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STATE OF NEW MEXICO
MAGGIE TOULOUSE OLIVER
SECRETARY OF STATE

December 2, 2019

Jeremy Farris, Executive Director
State Ethics Commission
407 Galisteo Street
Santa Fe, NM 87501

Submitted Electronically to Jeremy.Farris@state.nm.us

RE: Written Comments to Proposed Rule 1.8.3.

Dear Mr. Farris,

The Office of the Secretary of State ("SOS") respectfully submits these written comments regarding the proposed rulemaking to the State Ethics Commission Act of general procedural rules, Title 1, Chapter 8, Part 3.

The Secretary of State supports the State Ethics Commission ("SEC") in this rulemaking to implement the provisions of the State Ethics Commission Act enacted under SB 668. The SOS's recommendations in its written comments are meant to assist the SEC in promulgating procedural rules for its proceedings that are clear, effective, practical and judicious. The comments are organized according to the sections of the proposed rule to which they relate.

I. 1.8.3.7 DEFINITIONS: The following terms apply to these rules unless their context clearly indicates otherwise:

The SOS recommends including a definition of "referral date," defined as the date contained on the communication or correspondence referring a complaint to the SEC from any public agency or entity, local, state or federal. *See* Section II, *infra*.

The SOS suggests expanding the definition of "person" under Subsection K to: "any individual or entity, including but not limited to a federal, state or other governmental unit or subdivision, or an agency, department or instrumentality thereof."

II. 1.8.3.9 COMPLAINTS ALLEGING ETHICS VIOLATIONS: FILING REQUIREMENTS, TIME LIMITATIONS, NOTICE:

Subsection A: In Subsection A, subpart (3), the SOS suggests clarifying that a complainant or respondent may also represent themselves. The first statement in Subsection A, subpart (3) which reads: “A complainant may be represented only by a licensed attorney,” may mislead complainants and respondents to understand that they cannot represent themselves. The SOS suggests a clarification such as: If a complainant or a respondent is not self-represented, the complainant or respondent may only be represented by a licensed attorney. The SOS suggests including respondents in these requirements.

In Subsection A, subpart B (3), the SOS suggests replacing shall “promptly notify” with a definitive time-period as in “shall within five (5) days notify a person named as a respondent in a complaint filed during the 60-day pre-election blackout period of: . . . It could be shortened to a three day notification, but it should be less than the seven days required to notify a respondent pursuant to Section 10-16G-10(C)(2019).

Subsection A, subpart (6): The SOS suggests including a definition of “referral date” in the definitions section 1.8.3.7 to ensure a consistent calculation of the date of filing with the commission. See Section I, *supra*.

III. 1.8.3.10 DIRECTOR’S RESPONSIBILITIES UPON RECEIVING A COMPLAINT; RESPONDENT’S OPPORTUNITY TO RESPOND; JURISDICTIONAL REVIEW; REFERRALS; NOTIFICATION TO PARTIES:

Subsection A: The SOS suggests changing the 10 days to seven (7) days to notify respondent to conform to the statute; see NMSA 1978, Section 10-16G-10(C).

Subsection A, subpart (1): The SOS suggests a slight rewording to clarify the procedures a respondent must follow to respond to a complaint, and the calculation of time. It is not clear if the respondent can file only a motion to dismiss and no other responsive pleading. The SOS suggests making some response mandatory since there are no procedures if a respondent fails to respond to a complaint. The trigger for the 15 days should be easily identifiable to calculate the 15 day period.

Also the SOS recommends including a provision that instructs the respondent to send a copy of any responsive documents to the SEC. Although attorneys understand pleadings must also be submitted to the tribunal, most non-attorneys may not know this.

Suggested language: *Within fifteen calendar days of the date of the notification letter from the SEC, the respondent shall file an answer and/or a motion to dismiss the complaint, or any form of responsive pleading. All responsive pleadings shall be served upon the complainant with a copy sent by U.S. mail or electronically to the SEC.*

If the SEC determines that responsive pleading(s) from the respondent should be discretionary, there should be some procedure if a respondent fails to respond to the complaint. A suggested provision would be: *If the respondent fails to submit any responsive pleading within 15 days, the*

director will review for jurisdiction, and if jurisdiction lies, will refer to the general counsel for investigation.

Subsection D: The SOS suggests inserting “Section 10-16G-9(D)” and adding a time limit as follows: *If the director determines that the complaint is not wholly within the commission’s jurisdiction, but is within the jurisdiction of another state or federal agency, either in whole or in part, the director shall within ten days refer some or all claims within the complaint to the appropriate agency, in accordance with Subsection D of Section 10-16G-9(D) NMSA 1978 or the terms of any interagency agreement entered into pursuant to the terms of Subsection E of Section 10-16G-9 NMSA 1978.*

(Section 10-16G-9(D) states that if the SEC decides not to act on a complaint, the commission shall forward the complaint to the public agency that has jurisdiction within ten days of its decision.)

IV. 1.8.3.11 GENERAL COUNSEL’S RESPONSIBILITY TO INVESTIGATE COMPLAINTS; DISCOVERY AND SUBPOENAS; PROBABLE CAUSE DETERMINATIONS AND CONSEQUENCES; SETTLEMENT AUTHORITY:

Subsection B: A recommendation to and a decision by the commission to dismiss a complaint is problematic if either party wants to file an appeal. “The complainant or respondent may appeal a decision of the hearing officer within thirty days of the decision to the full commission . . .” NMSA 1978, § 10-16G-12(E).

