a model outside employment disclosure form. While the rules describe the information required to be disclosed in the form, having a model form will make the required information easier to search.

**1.8.4.10(B)(b)**

While the required information tracks with the current Financial Disclosure Act (FDA), Section 10-16A-1 NMSA 1978 et. seq., we encourage the Commission to take into consideration the following recommendations and to craft more expansive disclosure requirements within the model Code of Ethics:

NEW MEXICO ETHICS WATCH (NMEW) COMMENTS  
SEC RULEMAKING R-20-01

A) Remove the requirement that sources of income be reported under "broad general categories" and real estate holdings by "general description", and instead require specificity in reporting for these categories.

B) Expand collateral filing requirements to include domestic partners and other family or household members.

C) Require reporting of income under bands of income so that it is clear how significant a holding a particular asset or financial interest is.

D) Tighten the requirements surrounding reporting of the filer's residences, requiring a spouse or domestic partner to report their residence address; requiring the filer of the form to indicate whether their residence is owned or rented, and if rented, from whom; and requiring owned residences to be declared along with other real property holdings.

E) Require elected officials appointed to their positions to have to file a financial disclosure within 30 days of appointment, as state agency heads and other appointed officials must.

F) Remove the present limitations on reporting membership on boards, business interests, professional licenses, and similar associations to New Mexico. Such licenses, board memberships, and business interests should be reported wherever they occur.

See [http://nmethicswatch.org/wp-content/uploads/2017/01/NMEW\\_FinancialDisclosures\\_WalkingBeforeRunning\\_WEB5.pdf](http://nmethicswatch.org/wp-content/uploads/2017/01/NMEW_FinancialDisclosures_WalkingBeforeRunning_WEB5.pdf), p. 33. See also [http://nmethicswatch.org/wp-content/uploads/2018/09/NMEW\\_FDA-Follow-up-Report3.pdf](http://nmethicswatch.org/wp-content/uploads/2018/09/NMEW_FDA-Follow-up-Report3.pdf), p. 386, 387 for additional recommendations.

New Mexico Ethics Watch (NMEW) created a mock form that has been presented to the Secretary of State. That mock form is attached to these comments.

We note that the Commission has gone beyond the requirements of the FDA in requiring, in 1.8.4.10(B)(1)(c) that an officer or employee file a disclosure of financial interests "when the officer or employee believes, or has reason to believe, that the financial interest may be affected by their official acts or actions of the state agency that employs them..." and that the disclosure "must be filed within ten days of the date when the officer or employee knows, or should know, that a potential conflict has arisen...". We encourage the Commission to continue with this expansiveness beyond the FDA when crafting the model Code of Ethics relating to financial disclosure, as suggested in the recommendations provided in the above-linked reports.

August 5, 2020

VIA ELECTRONIC MAIL ONLY

New Mexico Ethics Commission  
UNM Science & Technology Park  
800 Bradbury Drive SE  
Suite 215  
Albuquerque, NM 87106

Re: New Mexico Ethics Commission Rulemaking R20-01

Dear Commissioners:

We are writing in response to the New Mexico Ethics Commission's request for comments on the proposed adoption of a new Part 4 of Title 1, Chapter 8, of the New Mexico Administrative Code, presenting a model code of ethics for submission to state agencies pursuant to Section 10-16G-5(A)(4) NMSA 1978.

Our organization believes the proposed model code of ethics would benefit from containing certain additional provisions pertaining to confidentiality that do not appear in the current version. These additional provisions, which are set forth in the attached draft of proposed amendments to the code, would consist of prohibitions against disclosure or misuse by state officers or employees of sensitive personal information that they have acquired by virtue of their positions as state officers or employees.

A prohibition against disclosure or misuse of confidential information for private gain is necessary to implement the statutory prohibition against such disclosure or misuse that is imposed by Section 6 of the Governmental Conduct Act (§10-16-6 NMSA 1978). The aforementioned statute reflects an important principle of ethical government service that has not been included in the proposed code of ethics, and we think it should be.

