

800 Bradbury Dr. SE
Suite 215
Albuquerque, NM 87106
(505) 827 7800
www.sec.state.nm.us



Hon. William F. Lang (*Chair*)
Jeffrey L. Baker
Stuart M. Bluestone
Hon. Garrey Carruthers
Ronald Solimon
Judy Villanueva
Frances F. Williams

STATE ETHICS COMMISSION

Executive Summary to the State Ethics Commission's Model Code of Ethics

January 2021

By an overwhelming vote in 2018, the people of New Mexico amended the state constitution to create the State Ethics Commission. In its 2019 session, the Legislature assigned duties and powers to the Commission. Among the Commission's many duties, the Commission must "draft a proposed code of ethics for public officials and public employees and submit the proposed code to each elected public official and public agency for adoption." This means that the Commission is required to provide a model code to all state agencies and institutions for them to review and consider adopting.

All state agencies already have the power to adopt their own codes of conduct, under the Governmental Conduct Act. Many have already done so. All statewide *elected* officials are *required* to adopt codes for themselves and the officers and employees they supervise.

Agencies that adopt codes may create ethical requirements for their officers and employees that are stricter than those in the state ethics laws. They may also address issues that are unique to their agencies by adding rules. These codes, once approved, are enforceable through each agency's disciplinary procedures. They also are intended to provide the basis for training new employees when they are hired, and, periodically, all employees of the agency.

The State Ethics Commission has approved this model code of ethics, which it recommends to each state agency and institution. The code sections are not effective until they have been adopted by each state agency, and subject to any lawful modifications that the agency may make. The Commission recommends the model code for several reasons:

First, the model code compiles not only the ethical requirements of the Governmental Conduct Act, but also those found in a number of other state and federal laws and regulations that govern officers and employees of state government. No other source combines all these ethical requirements into a single code.

Second, the model code is organized by topics, not statutes. This organization allows anyone who has a question about an issue to look up the ethics rules that might apply. They do not have to know in advance which statute or rule they must research to find an answer.

Third, the model code proposes some standards for agencies to consider that are stricter than those in statutory law. Where a model code provision recommends a stricter standard than a related statute requires, the Commission's commentary alerts the user to that recommendation. Stricter standards may prove to be important where the agency finds that a requirement in a statute is not clear or does not adequately protect the public interest.

Fourth, the model code offers extensive commentary and examples to explain many of its provisions. These explanations help users understand the meaning of the laws they are bound by. They also offer insights into how the Commission may apply the laws when it receives complaints of violations, or requests for interpretations of statutes.

Fifth, the completeness of the model code and its explanations makes it a comprehensive and reliable teaching tool for staff ethics training.

Sixth, the model code is informative not only to the officers and employees of state government, but also to others who may face ethical issues in their dealings with state government, such as contractors, campaign donors, and clients.

Finally, the Governmental Conduct Act requires each agency that has a code of conduct to review it at least once every four years. The commission's model code provides guidance to the agencies on the current state of New Mexico ethics law so that those reviews will be accurate and current.

Below are brief summaries of each section of the model code. Each section is referred to by its number in the New Mexico Administrative Code.¹

- 1.8.4.7: Definitions: provides definitions of terms used in the model code. Other terms are defined in the statutes that form the basis for the model code, especially the Governmental Conduct Act.
- 1.8.4.8: Structure of the code and corresponding commentary: explains the organization of the code and the Commission's explanations.
- 1.8.4.9: Principles of public ethics: describes the principles on which the model code is based. This section is not intended to create any requirements that may be enforced through administrative or disciplinary actions, even after adoption by an agency. But the principles may help set the ethical tone for the agency staff and explain the purpose and intended interpretation of the enforceable rules that follow.
- 1.8.4.10: Honest services; avoiding conflicts of interest: addresses the ethical rules created in a number of our state's laws and rules. Topics addressed in this section include:

¹ The brief descriptions herein should not be relied upon for answers as to whether any particular conduct is permissible under law; rather, the summaries are intended only to direct the reader to the appropriate section of the code to address their questions.

A. Outside employment: requires officers and employees to avoid conflicts when they work at jobs outside of government, and to disclose that outside work to their supervisors or other authorized administrative staff.

B. Disclosure of potential conflicts of interest and disqualification: generally defines financial interests that agency officers and employees must disclose, and how to do so. It also explains when their conflicts disqualify them from acting on matters that would otherwise lie within their area of responsibility.

C. Business with regulated entities: generally prohibits certain agency officers or employees from doing business or accepting employment with entities they regulate.

D. Accepting or giving gifts: prohibits officers and employees from soliciting any gifts, or accepting unsolicited gifts over \$250 in value, from restricted donors, or from soliciting charitable donations from them. Defines gifts that should be declined because of the appearance that would create, including certain gifts from subordinate employees. Requires reporting of certain gifts or offers. Also limits gifts that agency officers or employees may give from public funds, or, in certain circumstances, from their own funds.

E. Honoraria; no solicitation or acceptance of honoraria permitted for speaking or writing: prohibits acceptance of honoraria for providing services related to the performance by an officer of employee's public duties, but permits reimbursement of travel expenses.

F. Timekeeping, reimbursement, and use of state property: defines limits on using public resources.

G. Procurement: summarizes the ethical obligations of fairness, honesty, confidentiality and due diligence imposed by the Procurement Code, Governmental Conduct Act and state criminal statutes on public officers and employees involved in procurement. Specifically prohibits employees involved in procurement from contracting with their agencies, provided that agencies waive those restrictions under certain conditions, including public disclosure as defined in the rule. Defines agency responsibilities to prevent such conflicts.

H. Former officers and employees: limits former officers and employees from using their prior employment with the agency to the unfair advantage of new employers or clients.

1.8.4.11: Open government and freedom of information: summarizes the state laws ensuring transparency of government by requiring open meetings and inspection of public records.

1.8.4.12: Political activity: compiles the limitations imposed by the Governmental Conduct Act, the State Personnel Act, and the federal Hatch Act on political activity by state officers and employees.

- 1.8.4.13: Non-disclosure of confidential or sensitive personal information: defines limits on disclosing certain information obtained through one's employment with the government.
- 1.8.4.14: Nepotism: defines the family members a state employee may not hire, promote or directly supervise.
- 1.8.4.5: Sexual harassment: summarizes prohibited sexual harassment by public officials and the duty of each agency to prevent it and respond to complaints.
- 1.8.4.16: Substance abuse: summarizes the responsibility of each agency to appoint a substance abuse coordinator and defines the coordinator's responsibilities.
- 1.8.4.17: Enforcement and interpretation: describes administrative sanctions agencies may impose for violations, agency responsibilities to circulate its code and establish an internal complaint procedure, and how to seek interpretations from the State Ethics Commission of provisions in this model code.

