



STATE ETHICS COMMISSION

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February 7, 2022

Kari Fresquez
Director of Legislative & Executive Affairs
New Mexico Secretary of State
325 Don Gaspar, Suite 300
Santa Fe, NM 87501

Via email only: kari.fresquez@state.nm.us

Re: Secretary of State's proposed amendments to the Campaign Finance Rule, codified at 1.10.13 NMAC

Dear Ms. Fresquez:

I am writing to provide the views of the State Ethics Commission's staff on the Secretary of State's proposed amendments to the Campaign Finance Rule, 1.10.13 NMAC.

1.10.13.7:

Subsection K: Suggest inserting "or the secretary of state's designee" after "secretary of state." The Secretary of State commonly delegates formal and informal decisions to subordinate officers, and this change would clarify that a finding by an authorized designee is a finding by the Secretary of State.

Subsection AA: Suggest inserting "a finding of" between "means" and "an"; delete "identified by the secretary of state based upon an administrative examination or inquiry"; and delete "from a committee." The first and second proposed changes simplify and clarify the definition, and avoid confusion as to whether or not an "unresolved discrepancy" constitutes a "finding" by the Secretary of State that a violation has occurred. The third proposed change permits a finding of an unresolved discrepancy as to candidates or others potentially subject to the Campaign Reporting Act (for example, entities that dispute whether they are independent expenditure committees as defined by Section 1-19-26(Q)(4) NMSA 1978).

1.10.13.8:

Subsection D: Commission staff is unsure as to what purpose the hortatory language in this subsection serves. If anything, it recognizes that "the notice went to spam" is a valid excuse for a failure to respond or make a timely filing.

1.10.13.11:

Commission staff suggest a new subsection E:

If a person declines to identify a contributor pursuant to Subsection 1-19-27.3(D)(2) on the basis that the contributor requested in writing that the contribution not be used to fund independent or coordinated expenditures or to make contributions to a candidate, campaign committee or political committee, the person making the independent expenditure shall, contemporaneously with the filing of the report required under this Section and Section 1-19-27.3 NMSA 1978, submit to the secretary of state a statement under penalty of perjury that:

(1) a contributor requested that a contribution not be used to fund independent or coordinated expenditures or to make contributions to a candidate, campaign committee or political committee; and

(2) the person making the independent expenditure, coordinated expenditures, or contributions to a candidate, campaign committee or political committee did not use any of the funds received from the contributor for those purposes.”

Commission staff propose this addition based on experience with an earlier enforcement action against a domestic non-profit that spent hundreds of thousands of dollars on mailers supporting the passage of a ballot question but refused to disclose the expenditures as independent expenditures pursuant to Section 1-19-27.3. In response to a demand letter from the Commission, the non-profit agreed to disclose the amount, recipient, and purpose of its expenditures related to the mailers, but refused to disclose the contributors whose money funded the expenditures, indicating that it had “grant agreements” with these contributors that stipulated the contributions would not be used to fund independent expenditures. Commission staff believe that a person making an independent expenditure should not be allowed to refuse to disclose contributors pursuant to Subsection 1-19-27.3(D)(2) unless the person ensures that funds received were not used to make independent expenditures or other contributions that would otherwise be subject to disclosure.

1.10.13.22:

Commission staff believe that existing 1.10.13.22(A) NMAC and the proposed amendment undermine the purpose of contribution limits in the CRA, which seeks to address “the broader threat from politicians too compliant with the wishes of large contributors” and “the power of money ‘to influence governmental action’ in ways less ‘blatant and specific’ than bribery.” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000) (quoting *Buckley v. Valeo*, 424 U.S. 1, 28 (1976)). Under the Secretary of State’s existing and proposed rule, contributors may make contributions in excess of the contribution limits set forth in Section 1-19-34.7 NMSA 1978, and campaigns may accept those contributions, and need only refund or face the prospect of paying the excess contribution into the public election fund *if* (i) a complaint is filed or (ii) the Secretary of State discovers the excess contribution in its annual audit. Moreover, the Secretary of State’s responsibility with respect to excess contributions is limited to making a “finding” that an excess contribution occurred, triggering the obligation to pay the excess contribution into the public election fund. *See* § 1-19-34.7(G). It is therefore uncertain that Section 1-19-34.7(G) confers on

the Secretary of State the discretion to allow candidates receiving excess contributions to refund the excess contributions to donors giving contributions in excess of the allowable limits. The legislature has recognized limited circumstances where a contribution may be returned to contributors, *see* §§ 1-19-34.7(A)(1)(b), 1-19-29.1(A)(7) & (B), and it did not make provision in Section 1-19-34.7 for return of excess contributions to the contributor; instead, Section 1-19-34.7 requires excess contributions to be deposited in the public election fund. *Cf. San Juan Agric. Water Users Assn. v. KNME-TV*, 2010-NMCA-012, ¶ 26 (stating that courts will not read provisions into a statute when it is clear the legislature “knew how to articulate the statutory language to accommodate that [reading].”) (citations omitted).

1.10.13.25:

Subsection (B)(2)(h): Commission staff suggest deleting “salary,” such that all payments to a candidate’s family members, whether in the form of salary or payments for goods or services, must be priced at fair market value. Commission staff also suggest that the Secretary of State adopt a definition of “family” in 1.10.13.7 NMAC as related in the first or second degree of consanguinity or affinity in order to clarify the scope of this provision.

Subsection (B)(3): Commission staff suggest deleting all words following “permissible campaign expenditures.” This language (“a determination shall be made on a case-by-case basis . . .”) does not add anything to the rule beyond what is already set out at the beginning and in Section 1-19-29.1(A)(1).

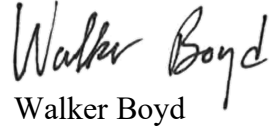
1.10.13.33:

Commission staff agree a recurring contribution does not violate Section 1-19-34.1 NMSA 1978, so long as the solicitation of the recurring contribution does not occur during the prohibited fundraising period. However, this conclusion is best reached through an interpretation of the phrase “knowingly solicit” in Section 1-19-34.1 (either in an advisory opinion or through a definition of the term “solicit”), not through a standalone provision in the New Mexico Administrative Code. Under 1.10.13.23(A) NMAC, a contribution occurs “when the contributor relinquishes control over it,” and an internet contribution (a common origin of recurring contributions) occurs when “the contributor electronically confirms the transaction.” These provisions could be read to suggest that a recurring contribution is not made until funds are transferred from the contributor to the candidate committee, which suggests that a recurring contribution occurs whenever payment is made. Instead of creating confusion about when a recurring contribution is made, Commission staff suggest the Secretary of State provide guidance (whether informally or through a formal advisory opinion issued by the Commission in consultation with the Secretary of State) to the effect that a recurring contribution may be made during the prohibited period so long as the solicitation of the contribution does not occur during the reporting period.

State Ethics Commission
Ms. Kari Fresquez
February 7, 2022
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Thank you for providing Commission staff an opportunity to provide feedback on these important proposed rules.

Very truly yours,

A handwritten signature in black ink that reads "Walker Boyd". The signature is written in a cursive, slightly slanted style.

Walker Boyd