



STATE ETHICS COMMISSION

CONCISE EXPLANATORY STATEMENT FOR AMENDMENTS TO 1.8.1 NMAC (NMSA 1978, § 14-4-5.5 & 1.24.25.14.F NMAC)

Submitted to New Mexico State Records Center and Archives: October __, 2020

1. **Citation to authority authorizing rule:** 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.
2. **Effective date of rule:** Date of final publication in *New Mexico Register*, likely Vol. XXXI, Issue 20 (October 27, 2020).
3. **Date of adoption of rule:** October 2, 2020
4. **Date of meeting at which agency voted to approve rule:** October 2, 2020
5. **Reasons for adopting rule:**
 - a. **1.8.1.9 & 1.8.1.10:** To establish a procedure whereby persons authorized to request advisory opinions may submit a request for an informal advisory opinion and receive the opinion from either the Commission's General Counsel or Executive Director before the next-scheduled Commission meeting.
 - b. **1.8.1.16:** To authorize virtual Commission meetings via web or teleconference in accordance with the Open Meetings Act, NMSA 1978, Section 10-15-1(C).

6. **Reasons for any change between the initial published amendments to rule and final adopted amendments to rule:**

Section 1.8.1.1 ISSUING AGENCY

No changes.

Section 1.8.1.3 STATUTORY AUTHORITY

1.8.1.3: Included reference to Section 10-16-13.1 of the Governmental Conduct Act.

Rationale: Under the Governmental Conduct Act, the State Ethics Commission is required to “advise and seek to educate all persons required to perform duties under the Governmental Conduct Act of those duties.” § 10-16-13.1(A). But local government officers and employees are not authorized to request formal advisory opinions. Commission staff believes the best way to reconcile the Commission’s duty to advise all persons subject to the Governmental Conduct Act of their duties with the restrictions in the State Ethics Commission’s power to issue formal advisory opinions is to permit local government officers and employees to request informal advisory opinions. Section 10-16-13.1 provides this authority.

Section 1.8.1.7 DEFINITIONS

1.8.1.7(D): Included reference to definitions contained in the State Ethics Commission Act.

Rationale: The Commission received comments pointing out that the terms “director” and “general counsel” are not defined in 1.8.3.7 NMAC. This change directs the reader to the State Ethics Commission Act for those terms as well as any other defined terms.

Section 1.8.1.9 ADVISORY OPINIONS

1.8.1.9: Combined Section 1.8.1.9 with Section 1.8.1.10, and divided the rule into new subsection A (dealing with advisory opinions) and new subsection B (dealing with informal advisory opinions). New subsection A(1) sets forth what qualifies as a request for an advisory opinion and the confidentiality requirements for identifying information contained in the request. New subsection (A)(2)-(4) sets out the requirements for the commission’s issuance of an advisory opinion: the commission must either (1) issue an advisory opinion within 60 days of receiving a request; (2) inform the requester that the commission will not issue an opinion and provide a written explanation of its decision; or (3) inform the requester that the commission requires more than 60 days to issue an opinion and keep the requester updated on the status of the request. New subsection 1.8.1.9(B) is similar to proposed section 1.8.1.10, with the following substantive edits: delete the vague phrase “for deliberation and decisionmaking” as unnecessary; addition of a new subsection 1.8.1.9(B)(1) to authorize persons subject to the Governmental Conduct Act to request informal advisory opinions.

Rationale: Commission staff recognized that there is a potential for members of the public to be confused about the difference between advisory opinions and informal advisory opinions, and that the rules for advisory opinions and informal advisory opinions are not organized to correspond to the process for requesting and receiving advisory opinions or informal advisory opinions. In addition, Commission staff believes that in order to discharge the Commission’s obligation to “advise and seek to educate all persons required to perform duties under the Governmental Conduct Act of those duties,” persons subject to the Governmental Conduct Act should be permitted to request informal advisory opinions. These concerns are addressed with the changes described above.

Section 1.8.1.10 INFORMAL ADVISORY OPINIONS

1.8.1.10: This section was deleted and merged with Section 1.8.1.9, for the reasons set forth above.

Rationale: See above.

Section 1.8.1.16 COMMISSION MEETINGS

1.8.1.16: This section was revised to include an introductory statement, to clarify that the format of commission meetings (i.e., in-person, virtual, or telephonic) is determined by this section. The section was further revised to state that the Commission “should” (as opposed to “shall”) schedule virtual meetings on a platform that allows members of the public to observe and participate. The section was also renumbered as a result of the deletion of Section 1.8.1.10.

Rationale: The existing rule did not have a clarifying introductory provision that would assist the reader to understand how the rule governs commission meetings. The existing introductory provision, which contains substantive requirements for the time, place, and duration of meetings, was more sensibly included in a discrete subsection. Additional edits are designed to ensure that this section does not impose requirements on the commission that stricter than the requirements of the Open Meetings Act.

7. **Reasons for not accepting substantive arguments made through written pre-filed public comment:**

Section 1.8.1.1 ISSUING AGENCY

No comments received.

Section 1.8.1.3 STATUTORY AUTHORITY

No comments received.

Section 1.8.1.9 ADVISORY OPINIONS

1.8.1.9(A)(1): New Mexico Ethics Watch argued that “the list of who can request an advisory opinion be expanded to include members of the public.” New Mexico Ethics Coalition similarly argued to “expand the list of those who can request advisory opinions to members of the public.”