Last, state law authorizes other state agencies to enforce certain laws that also govern conduct within a government workplace, including laws addressing discrimination and sexual harassment. The commission may refer to those agencies any questions of interpretation of the laws that they enforce. Those laws are therefore identified but not described as extensively in this model code.

The State Ethics Commission would like to offer special thanks to Paul Biderman and Clifford Rees, who contributed to the development of this model code of ethics.

January 19, 2021

/s/
Jeremy Farris
Executive Director
State Ethics Commission



STATE ETHICS COMMISSION

PROPOSED CODE OF ETHICS (1.8.4 NMAC) WITH COMMISSION COMMENTARY AND EXAMPLES

1.8.4 NMAC (“Proposed Code of Ethics”): This rule provides a model code of ethics for public officials and public employees, pursuant to NMSA 1978, Section 10-16G-5(B)(4) NMSA 1978. The model code of ethics compiles, in a single rule, the ethics provisions of state laws and rules governing the conduct of state officers, employees, and those who interact with them in an official capacity. Topics addressed in the model 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.

| | |
|------------------|--|
| 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, 1/1/2021]

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, 1/1/2021]

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, 1/1/2021]

1.8.4.4 DURATION: Permanent.
[1.8.4.4 NMAC-N, 1/1/2021]

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, 1/1/2021]

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 officers and employees, the violation of which could form the basis for discipline by the adopting agency, including dismissal, demotion or suspension, in accordance with state law.
[1.8.4.6 NMAC-N, 1/1/2021]

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 any person, company or other organization that buys, sells or provides goods or services, including non-governmental or not-for-profit organizations.

C. "Code" means this proposed code of ethics.

D. "Commission" means the State Ethics Commission.

E. "Confidential information" has the same meaning as defined by Subsection B of Section 10-16-2 NMSA 1978, namely, information that by law or practice is not available to the public.

F. "Family member" means a first-degree, second-degree or third-degree relative, as those terms are defined at Subsection B of 1.8.4.14 NMAC.

G. "Financial interest" means an ownership interest in a business or property; or employment or prospective employment for which negotiations have already begun.

H. "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.

I. "Immediate family member" means a first-degree or second-degree relative, as those terms are defined at Subsection B of 1.8.4.14 NMAC.

J. "Indirectly" means to perform an act, achieve a result or obtain a benefit through another person, by use of implication, suggestion or passive acceptance.

K. "Market value" means the amount for which a good or service can be sold on the relevant market.

L. "Official act" means any act or omission to act that would not be possible but for the actor's official position or state employment.

M. "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.

N. "Restricted donor" has the same meaning as defined by Subsection D of Section 10-16B-2 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.

O. "Sensitive personal information" means confidential identifying information such as: social security numbers or individual tax identification numbers, a person's place and date of birth, a person's status as a recipient of public assistance or as a crime victim, and a person's sexual orientation, physical or mental disability, immigration status, religion, or national origin.

P. "Shall" means must, and **"must"** means shall.

Q. "Substantial financial interest" means an ownership interest that is greater than twenty percent.

R. Any other terms shall be defined for purposes of this rule as they are defined in Section 10-16-2 NMSA 1978.
[1.8.4.7 NMAC-N, 1/1/2021]

COMMISSION COMMENTARY TO 1.8.4.7 NMAC:

[1] The definition of "business" in subsection 1.8.4.7(B) is intended to be broad enough to encompass non-profit organizations doing business with government agencies. It does not include government agencies engaged in transactions with one another.

[2] For definitions of the degrees of relationship of family members and immediate family members by marriage, refer to the commission comment [1] to 1.8.4.14.

[3] The definitions of "financial interest" in subsection 1.8.4.7(G) and "substantial financial interest" in subsection 1.8.4.7(Q) are based upon the definitions of those terms in the Governmental Conduct Act, NMSA 1978, §§ 10-16-2(F) and (L), respectively. When applying the term to the Procurement Code, NMSA 1978, §§ 13-1-28 to -199, "financial interest" is defined differently, *see* NMSA 1978, § 13-1-57.

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, 1/1/2021]

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 be impartial and fair, and 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 Openness to Change. Individuals not only err in judgment but also act in ways that unconsciously benefit some and burden others; accordingly, officers and employees should be open to and invite review, correction and reversal of their actions when they are mistaken, have failed to take relevant information into account, or are otherwise in violation of the principles of this code or the law.

[1.8.4.9 NMAC-N, 1/1/2021]

COMMISSION COMMENTARY TO 1.8.4.9 NMAC:

- [1] This section describes the core principles of ethical public service. Public officers and employees are entrusted by the people of New Mexico to manage and spend their tax dollars efficiently and with integrity. The public expects government services to be delivered fairly, promptly, and respectfully. The public wants public servants to know their jobs, to do them diligently, and to be held accountable whenever they fail to live up to the core standards of ethical public service.

- [2] The legislature has codified these expectations as duties incumbent upon public officers and employees NMSA 1978, Section 10-16-3(A):

A legislator or public officer or employee shall treat the legislator's or public officer's or employee's government position as a public trust. The legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.

- [3] The principles set out in this section do not create enforceable standards of conduct. Rather, they are designed to serve as a guide to help public officers and employees understand and apply the specific sections of this code of ethics. For example, a reader might ask what legitimate business an agency of the state has in investigating and potentially disciplining an officer or employee for failing to disclose the financial interest of a close family member in an official decision (Section 1.8.4.10(B)). The principles above furnish an answer: every official action must advance the public interest, be impartial and independent, and be consistent with previous actions taken under similar circumstances.
- [4] A code of ethics cannot anticipate every issue that may arise, and there may be reasonable disagreement over what the principles above require in each situation. Public officers and employees should use their own judgment to consider how these principles apply to various situations. Public officers and employees who keep these principles in mind are more likely to succeed in meeting the public's high expectations.
- [5] These rules set a high but attainable standard of ethical conduct. Occasional problems and emergencies can nonetheless get in the way of complete compliance by public employees, especially people with significant family responsibilities. If such challenges are likely to be recurring, employees should discuss them with supervisors and work out arrangements that accommodate the employee's special needs while protecting the public interest.
- [6] Subsection A. Honest Services are the public's right to receive services from public officers and employees, free of unlawful influences. This code of ethics and the Commission's accompanying commentary are designed to help protect public officers and employees from performing their duties improperly because of inappropriate pressure or temptation.
- [7] Subsection B. Proportionality recognizes that the law gives public officers and employees discretion in exercising their authority; this discretion must be exercised wisely. This can occur, for example, when officers impose administrative penalties on licensed or regulated businesses, or upon subordinate employees, for violating rules. That discretion should be used to signal that violations of laws are to be taken seriously, but not to the point of imposing unfair

harshness. Not every violation of a licensing law, for example, requires revocation of the license.