The SOS recommends delegating the authority to the general counsel to decide if a complaint is frivolous or unsubstantiated. Subsection E of Section 10-16G-10 states that the general counsel shall conduct an investigation and determine if a complaint is frivolous or unsubstantiated, and if so, the general counsel shall dismiss the complaint. In the alternative, the general counsel could present a recommendation to a hearing officer, but this may be an unnecessary use of legal resources.

Subsection F: The SOS suggests defining “promptly notify” by setting a definitive time. Change Subsection “B” of 1.8.3.15 to Subsection C. It seems Subsection “B” does not apply.

V. 1.8.3.12 GENERAL COUNSEL’S INVESTIGATION REPORTS AND RECOMMENDATIONS TO COMMISSION; DISPOSITION BY AGREEMENT; NOTICE TO PARTIES:

Subsection A: The SOS suggests providing a definitive time frame instead of “shall report promptly.”

Subsection D: The SOS does not see that the statute contemplates the use of a mediator, although agrees that the use of a mediator in certain cases is beneficial. Under the New Mexico appellate rules, mediation is used to explore settlement and to simplify issues at no cost to either party. See Rule 12-313 NMRA. The district courts have varying rules for mediation and mediation costs are free in some circumstances or shared among the parties. See, for example LR9-601; LR12-603; R13-603.

The SEC rules do not provide for a procedure if the complainant requests mediation. The SOS would suggest providing a mediator at no charge to the parties for a set number of hours only (3-4 hours) and allowing the parties to share the costs of further mediation, if the parties agree continuing mediation would be productive.

**VI. 1.8.3.13 HEARING OFFICERS; HEARINGS; INTERPRETERS;
EVIDENCE:**

Subsection A: The SOS suggests the State Ethics Commission provide a list of at least five arbitrators provided by the SEC from which the person against whom the complaint has been filed may select one within a specified number of days. See NMSA 1978, Section 1-19-34.4 (E) for restrictions on arbitrators such as: a person cannot serve as an arbitrator who is subject to the Campaign Reporting Act, the Lobbyist Act or the Financial Disclosure Act.

Subsection C: The SOS suggests that the SEC consider allowing communication and notices to be sent using electronic mail or U.S. mail to notify the parties about the hearing and other matters, as preferred by the party. Many people prefer email to regular postal mail and it is a cost-saving measure.

Subsection F: The SOS is concerned that obligating the complainant to represent him/herself at an evidentiary hearing where the Rules of Evidence apply, or demand that he/she hire an attorney will inhibit the average citizen from filing a complaint, regardless of its merit. The statute does not prohibit the SEC's general counsel or possibly an SEC staff attorney from representing the commission or the state's interests in enforcing ethical behavior in its public officials, state employees, etc.....

In addition there seems to be no provision(s) that set forth the procedures for binding arbitration as required under certain acts such as the Financial Disclosure Act. See NMSA 1978, § 10-16A-8(B)(2019).

Subsection H: The SOS is not clear why the SEC general counsel would need to intervene in a hearing or what the purpose would be, or on whose behalf the SEC counsel would be intervening. The SOS recommends the general counsel make a determination that the SEC will handle a case after probable cause is found, but prior to a hearing. There may be a potential claim of prejudice from the respondent if the general counsel intervenes on behalf of a complainant or the state.

VII. 1.8.3.14 APPEALS

Subsection A: The SOS suggests adding the word "final" in the first sentence before the word "decision" as in . . . "may appeal the **final** decision of the hearing officer This would avoid the parties appealing evidentiary or procedural rulings to the Commission and thus delaying the proceedings.

Subsection B and C: The SOS suggests for purposes of clarity that subsection B and C be switched. That is, subsection C should be before B, because the briefing should occur before any hearing or oral argument.

The SOS also suggests that the language in subsection C read as follows: "The commission shall schedule oral arguments, if requested by either party or ordered by the commission within sixty days of the notice of appeal." After an evidentiary hearing before a hearing office, the parties cannot introduce any new evidence so the commission is not conducting a hearing so much as giving each party the opportunity to persuade the commission that the hearing officer's decision was or was not an abuse of discretion.

Subsection C(3): A page limit of 10 pages for an appellate brief seems too limited. If the SEC uses a ten page limit, the SOS suggests a provision to petition for an extension of the page limit and to clarify that the cover page, the table of contents, the list of authorities, and the signature page/certification of service will **NOT** count toward the ten page limit.

VIII. 1.8.3.15 OPEN RECORDS AND CONFIDENTIALITY

No comments on this section.

Thank for the opportunity to provide comments on the State Ethics Commission procedural rules. The Office of the Secretary of State looks forward to working with the Commission to facilitate the parties' shared purposes and jurisdiction in seeking compliance and enforcement in ethical standards from New Mexico's public officials and employees.

Sincerely,

A handwritten signature in cursive script that reads "Maggie Toulouse Oliver". The signature is written in dark ink and is positioned above the printed name and title.

Maggie Toulouse Oliver
Secretary of State