Rationale: This comment is declined because its adoption would conflict with statute—specifically, NMSA 1978, Section 10-16G-8(A)(1). *See* NMSA 1978, § 14-4-5.7 (“No rule is valid or enforceable if it conflicts with statute. A conflict between a rule and a statute is resolved in favor of the statute.”).

1.8.1.9(A): New Mexico Ethics Watch argued for “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.” New Mexico Ethics Coalition similarly argued that the Commission should provide “clear decision rules or criteria for when an advisory opinion is warranted . . . [to] provide a public reference and avoid the perception that decisions to review in an advisory way are arbitrary or subjective.”

Rationale: This comment is declined because the State Ethics Commission currently issues advisory opinions response to every valid request. Should the Commission cease issuing advisory opinions in response to every valid request, at that point, sound and publicly-available decision criteria are advisable for the aforementioned reasons.

1.8.9(A): New Mexico Ethics Coalition argued for a rule that creates “a cap on the length of time it will take for an advisory opinion to be issued. 60 days is reasonable by delays with a 30-day notice should not extend beyond 4 months.”

Rationale: The Commission believes that the suggested limitation restricts the Commission’s discretion in a manner not required by the State Ethics Commission Act. Further, in certain instances the Commission may need to delay issuance of an advisory opinion beyond four months (for example, if the Commission lacks staff resources to write an opinion).

1.8.1.9(B): New Mexico Ethics Coalition argued for a rule that provides additional clarification “why requests for advisory opinions are confidential and how each party benefits from this confidentiality.”

Rationale: This comment is declined because, at NMSA 1978, Section 10-16G-8(B), the Legislature requires that “[a] request for an advisory opinion shall be confidential and not subject to the provisions of the Inspection of Public Records Act.” *See generally* § 14-4-5.7 (“No rule is valid or enforceable if it conflicts with statute. A conflict between a rule and a statute is resolved in favor of the statute.”). The Commission does not know the reasons why the Legislature as a corporate entity, or particular legislators, voted in favor of this statutory provision.

Section 1.8.1.10 INFORMAL ADVISORY OPINIONS

1.8.1.10(A): New Mexico Ethics Watch argued that members of the public should be able to request an informal advisory opinion, either through a hotline or through whatever channels are currently being employed by Commission staff. New Mexico Ethics Coalition also makes this argument.

Rationale: This comment is declined because its adoption might conflict with NMSA 1978, Section 10-16G-8(A)(1). The proposed rule would provide a way to circumvent the Legislature’s limit on who may request advisory opinions of the State Ethics Commission. The Commission declines to promulgate the proposed rule to avoid a conflict between the Commission’s rules and the State Ethics Commission Act. *See* § 14-4-5.7.

1.8.1.10(A): New Mexico Ethics Watch argued for “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.” New Mexico Ethics Coalition similarly argued that the Commission should provide “clear decision rules or criteria for when an advisory opinion is warranted . . . [to] provide a public reference and avoid the perception that decisions to review in an advisory way are arbitrary or subjective.”

Rationale: This comment is declined because the State Ethics Commission currently issues advisory opinions response to every valid request. Should the Commission cease issuing advisory opinions in response to every valid request, at that point, sound and publicly-available decision criteria are advisable for the aforementioned reasons.

Section 1.8.1.14 ADDRESS FOR FILING DOCUMENTS

No public comments received.

Section 1.8.1.16 COMMISSION MEETINGS

1.8.1.16(C): New Mexico Ethics Watch argued that the rule should specifically allow virtual attendance by members of the public even when the Commission meets in person. New Mexico Ethics Coalition also makes this argument.

Rationale: While the Commission will make every effort to facilitate attendance by members of the public at every Commission meeting, the Commission declines to adopt the suggestion as a rule binding on the Commission at this time. There are several reasons: First, as in the past, the Commission might hold future in-person meetings in venues around New Mexico, and Commission staff might not have adequate control of the venue's internet and AV capabilities to ensure compliance with the rule in each instance. Second, the Commission has not yet gained experience with conducting a simultaneous in-person and virtual meeting. Third, the Commission currently lacks the technology that would enable live broadcasting in-person meetings in a way that allows for contemporaneous public participation; however, the Commission is researching such technology. For these reasons, while the Commission intends to pursue this suggestion, it declines to promulgate it as a rule.

1.8.1.16(C): New Mexico Ethics Coalition argues that the Commission should make meetings available on YouTube for viewing later.

Rationale: The Commission currently makes video recordings of meetings available on its website. See www.sec.state.nm.us/transparency/. The Commission declines to codify this practice as a rule.

1.8.1.16(D): New Mexico Ethics Coalition argues that the Commission should have clear guidelines to “avoid the perception that limits are set arbitrarily or with the intent to stifle civic engagement. Specifically how time limits will be determined would be useful.”

Rationale: The rule codifies the Commission Chair's authority to run Commission meetings in a fair and efficient manner. As New Mexico Ethics Coalition notes in its pre-filed public comment, “[t]he Commission has done an excellent job of planning in-person and virtual meetings to allow for public comment.” In light of the Chair's current handling and accommodation of public participation and public comment, the Commission declines to adopt the proposed rule as unnecessary at this time.