- [8] Subsection C. Impartiality and Fairness in the performance of public duties is expected by all users of government services. All the actions of government officers and employees in the award of benefits, contracts, and other expenditures; in enforcing criminal and civil laws; and in personnel decisions and other actions should be made with due consideration of the interests and wishes of all constituents, to the extent allowed by law. Even decisions that are impartially made may leave an appearance of impropriety, if they are not adequately justified and explained. The rules on conflicts of interest and procurement emphasize this principle.
- [9] Subsections D & E. Consistency and Diligence in public service require thorough understanding and commitment to one's responsibilities. Professional public servants seek out training opportunities so that they will excel in their job performance. They meet or exceed reasonable deadlines for tasks and perform them efficiently, thoroughly and conscientiously. The public relies on government to continue its past policies and practices; if changes are needed, the agency should alert the public to the change promptly to allow time to adapt.
- [10] Subsection F. Respect. Ethical public officers and employees treat clients, co-workers, supervisors, contractors, and all other people with respect. Their respect is reflected in their use of language, their behavior while on the job, acceptance of supervision, and particularly in how constructively they manage conflict. Above all, public officers and employees never engage in sexual or any other type of harassment toward anyone they work with or encounter. They respect public property and the property of their coworkers.
- [11] Subsection G. Transparency. Government actions can and often do have major impacts on the interests of the public. Members of the public are entitled to know what decisions are being made, the processes used to reach them, and the reasons for each action taken. Only through such transparency can the public make their feelings known to their elected officials, and either appreciate their actions or hold them accountable.
- [12] Subsection H. Fallibility and Openness to Change. Supervisors who demand rigid conformity to established practices or reject staff initiatives out of hand squelch the creativity and new ideas that employees might want to offer. Those ideas might prove beneficial to the organization's productivity and reputation. While experiments may also lead to mistakes, supervisors should be tolerant of such efforts. Those that succeed may well outshine the occasional failures.

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, including self-employment information;

(ii) all sources of gross income over \$5,000, identified by one of the following general category descriptions that disclose the nature of the income: law practice or consulting operation or similar business, finance and banking, farming and ranching, medicine and health care, insurance (as a business and not as a payment on an insurance claim), oil and gas, transportation, utilities, general stock market holdings, bonds, government, education, manufacturing, real estate, consumer goods sales with a general description of the consumer goods and the category "other," with a general description of the other income source;

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

(iv) other business interests of \$10,000 or greater value in a New Mexico business or entity, including any position held and a general statement of purpose of the business or entity;

(v) memberships on boards of for-profit businesses in New Mexico;

(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. 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.

(3) Disclosure of non-profit board memberships. An officer or employee of this agency shall disclose within 30 days of taking office and each January thereafter all memberships on non-profit boards.

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.

(a) An officer or employee of this agency may not, directly or indirectly, solicit a gift from a restricted donor.

(b) An officer or employee of this agency may not, directly or indirectly accept, and must decline, an unsolicited gift with a market value in excess of \$250 from a restricted donor or any other person who offers the gift because of the donee's status as an officer or employee of this agency. No more than one such gift or gifts having a total value of \$250 may be accepted by the same officer or employee within a single calendar year, and any such gift must be disclosed as required by paragraph 5 of this subsection.

(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 grade 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 is offered by a person or business entity who has interests that may be substantially affected by 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 to an officer or employee.

(5) **Disclosure of offers or 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 receives a gift of any value 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, Section 14 of Article 9 of the New Mexico Constitution.

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.

(d) This agency may not contract with a business in which any officer or employee of the agency, or a family member, has a substantial financial interest; however, the agency may enter such a contract if the officer or employee publicly discloses the substantial financial interest and the contract is awarded through a competitive process.

(e) The requirement to make public disclosure pursuant to subparagraphs (c) and (d) of paragraph (3) of this subsection shall be satisfied by correspondence to the state purchasing agent and by posting the required disclosure in a prominent place on the webpage of the state 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) discloses all campaign contributions, where such contributions in the aggregate exceed \$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 two years of the date of the officer's or employee's separation from this agency, 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.

(c) Nothing in this paragraph shall prevent an agency from contracting with a former employee on terms that otherwise comply with state law and the provisions of this code.

(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, 1/1/2021]

COMMISSION COMMENTARY: 1.8.4.10(A) and (B)

Disclosure of outside employment and other financial interests

Basic disclosure requirements

[1] Subsection A is intended to ensure that any private jobs held by officers and employees of state government do not create conflicts with their state jobs.

[2] Subsection A(2) requires an officer or employee to disclose outside employment to a supervisor or other designated agency representative. Disclosure of outside employment is required by the Governmental Conduct Act. This rule specifies details for that disclosure. *See* NMSA 1978, § 10-16-4.2.

- [3] Subsection B requires disclosure of a list of financial interests, either of the officer or employee or their spouses, that may conflict with the officer's or employee's duties under their state jobs.
- [4] Subsection B(1)(b) requires the officer or employee who holds any of the potentially conflicting financial interests listed in that paragraph to disclose those interests either before entering state employment, or within ten days of the date when the employee knows (or should know) that a potential conflict of interest exists. The Financial Disclosure Act is less stringent, requiring disclosure prior to entering state employment and every January thereafter. *See* NMSA 1978, §§ 10-16A-3(A)-(C) & 10-16-4(A). The Commission believes that disclosure of potentially conflicting outside employment should be prompt, to ensure that no conflicts exist during the period before the disclosure is due.

