**CONCISE EXPLANATORY STATEMENT FOR NMAC 1.8.3**

(NMSA 1978, § 14-4-5.5 & 1.24.25.14.F NMAC)

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

Submitted to New Mexico State Records Center and Archives: December 5, 2019

**Section 1.8.3.1 through 1.8.3.6**

No comments were received.

**Section 1.8.3.7**

1.8.3.7(K): The Secretary of State argued for “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.’”

Rationale: the current definition of “person,” includes any “entity,” and “entity” includes governmental units or subdivisions. Therefore, the proposed expansion is unnecessary.

1.8.3.7(O): The Secretary of State argued for “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.” This change accompanies a separate change to 1.8.3.9(A)(6) advocated by the Secretary of State to include a specific reference to the “referral date” of a complaint “to ensure a consistent calculation of the date of filing with the commission.”

Rationale: 1.8.3.9(A)(7) states that a complaint is timely for statute of limitations purposes if it is timely filed with the entity that later refers the complaint to the Commission. Since the date of referral is not relevant to the statute of limitations, an additional definition of “referral date” is unnecessary.

**Section 1.8.3.8**

No comments were received.

**Section 1.8.3.9**

1.8.3.9(A)(1)(a): Mr. Kenneth S. Resnick argues that the rules should include a definition of “actual knowledge” clarifying that a complainant “need not have “actual knowledge” (in the sense of direct, first-hand and personal knowledge) of all the factual elements of the alleged violation before filing a complaint.”

Rationale: “actual knowledge” is defined as “[d]irect and clear knowledge, as distinguished from constructive knowledge[.]”[[1]](#footnote-1) Courts generally discuss the term in the context of determining whether a party’s knowledge of some fact or condition triggers (or defeats) a statute of limitations defense or some other legally-significant condition precedent.[[2]](#footnote-2)   “[Actual knowledge] does not mean first-hand knowledge, but only ‘knowledge’ as the word is used in common parlance[.]”[[3]](#footnote-3) Therefore, the proposed change is unnecessary.

**Section 1.8.3.10**

The commission did not receive any substantive arguments that were not accepted.

**Section 1.8.3.11**

1.8.3.11(E): The Secretary of State argues that “promptly notify” should be replaced with a definitive time.

Rationale: This addition would only create an internal administrative burden. The time frame under issue is when the general counsel should announce their decision resulting from their investigation on probable cause, a decision that is not otherwise open to public view.

**Section 1.8.3.12**

1.8.3.12(A): The Secretary of State argues that “promptly notify” should be replaced with a definitive time.

Rationale: This addition would only create an internal administrative burden. The time frame under issue is when the general counsel should announce their decision resulting from their investigation on probable cause, a decision that is not otherwise open to public view.

**Section 1.8.3.13**

1.8.3.13: The Secretary of State correctly notes there are no provisions that set forth the procedures for binding arbitration for certain Financial Disclosure Act claims under NMSA 1978, Section 10-16A-8(B).

Rationale. None will be added to NMAC 1.8.3, because the statute, Section 10-16A-8(B)-(D), provides enough clarity as to procedure. For example, the statute makes clear the Uniform Arbitration Act applies to such post-commission proceedings.

1.8.3.13(A): The Secretary of State argues that this provision should be modified so that “the State Ethics Commission provide a list of at least five arbitrators provided by the [Commission] from which the person against whom the complaint has been filed may select one within a specified number of days.”

Rationale: The Ethics Commission Act and these rules contemplate a hearing officer taking evidence and issuing a final decision on a complaint after the general counsel determines the complaint is supported by probable cause. *See* NMSA 1978, §§ 10-16G-5(A)(3), -12, -13, -16(B). Although NMSA 1978, § 10-16A-6(B) (2019) states that a respondent may demand binding arbitration after the State Ethics Commission imposes a civil penalty under the Financial Disclosure Act, any binding arbitration pursuant to the Act would be conducted under those statutory provisions, not these rules.

1.8.3.13(A): Mr. Kenneth S. Resnick argues that hearing officers should be required to have “minimum years of legal experience” and “some minimum relevant subject-matter experience” with the rules of civil procedure, rules of evidence, and litigation/trial practice.

Rationale: The rules currently require hearing officers to be “familiar with the ethics and election laws enforced by the commission,” and the Commission can set additional minimum requirements as necessary during the process of contracting with hearing officers.

1.8.3.13(M): Mr. Kenneth S. Resnick argues that a hearing officer should be permitted to “make any observations or recommendations with respect to any perceived gaps, weaknesses, ambiguities in the public ethics regulations (substantive or procedural) or other constructive suggestions for systematic improvements in the public ethics sphere.”

Rationale: Because the hearing officer serves as the chief factfinder in the Commission’s complaint process, it would not be appropriate to give the hearing officer authority to offer suggested revisions to the laws they have been charged with interpreting and enforcing.  This could create an appearance that their decision was motivated less by what they determined to be the law and more by what they believe the law should or should not proscribe.  Moreover, a hearing officer can and should issue detailed findings of fact that would permit the commission, sitting in an appellate capacity, to serve the same function.  In addition, under the current rules the hearing officer is (by design) separate from political influence, being selected by the director, not the commissioners.  But by the same token, the hearing officer is less accountable to the public, which elects the legislators who in turn nominate Commission members.  As a bipartisan body, the Commission’s recommendations will carry more weight with the legislature than the recommendations of a hearing officer.[[4]](#footnote-4)

**Section 1.8.3.14**

1.8.3.14(B)(3): The Secretary of State argues that a page limit of 10 pages for an appellate brief seems too limited, and suggests that, if the NMSEC implements a 10-page limit, it should be exclusive of the cover page, table of contents, list of authorities, and signature page/certification of service.

Rationale: The Commission’s subject matter jurisdiction is limited. With that limitation in mind, ten pages is enough to adequately frame the arguments.

**Section 1.8.3.15**

The commission did not receive any substantive arguments that were not accepted.

1. Black’s Law Dictionary (11th ed. 2019) [↑](#footnote-ref-1)
2. *See*, *e.g.*, *Salas v. Mountain States Mut. Cas. Co.*, 2009-NMSC-005, ¶ 18, 145 N.M. 542, 202 P.3d 801 (discussing requirement that an insurer with “actual knowledge of the identity of a class-two insured with an allegedly compensable claim” disclose to the insured the benefits the insured may be entitled to receive under a policy); *Higgins v. Board of Directors of New Mexico State Hospital*, 1964-NMSC-034, 73 N.M. 502, 389 P.2d 616 (discussing Workers Compensation Act’s provision requiring notice to an employer of a covered injury within 30 days of occurrence, except where the employer has “actual knowledge” of an accident that caused a claimed injury).  “Actual knowledge” thus does not necessarily imply “firsthand knowledge.” [↑](#footnote-ref-2)
3. *Collins v. Big Four Paving, Inc.*, 1967-NMSC-019, ¶ 13, 77 N.M. 380, 423 P.2d 418. [↑](#footnote-ref-3)
4. *See* NMSA 1978, § 10-16G-9 (stating that “the state ethics commission shall submit a report to the legislature and the office of the governor regarding whether to extend commission jurisdiction,” and if so “address . . . recommended changes to existing law.”).  [↑](#footnote-ref-4)