When New Mexicans provide their sensitive personal information to state agencies either to access the agency's services or participate in programs, they do so with a reasonable expectation their information will remain confidential. There are presently a few provisions among our statutes that attempt to limit the disclosure of discrete kinds of personal information by certain agencies (e.g., §7-1-8 et seq. NMSA 1978; §66-2-7.1 NMSA 1978). But some of these provisions have loopholes or exceptions that virtually swallow the rule (e.g., §66-2-7.1(A)(2) NMSA 1978). There is no uniform policy across state agencies dictating how state employees must handle New Mexicans "sensitive personal" information and when disclosure is appropriate. Yet for many state agencies to function properly, they need to obtain and handle sensitive personal information from New Mexicans. Examples of sensitive information individuals might want to keep private may include their status as a public assistance recipient or as a crime victim, national origin, disability, and religion. This type of information should be kept private by state employees unless disclosure is required by law.

We propose adding language to the model code that would provide such guidance. Specifically, we suggest including the definition of “confidential information” directly from Section 10-16-2(B) NMSA 1978 as part of the new Section 1.8.4.7. We also propose the inclusion of a new subsection defining “sensitive personal information” to mean “information about an individual who has provided the information for use by this agency and who may suffer harm or adverse consequences from disclosure of the information to persons outside the agency.”

These proposed additions would delineate the circumstances in which officials and employees of state agencies could share people’s personal information with outside agencies, and would prohibit this practice in all cases in which these circumstances are not present.

While our proposal may not have an exact counterpart in the current statutes, such supplementation of the statutory rules by departmental codes of conduct is expressly authorized by §10-16-11.1 NMSA. The prohibition on the disclosure of sensitive personal information would fit well within this statutory authorization, and such a prohibition is needed, as a matter of sound policy, to restrain inappropriate disclosure of New Mexicans’ personal information by state employees. We also suggest including examples of unallowable disclosure of an individual's personal, sensitive information within the Commission’s newly created commentary guideline as an aid to state employees.

In sum, state employees’ practice of sharing personal information with outside agencies or individuals to be used for purposes entirely unrelated to the purposes for which the information was provided undermines New Mexicans’ faith in their state government and hinders our state agencies in the performance of their proper functions. This practice should therefore be curtailed, and our proposed addition to the model code would begin to accomplish this aim by giving state agencies the opportunity to impose clearer restrictions. We hope the commission will give careful consideration to the inclusion of this provision in its model code.

Sincerely,

*//s// Gabriela Ibañez Guzmán*  
Gabriela Ibañez Guzmán  
Staff Attorney

Somos Un Pueblo Unido  
1804 Espinacitas St.  
Santa Fe, NM 87505  
(575) 496-9654 (cell)

PROPOSED AMENDMENTS TO THE DRAFT CODE  
OF ETHICS FOR STATE AGENCIES PUBLISHED BY  
THE STATE ETHICS COMMISSION IN THE  
NEW MEXICO REGISTER ON JUNE 23, 2020

1. In proposed new Section 1.8.4.7, insert the following additional definitions in alphabetical order, and renumber the other subsections accordingly:

“XX. ‘Confidential information’ has the same meaning as defined by Section 10-16-2(B) NMSA 1978, namely, information that by law or practice is not available to the public.”

“YY. ‘Sensitive personal information’ means information about an individual who has provided the information for use by this agency and who may suffer harm or adverse consequences from disclosure of the information to persons outside the agency.”

2. After Section 1.8.4.10, insert the following new Section 1.8.4.11, and renumber the succeeding sections accordingly:

"1.8.4.11                    Non-Disclosure of Confidential and Sensitive Personal Information

A. An officer or employee of this agency shall not use or disclose confidential information acquired by virtue of the officer’s or employee’s position with the agency for the officer’s or employee’s or another person’s private gain.

B. An officer or employee of this agency shall not disclose to anyone outside the agency sensitive personal information acquired by virtue of the officer’s or employee’s position with the agency unless disclosure is required by law, necessary to carry out the functions of the agency or expressly authorized by the person whose information would be disclosed.