Special restrictions on outside employment for employees involved in the contracting process

- [5] In addition to the rules applicable to all state officers and employees requiring them to disclose any outside employment, Subsections B(2) and G(3)(b) of Section 10 note a special rule for officers and employees involved in contracting. Under the Governmental Conduct Act, an officer or employee of a state agency involved in the agency's contracting process may not become employed by *any* business contracting with the agency. *See* NMSA 1978, § 10-16-4.3. A similar provision is found in the Procurement Code at NMSA 1978, § 13-1-193. This restriction applies even if the agency employee is not involved in contracting between that business and the agency.
- [6] While the Procurement Code includes a provision allowing waivers from the prohibition in the previous paragraph at NMSA 1978, § 13-1-194, the Governmental Conduct Act does not permit waivers under any circumstances.

Contents and timing of disclosure statements

- [7] The Financial Disclosure Act, NMSA 1978, Sections §§ 10-16A-1 to -8, requires legislators and statewide elected officers to file financial disclosures with the Secretary of State within 30 days of their taking office and each subsequent January. *See* NMSA 1978, § 10-16A-3. Candidates for election to these offices must file their disclosure statements along with their declaration of candidacy. Certain designated appointed officers have similar disclosure requirements in that rule. These appointed officers include any state agency head, or any officer whose appointment to a board or commission is subject to confirmation by the New Mexico State Senate. *Id.*
- [8] The Financial Disclosure Act requires disclosure of: employment by the public officer and that officer's spouse, both during the time of reporting and the year prior to taking office; a description of each spouse's job; each broad category of

work resulting in gross income over \$5,000 in the reporting year; employment for state agencies that paid \$5,000 or more; and any state agency before which the public officer or spouse represented or assisted clients. *See* NMSA 1978, § 10-16A-3(D). Public officers may update their report at any time but are required to file at least once annually. *See* NMSA 1978, § 10-16A-3(D).

- [9] Under the Financial Disclosure Act, an employee not otherwise required to make a financial disclosure must do so if the employee holds a financial interest that may be affected by the employee's official acts "or [the] actions of the state agency by which he is employed." *See* NMSA 1978, § 10-16A-4.
- [10] The Governmental Conduct Act requires all state officers and employees to disclose outside employment to their office or supervisor. *See* NMSA 1978, § 10-16-4.2. The Governmental Conduct Act and Procurement Code also prohibit officers and employees involved in contracting from working for any contractor to the agency, irrespective of whether the state officer's or employee's work involves that contractor. While the Procurement Code includes a provision allowing waivers from this prohibition (NMSA 1978, § 13-1-194), the Governmental Conduct Act does not permit waivers under any circumstances.

EXAMPLES: 1.8.4.10(A) and (B)

- [a] **Disclosure of an outside job.** A state correctional facility cook moonlighting as a chef in a restaurant has a duty to report her outside job to her state Corrections Department supervisor on a signed conflict disclosure form. *See* 1.8.4.10(A)(1) and (A)(2)(a) NMAC. The supervisor confirms that the hours for her outside job do not conflict with her state job. The cook agrees to disclose to the supervisor if she is asked to work any hours that conflict, before agreeing to new hours. *See* 1.8.4.10(A)(2)(c) NMAC; *see also* NMSA 1978, § 10-16-4.2 ("A public officer or employee shall disclose in writing to the officer's or employee's respective office or employer all employment engaged in by the officer or employee other than the employment with or service to a state agency or local government agency.").
- [b] **Factors to consider involving an outside job.** A hydrologist for the Environment Department is offered a part-time contract with an oil company to analyze impacts of its drilling operations on aquifers. The hydrologist reports the offer to his supervisor, committing to work for the oil company only on his days off, and pointing out that oil drilling is regulated by a different state agency, the Oil Conservation Division of the state Energy, Minerals and Natural Resources Department. *See* 1.8.4.10(A)(1) and (A)(2)(b) NMAC. He and his supervisor must consider the time this job would require, the possibility that the hydrologist might be asked to challenge findings by the staff of the Oil Conservation Division, and similar factors to determine whether this employment would create significant conflict with the hydrologist's public responsibilities. *See* 1.8.4.10(A)(1) and (2)(b) NMAC; NMSA 1978, § 10-16-1-4.3.

- [c] **Disclosure of an unpaid job.** A specialist for the state Department of Information Technology is asked to provide volunteer services to a non-profit organization. Since the outside employment is unpaid, disclosure is not required by the rule. *See* 1.8.4.10(A)(1) NMAC. The specialist may nonetheless wish to disclose the outside work so that his supervisor can point out any issues that may be created and how to avoid them. *See* 1.8.4.10(A)(2)(c) NMAC. Such a conflict might arise, for example, if the non-profit group were to use the specialist's services to develop evidence in a lawsuit against the state. *Id.*
- [d] **Employment with a prospective contractor prohibited because of employee involvement with RFP.** Joanne, an employee of the state Department of Health (DOH), is asked by her supervisor to participate in drafting a Request for Proposals (RFP) for public relations services, after which she will help to oversee the work of the selected contractor. She is an expert in messaging to the public how to avoid infection during an epidemic. DOH contracts with a public relations firm that then offers a part-time, temporary job to Joanne to draw upon her expertise to craft and disseminate effective messages. Joanne is prohibited from accepting the offer because she was involved in developing the RFP. *See* 1.8.4.10(B)(2) and 1.8.4.10(G)(3)(b) NMAC.
- [e] **Employment with prospective contractor prohibited for employee involved in unrelated contracting.** Same facts as in example [d], above, except that Joanne is involved only in preparing an RFP for health inspections at restaurants, not the public health messaging campaign. She discloses to her supervisor the job offer from the public relations firm. Even though her involvement in the contracting process for the agency is unrelated to the proposed outside employment, she still is prohibited from accepting the offer. *See* 1.8.4.10(B)(2) and 1.8.4.10(G)(3)(b) NMAC. The statute and rule prohibit any employee involved in the agency's contracting process from working for any contractor with that agency, regardless of whether the employee was involved in that particular contract. *Id.*; *see also* Comment [5], above.
- [f] **Outside work by employee not involved in contracting processes.** Fred works as a park ranger for the State Parks Division (Division) of the Energy, Minerals and Natural Resources Department. His job does not involve any procurement. He is recruited by a non-profit conservation group which has contracts with the Division. The group wants to pay him to provide tourist guide services on his days off. Fred is not prohibited by the law from working for pay for a group that contracts with his Division because he is not involved in contracting for his agency. He must, however, still disclose the outside work to his supervisor before beginning it. *See* 1.8.4.10(B)(2) NMAC.
- [g] **Disclosure of outside employment by commissioner.** Henry is appointed to the Construction Industries Commission, receiving the required state Senate confirmation. He files his financial disclosure form with the Secretary of State immediately after taking office in January. Six months later, in June, he accepts a

job as a manager for a corporation that builds large construction projects. He discloses that employment on his financial disclosure statement filed the following January, which he simultaneously files with the Superintendent of the Regulation and Licensing Department. *See* 1.8.4.10(B)(1)(b) NMAC. While Henry has complied with the disclosure requirements of the Financial Disclosure Act, he has nevertheless violated 1.8.4.10(B)(1)(c). The rule requires him to file the disclosure within ten days of when he knows about the conflict. That is sooner than it is required by the statute. *See* NMSA 1978, § 10-16A-3.

COMMISSION COMMENTARY: 1.8.4.10(C)

Business with regulated entities

- [1] Subsection C prevents state officers and employees with regulatory authority from developing financial interests in the entities they regulate. Thus the subsection prohibits officers or employees of regulatory agencies from making sales to, accepting employment with, or entering into contracts with regulated businesses or individuals.
- [2] While officers or employees of a regulatory agency may not be able to prevent their immediate family from accepting employment with a business that is regulated by the agency, the officers or employees must in such circumstances disqualify themselves from any official acts or decisions.
- [3] The rule does not apply to officers or employees who are ordinary customers of the regulated entity, so long as they get no special treatment.

EXAMPLES: 1.8.4.10(C)

- [a] An intervenor in a rate case involving a water utility company moves to disqualify one of the commissioners who is a customer of the water utility. This alone is not considered a conflict of interest, unless the commissioner is given a lower rate or other favorable treatment by the utility.

COMMISSION COMMENTARY: 1.8.4.10(D)

Accepting or giving gifts

- [1] Gifts: Ethics rules aim to remove undue influence over government officers and employees, as well as any reasonable perception of such undue influence. Gifts to public officials may be nothing more than personal shows of friendship for the officials as people, unrelated to their public duties. But in some circumstances, gifts can set off alarm bells among the public, ethics watchdog groups and the media, who may see them as attempted bribes for official favors.
- [2] As a result, the state has enacted a law defining what gifts may or may not be given to or received by public officers and employees. The Gift Act, NMSA 1978, §10-16B-1, does not prohibit all gifts to public officers and employees. Instead,

the Act identifies certain persons as “restricted donors,” people who have an interest in the official actions taken by these government employees. The Act places restrictions on gifts that such people can give, or that the public officials can accept, to help protect public confidence in the independence and objectivity of official decisions.

- [3] Paragraph D(1) of 1.8.4.10 NMAC prohibits public officials from soliciting any gift from restricted donors. It also prevents them from accepting any unsolicited gifts, if they are given because of the donee’s status as an officer or employee of the agency. This rule creates a more restrictive policy than that of the state law, which permits gifts of up to \$250.
- [4] Restricted donors are defined in this rule at 1.8.4.7(N) NMAC, and in section D of the Gift Act, essentially as people who want something from, or will be affected by the action of, the agency where the officer or employee to whom they are giving a gift works. The term also includes lobbyists or their clients with respect to matters within the officer’s or employee’s jurisdiction.
- [5] Paragraph D(2) of 1.8.4.10 NMAC prohibits a public officer from accepting gifts from an employee under his or her supervision, or soliciting business from a supervised employee. This rule is designed remove any opportunity for a public officer to pressure an employee he or she supervises to pay money for more favorable treatment. The rule also prevents other supervised employees from feeling pressured to make gifts to or purchases from their supervisors.
- [6] Paragraph D(3) similarly prevents the public officer or employee from soliciting charitable donations from subordinate employees or from businesses regulated by the state agency.
- [7] Paragraph D(4) addresses situations not covered by the rest of this rule, such as gifts from people who are not restricted donors. It sets criteria for the state officer or employee to consider when offered a gift. These criteria include the size of the gift and whether it is offered at a time when the public official is acting on an issue important to the donor. This policy is not included in the Gift Act.
- [8] Paragraph D(5) requires that the employee disclose details of offers of gifts, or gifts that an employee takes inadvertently, from a restricted donor. This requirement is not included in the Gift Act.
- [9] Paragraphs D(6) and (7) restrict donations that a public officer or employee may make to others, either from their own or public funds. The Gift Act does not address gifts made by public officers or employees.

EXAMPLES: 1.8.4.10(D)

- [a] **Holiday gifts.** The representative of a public utility company goes to the Public Regulation Commission to convey holiday wishes on behalf of the company, and hands out small packets of pecans grown in state to all the commissioners and staff. The gifts are well under the \$250 limit in the Gift Act on permissible gifts by restricted donors, NMSA 1978, §10-16B-3(A). But the gifts still violate this rule, which has no allowable limit for gifts from restricted donors. Since the gifts are plainly given because of the official status of the people receiving them, they are impermissible under 1.8.4.10(D)(1) NMAC.
- [b] **Soliciting for charities.** During the week of Christmas, a hearing officer imposes a fine on a drilling company for improper practices that poisoned the groundwater. Given the season, the hearing officer offers to suspend the fine if the company donates at least half the amount of the fine to a charity feeding people in need. Despite the hearing officer's charitable intentions, the offer is an improper solicitation under the Gift Act, at NMSA 1978 §10-16B-3(C), as well as a violation of this rule, 1.8.4.10(D)(2)(a).
- [c] **Declining permissible gifts.** Mary, the head receptionist in the Governor's office, is surprised to receive a large, extravagant bouquet of flowers from a businessman, who has been in the office only once. The businessman knows that Mary maintains the Governor's calendar, with the ability to suggest whom the Governor should meet. Mary looks up the definition of "restricted donor" in the Gift Act, NMSA 1978, §10-16B-2(D), and concludes that the businessman does not fit any of the definitions, so she accepts the flowers. Although Mary is correct in her reading of the Gift Act, at least from what she knows, this rule holds her to a stricter standard than that of the law, 1.8.4.19(D)(4) NMAC. This rule requires an employee to consider declining the gift, based on the listed factors. In this case, the implication that the donor wants Mary to prioritize his requests for access to the Governor should lead her to consider returning the gift, under subparagraph (d).
- [d] **Gifts made by agency officers or employees.** The state housing authority director has just named the organizations chosen to receive grants to build affordable housing. Because the director felt that one organization that did not receive an award does good work, she writes them a personal check as a donation, to show appreciation for their work. Her donation is not prohibited under 1.8.4.10(D)(6)(a), because the agency is not doing business with the organization or considering doing business with them.
- [e] **Disclosure of gifts from restricted donors.** An inspector for the General Services Department sees on his desk a pen and pencil set, with a note from a contractor. The inspector ensures that this contractor's work on state buildings complies with building codes. The inspector returns the set to the contractor, and must report the gift to his supervisor the information required in 1.8.4.10(D)(5).

- [f] **Gifts from friends at the agency.** A manager at a state agency is dating an employee in another division of the same agency. The employee's job is at a lower grade than the manager's, but she is not his supervisor. The employee brings her a birthday gift. The supervisor may accept the gift, because she is not his supervisor and they have a personal relationship justifying the gift.
1.8.4.10(D)(2).

COMMISSION COMMENTARY: 1.8.4.10(E)

Honoraria

- [1] Paragraph 1.8.4.10(E) prohibits state employees from accepting payments of any kind for giving speeches or other service relating to their official duties. The rule makes clear that any such services are to be provided as one of the responsibilities owed to the public by all state officials.
- [2] The rule allows the officer or employee to be reimbursed for actual expenses for giving the speech or other service. Reimbursement substitutes for claiming travel expenses from the agency of the officer or employee.
- [3] The rule does not prohibit the officer or employee from accepting payment for private business work outside the agency. Such work must be disclosed under 1.8.4.10(A)(2) NMAC.
- [4] While the Governmental Conduct Act, at NMSA 1978, § 10-16-4.1, allows honoraria of up to \$100 in such cases, the New Mexico Constitution forbids acceptance of any honoraria by state employees, at Article XX, § 9. The Commission believes that the Constitutional provision is controlling, and is better policy.

EXAMPLES: 1.8.4.10(E)

- [a] A museum curator for the Department of Cultural Affairs is invited to give an evening lecture to a garden club on Georgia O'Keeffe's New Mexico paintings. Since this requires driving several hundred miles and an overnight stay, the club offers to reimburse his travel costs and pay him a \$100 honorarium as a token of appreciation. The curator accepts the travel reimbursement, which saves money from the museum's travel budget, but politely declines the honorarium, under this rule.
- [b] The same curator, an expert on Mozart, is offered a fee by the Santa Fe Opera to give a lecture before a performance of one Mozart's operas. The curator has no responsibility involving music in his museum role. So long as he prepares for and delivers his lecture on his own time, he can accept the payment.

COMMISSION COMMENTARY: 1.8.4.10(G)

Procurement

- [1] Paragraph 1.8.4.10(G) NMAC compiles ethics-related rules from the Governmental Conduct Act, NMSA § 10-16-1 and the Procurement Code, § 13-1-28. The goal is to ensure fair and equitable treatment for all seeking to contract with the state. A fair process is essential to encourage people to put in bids or proposals, giving the state an optimal array of proposals to select among.
- [2] Paragraph 1.8.4.10(G)(3)(a) NMAC prohibits from participation in a procurement by an officer or employee who has a financial interest in a business that is participating in the procurement. This prohibition also applies when an immediate family member holds such an interest. The terms “immediate family member” and “financial interest” are defined in Subsection 1.8.4.7(I) and (G).
- [3] Paragraph 1.8.4.10(G)(3)(b) NMAC prohibits officers or employees of a state agency who participate directly or indirectly in procurement from being employed at the same time by any contractor with the agency. This rule is found in both the Governmental Conduct Act, NMSA 1978, § 10-16-4.3, and the Procurement Code, NMSA 1978, § 13-1-193. Note that these statutes prevent employment with a contractor who has *any* contracts with the agency, whether or not the agency officer or employee participated in that particular procurement.
- [4] Paragraph 1.8.4.10(G)(3)(c) NMAC permits the agency to waive the conflicts in either subsections (a) or (b), if the criteria in the rule are satisfied. Public disclosure is defined in subparagraph (e). This waiver is permitted in the Procurement Code, NMSA 1978, § 13-1-194. There is no such waiver permitted under the Governmental Conduct Act, however.
- [5] Paragraph 1.8.4.10(G)(3)(d) prohibits the agency from contracting with a business in which any officer or employee of the agency, or their family member, has a substantial financial interest, unless public disclosure of the conflict is made and the procurement is done through a competitive process. The terms “family member” and “substantial financial interest” are defined in 1.8.4.7(F) and (Q) respectively.
- [6] Paragraph 1.8.4.10(G)(4) defines the due diligence obligations of the agency. These include ensuring that anyone submitting a bid or proposal has no input into the preparation of the proposal; and that no campaign contributions have been made during the time period during which they are prohibited.

EXAMPLES: 1.8.4.10(G)

- [a] **Contribution to RFP by employee of aspiring contractor.** A member of the IT procurement staff of a state agency wants to be sure the RFP he is working on requires the most up to date software. He places a call to a classmate who identifies the desired software. The classmate, having contributed knowledge in

the preparation of the request for proposal, is barred from submitting a proposal under Paragraph 1.8.4.10(G)(4).

- [b] **Employee indirectly involved in procurement also employed by contractor by**
A corrections officer at the state penitentiary is asked to keep track of food supplies to ensure that the necessary amounts are on hand at all times. The assigned officer works on some of her days off with a company that supplies part of the food. Her moonlighting violates 1.8.4.10(G)(3)(b). Her conflict may be waived by the Department under paragraph (G)(3)(c), but the agency will have to meet the criteria in that rule.

- [c] **Contract offer by business owned by family of agency employee.** A rural field office of the Oil Conservation Division needs equipment to conduct well inspections. The only supplier in the area with the needed equipment belongs to a company owned by the family of one of the staff of the agency. The staff member has no role in procurement. The Division may contract with the family-owned business, provided that, first, public disclosure is made under subparagraph (G)(3)(e), and, second, the procurement is performed pursuant to a fully competitive process.

COMMISSION COMMENTARY: 1.8.4.10(H)

Former officers and employees

Restrictions against contracting by the agency

- [1] Conforming to the Governmental Conduct Act, NMSA 1978, § 10-16-8, this rule divides the ethical restrictions on contracting with former officers and employees into two parts: restrictions on the agency, addressed in paragraph (H)(1), and restrictions on the former officer or employee, in paragraph (H)(2). Paragraph (1) of subsection H then further subdivides the limitations agencies must observe in dealing with persons or businesses who work with their former officers or employees, according to whether the now “represent” or are “assisting” the business.

- [2] If a person or business is *represented* by a former officer or employee of the agency, the agency may be barred from contracting with, or taking other favorable action toward, that person or business. The restriction applies if the contract or action is valued at \$1000 or more, and is the direct result of an act by an officer or employee who separated from the agency within the prior two years

- [3] If the person or business is *assisted* by the former officer or employee, however, the value of the contract or favorable action, and the length of time that has elapsed since the officer or employee left the agency, are not considered. So long as an official act of the officer or employee directly resulted in the contract or action, the agency may not contract with the business, or take other favorable action towards it.

- [4] Neither the statute nor the rule defines “representing” and “assisting.” The words should therefore be used in their ordinary meaning. Several examples are offered below.
- [5] The rule clarifies that it does not foreclose hiring former officers or employees to work directly on contract. The rule’s restrictions only prevent the former officials from supporting the efforts of third parties to gain contracts or favorable treatment. Retired employees must be careful, however, to determine how returning to work will impact their state pensions or social security benefits.

Restrictions against actions by former officers or employees

- [6] In addition to the rule’s restrictions on agency actions, the rule also restricts the actions of former officers or employees who participated “personally and substantially” on a matter while they were employed by their agency. Paragraph (2) of subsection H of this rule prohibits the former officer or employee from representing anyone on such matters in their dealings with the agency. This rule is necessary because, in representing a new client, the former employee can bring to bear against her former agency the inside knowledge and attitudes that she observed, or perhaps helped to form, while working there. Therefore, the former official may only represent a business on a matter which was outside the employee’s authority or scope of responsibility.
- [7] The restriction against representation of a business by a former officer or employee of a state agency is consistent with the corresponding rule of professional conduct for attorneys, 16-111 NMRA. But whereas that rule permits, at 16-111(A)(2), a waiver in writing by the former employer, no such waiver is available under the Governmental Conduct Act.
- [8] Finally, the rule prohibits former officers and employees from representing anyone for pay before the agency for one year after separating, regardless of whether they were involved with the issue while employed by the agency. This rule is intended to prevent former officers and employees from prematurely benefiting from their connections to and knowledge of the agency.

EXAMPLES: 1.8.4.10(H)

- [a] While working for the Department of Transportation, Jack led an effort to overhaul the rules for certain highway construction projects. Three years after Jack retires, DOT issues an RFP based on the rules that Jack worked on. XYZ, a construction firm, hires him to help them prepare their proposal to make sure it complies with these rules. DOT may not accept this proposal. Jack’s work at the agency led directly to the issuance of the RFP. Since Jack *assisted* XYZ to prepare its response, even after three years, DOT cannot accept it under 1.8.4.10 (H)(1)(b).

- [b] Janet leaves the Department of Cultural Affairs and the state after having created a program to hire contractors to educate schoolchildren on the works of New Mexico artists. No RFP goes out for the program during her absence. Returning to the state a year later, Janet is asked by a non-profit group to speak to the Secretary of Cultural Affairs on their behalf to request \$10,000 legislative appropriation to restore the program, with the non-profit group serving as contractor. Because Janet's request is made less than two years after she left the agency, the project value exceeds \$1000, and her official action directly led to the creation of the program, the Secretary cannot grant the request. Janet is *representing* the group to her former agency head, so 1.8.4.10(H)(1)(a) requires that two years elapse before the Department may consider her request.
- [c] Fred retires from his job as an assistant attorney general for the Attorney General's Consumer Protection Division, where he worked exclusively on public utility rate proceedings. He leaves to go into private law practice. A car dealership accused of unfair trade practices by the Consumer Division tries to hire him to represent them. Fred may not accept the case for a year, even though he had nothing to do with that area of enforcement while working for the AG. 1.8.4.10(H)(2)(b).
-

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, 1/1/2021]
-

COMMISSION COMMENTARY: 1.8.4.11

- [1] New Mexico's policies requiring public access to meetings and documents are encoded in the Open Meetings Act, NMSA 1978, § 10-15-1 and the Inspection of Public Records Act, NMSA 1978, § 14-2-1. Both these laws are enforced and interpreted by the Office of Attorney General, which has published compliance guides on each law. These guides, which offer detailed commentary and examples, may be accessed on the Attorney General's website, nmag.gov/resources/publications.
-

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 employee whose salary is paid completely, directly or indirectly, by loans or grants made by the United States or a Federal agency is covered by the provisions of the Hatch Act [5 U.S.C. Sections 1501 to 1508] and, therefore, may not be a candidate for a partisan political elective office.

G. 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) being a candidate in an election for or 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, 1/1/2021]

COMMISSION COMMENTARY: 1.8.4.12

- [1] This rule compiles the restrictions on political activities by officers and employees of state government as established in the following sections of law: the Governmental Conduct Act, NMSA 1978, § 10-16-1, at § 10-16-3.1; the State Personnel Act, § 10-9-1, at §10-9-21; the federal Hatch Act, 5 U.S.C. § 1501; and Personnel Rule 1.7.6.10 NMAC.
- [2] Like the governing state and federal law, the rule strikes a balance between, on the one hand, preventing use of the power or resources of public office to support partisan political ends; and, on the other hand, protecting the constitutional rights of public officers and employees to express their political views. Thus, for example, officers and employees of state agencies are prohibited from election to a partisan political office, holding office in a political party or other political organization, pressuring subordinate employees to contribute money or time to candidates, or using public funds to support candidates for election. But officers and employees of state government are specifically permitted, using their own time and resources, to donate to or work for candidates for elected office, or to run for non-partisan elected positions.
- [3] The prohibitions against certain political conduct apply to all non-elected employees of state government, whether classified or exempt. Exempt officers and employees are subject to the same restrictions as classified personnel, even though they are often referred to as “political appointees.” *Elected* officials may campaign for elected office and hold office in political organizations, but are otherwise subject to the limitations of this rule.

EXAMPLES: 1.8.4.12

- [a] A state elected official announces her candidacy for election to a second term. The next day at work, she calls in her exempt appointees to ask them what each of them will do to help her gain a second term. This violates 1.8.4.12(A) and (B) NMAC, because even exempt personnel may not be pressured to support a political campaign, although they are free to volunteer to do so on their own time. Moreover, calling a political strategy meeting during work time violates paragraph (D) of the rule.
- [b] Jim, a classified employee of his state agency, plans to run for the state legislature in the next election, but has not announced his candidacy yet. To help him get name recognition among party regulars he runs for election as the county chairman of his political party. He is not allowed run for that position under paragraph (C) of this rule.

- [c] Jamie is unhappy with the schools in her district and decides to run for school board while serving in her state job. Since this is a non-partisan office, she is permitted to keep her job while running and after her election. But all campaigning for and service on the school board must be on her personal time.

1.8.4.13 NON-DISCLOSURE OF CONFIDENTIAL OR 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.

[1.8.4.13 NMAC-N, 1/1/2021]

COMMISSION COMMENTARY: 1.8.4.13

[1] This rule is based on the Governmental Conduct Act, NMSA 1978, § 10-16-6. The Governmental Conduct Act defines “confidential information” at § 10-16-2(B) as “information that by law or practice is not available to the public.” The best comprehensive listing of confidential documents is the compilation in Section III of the Attorney General’s Guide to the Inspection of Public Records Act, at nmag.gov/publications.

[2] Examples of confidential information protected by this section include employee personnel records, privileged information under court rules, and information on the location of domestic violence victims.

1.8.4.14 NEPOTISM

A. This agency shall not permit the hiring, promotion, or direct supervision of an employee by an individual who is related by blood, adoption or marriage within the first, second or third degree to the employee.

B. For the purposes of Subsection A of this Section:

(1) First-degree relatives include an individual’s parents, siblings, and children.

(2) Second-degree relatives include an individual’s grandparents, grandchildren, uncles, aunts, nephews, nieces, and half-siblings.

(3) Third-degree relatives include an individual’s great-grandparents, great grandchildren, great uncles, great aunts, and first cousins.

[1.8.4.14 NMAC-N, 1/1/2021]

COMMISSION COMMENTARY: 1.8.4.14

- [1] Relationships by marriage are generally one degree more distant than the equivalent relationships by blood or adoption. For example, your natural or adopted daughter is your first-degree relation, but your son's wife (your daughter-in-law) is your second-degree relation.
-

1.8.4.15 SEXUAL HARASSMENT

A. Officers and employees of this agency shall refrain from sexual harassment of any other employee or any other person having business with this agency.

B. Examples of sexual harassment include, but are not limited to:

- (1) sexual innuendo or sexually oriented verbal abuse;
- (2) sexual jokes, sexist jokes, vulgar jokes or abusive sexual teasing;
- (3) unwanted physical contact such as hugging, patting, stroking or grabbing body parts;
- (4) statements or acts of a sexual nature about a person's physical attributes or sexual activity;
- (5) displaying sexually suggestive pictures, objects or materials;
- (6) using disparaging, demeaning or sexist terms to refer to any person;
- (7) making obscene gestures or suggestive/insulting sounds;
- (8) indecent exposure; and
- (9) suggesting or demanding sexual favors or activity in relation to any condition of employment.

C. Officers and employees of this agency shall investigate all instances of alleged sexual harassment and sexual assault and take prompt and appropriate action, and make every effort to remove sexual harassment and sexual assault from the workplace.

[1.8.4.15 NMAC-N, 1/1/2021]

COMMISSION COMMENTARY: 1.8.4.15

- [1] This rule provides only a brief summary of sexual harassment law and the responsibilities of state agencies when sexual harassment is reported or suspected. Sexual harassment is prohibited by Title VII of the 1964 Civil Rights Act (Pub. L. 88-352), which is enforced by the federal Equal Opportunity Employment Commission. The state agency responsible for addressing discrimination based on sex in New Mexico is the State Human Rights Commission, which derives its authority from the Human Rights Act, NMSA 1978, § 28-1-1.
-

1.8.4.16 SUBSTANCE ABUSE

A. This agency shall appoint a substance abuse coordinator as required by Subsection A of 1.7.8.10 NMAC, who shall be responsible for the agency's drug and alcohol abuse program under 1.7.8 NMAC.

B. The substance abuse coordinator shall provide drug and alcohol abuse awareness information to employees including but not limited to the:

- (1) dangers of drug and alcohol abuse;
- (2) availability of counseling, rehabilitation, and employee assistance programs; and
- (3) sanctions that may be imposed upon employees as provided in 1.7.8.19 NMAC.

C. The drug abuse coordinator shall ensure that the agency has contracted or made arrangements with a medical review officer to perform the drug and alcohol testing duties required by 1.7.8 NMAC.

[1.8.4.16 NMAC-N, 1/1/2021]

1.8.4.17 ENFORCEMENT AND INTERPRETATION

A. Violations of the provisions of this code of conduct shall constitute cause for dismissal, demotion or suspension as provided by Subsection C of Section 11 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978.

B. This agency shall establish a written internal complaint procedure by which employees can seek to remedy violations of the provisions of this agency's code of conduct.

C. Agency complaint procedures shall:

- (1) provide the respondent to a complaint notice of the complaint and an opportunity to be heard;
- (2) be made available to all officers and employees of the agency;
- (3) ensure that officers and employees have the right to present or make known their complaints, free from interference, restraint, discrimination, coercion, or reprisal;
- (4) ensure that adjudication of internal agency complaints accord with due process; and
- (5) utilize alternative methods of dispute resolution, including mediation, wherever appropriate to resolve conflicts in the workplace and encourage positive working relationships among officers and employees.

D. If an agency adopts a code of conduct that mirrors provisions set forth in 1.8.4 NMAC, then any officer or employee of the adopting agency may request an advisory opinion from the state ethics commission regarding the interpretation or application of any adopted code provision pursuant to Subsection A of Section 8 of the State Ethics Commission Act, Section 10-16G-1 NMSA 1978.

E. Any remedy or discipline available through internal agency complaint procedures established under this provision does not preclude other remedies or sanctions available at law.

[1.8.4.17 NMAC-N, 1/1/2021]

COMMISSION COMMENTARY: 1.8.4.17

- [1] Paragraph (1) of subsection C of this section should read: “provide the respondent notice of the complaint and an opportunity to be heard;”.

- [2] The State Ethics Commission has jurisdiction to enforce and interpret only provisions of the laws listed in NMSA 1978, § 10-16G-9(A). Violations of other laws establishing ethics laws are enforced and interpreted by other agencies, such as has been noted in commentary throughout this rule.

History of 1.8.4 NMAC: [RESERVED]