NM Secretary of State
Notice of Adoption Campaign Finance Rule
NMAC 1.10.13.1 to .31

The Office of the New Mexico Secretary of State ("NMSOS") announces the adoption of its proposed rules regarding the New Mexico Campaign Practices Act ("CPA") and the New Mexico Campaign Reporting Act ("CRA"). These adopted rules will be codified as 1.10.13.1 to .31 NMAC. These rules are adopted according to the NMSOS's rule making authority pursuant to NMSA 1978, Section 1-2-1 and Section 1-19-26.2. The adoption of these rules are further authorized by the Administrative Procedures Act, NMSA 1978, Sections 1-8-1 to -25, and the State Rules Act, NMSA 1978, 14-4-1 to -11. The effective date of these rules is October 10, 2017. The final rules may be found on the NMSOS's website at http://www.sos.state.nm.us/Legislation_And_Resources/NM_Administrative_Code_Rules.aspx.

The NMSOS held four public comment hearings on these rules before adoption. Public comment hearings were held on July 13, 2017 in Santa Fe; July 18, 2017 in Albuquerque, July 19, 2017 in Las Cruces, and on August 30, 2017 in Santa Fe, New Mexico.

Concise statement of its principal reasons for adoption:

The objective of these rules is to provide clear guidance to all persons, candidates, and committees regarding the application and implementation of the provisions of the CPA and the CRA, NMSA 1978, Sections 1-19-1 through 1-19-37, in order to comply with campaign finance disclosure and filing requirements in a manner that meets the requirements set forth in applicable case law, while also providing for consistent guidance to the NMSOS in administering and enforcing the law. The rules provide guidance to affected parties on how to disclose campaign finance information more completely and accurately in order to increase public transparency. Finally, the proposed rules define the scope and applicability of New Mexico law governing campaign participation by non-candidates and are based on recent court decisions that have restricted the enforceability of the CRA. These rules represent the duty of the NMSOS to identify and account for the particular elements of the CRA that are constitutionally unenforceable and the specific requirements that are constitutional and must be enforced. The NMSOS asserts that the CRA disclosures provide essential information to New Mexicans and are vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment.

Explanation of positions rejected in adoption of the rules:

The NMSOS carefully considered all comments received at the public hearings and in writing during the comment period. The NMSOS received extensive public comment throughout the rule making process. All written comments have been available for public inspection at the NMSOS's website: http://www.sos.state.nm.us/Elections_Data/2017-campaign-finance-rulemaking.aspx. The NMSOS has consolidated the most common arguments received against the proposed rules.

Comment 1: The reporting requirements for independent spending go beyond the NMSOS's authority to implement.

Reasons for Not Incorporating in Final Rule: The Secretary of State is a constitutional officer of the State of New Mexico. *See* N.M. Const. art. V, § 1. She has pledged to "support the Constitution of the United States and the Constitution and laws of [New Mexico], and . . . faithfully and impartially discharge the duties of [her] office to the best of [her] ability." N.M. Const. art. XX, § 1. She has also been granted rule making authority pursuant to NMSA 1978, Sections 1-2-1 and 1-19-26.2. To that end, the NMSOS has a duty to adopt and promulgate rules and regulations to implement the provisions of the CRA, narrowing the application of the statute in such a manner as to render those actions constitutional.

The proposed rules define the scope and applicability of New Mexico law governing campaign participation by non-candidates in the wake of several recent court decisions that have drastically restricted the enforceability of the governing statutes. The rules identify which of the numerous statutory requirements for non-candidate campaign spenders that remain constitutional pursuant to these rulings and will still be enforced. As noted above, there is not a single reporting requirement for independent spenders imposed by these rules that is not already imposed by the CRA itself. Additionally, the proposed rules provide guidance to candidates and political committees regarding the manner in which existing laws are interpreted and enforced. The guidance is based upon the questions and comments the NMSOS regularly receives during its efforts to administer and oversee the CPA and CRA. Providing written guidance in rule is a statutory duty of the NMSOS and is superior to providing informal or unwritten guidance which poses a risk of being inconsistent, arbitrary, and capricious.

Comment 2: The dollar thresholds for reporting independent spending under the rules are too low, and have no justification and no foundation in the CRA.

Reasons for Not Incorporating in Final Rule: All of the proposed thresholds have constitutional justifications and represent the efforts of the NMSOS to bring the reporting requirements of the CRA within constitutional bounds. See e.g. *Independence Institute v. Williams*, 812 F.3d 787 (10th Cir. 2016) (Upheld a threshold of $1,000 for triggering limited reporting about independent expenditures.); *Coalition for Secular Govt v. Williams*, 815 F.3d 1267 (10th Cir. 2016) (Struck down $3,500 as too low of a threshold for burdensome registration and reporting, in which all of the reporting entity's contributions and expenditures in any amount for any purpose must be periodically reported for as long as the entity continues to exist.) The court in this case suggested that a threshold of $5,000 might be permissible and criticized the Colorado Supreme Court for having refused to allow their secretary of state to adopt a rule establishing a $5,000 threshold in place of the unconstitutional $200 threshold set forth in their constitution for this kind of extensive reporting.

Comment 3: Many of the proposed rules for reporting independent campaign spending infringe upon the right of free speech guaranteed by the First Amendment of the U.S. Constitution.

Reasons for Not Incorporating in Final Rule: The recent court decisions of *Citizens United v. FEC*, 558 U.S. 310, 130 S.Ct. 876 (2010), *Independence Institute v. Williams*, 812 F.3d 787 (10th Cir. 2016), and *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013) provide ample constitutional justification for the proposed rules. As noted above, the very purpose of the proposed rules is to

bring the requirements of the CRA within the constitutional limitations delineated by the courts so as to not infringe upon free speech. In general, these cases held that independent campaign participants have a right to speak as much as they wish, and spend as much as they wish, when they attempt to influence the decisions of voters through express advocacy or ads mentioning candidates or ballot measures right before an election, but the voters have a right to know who is paying for these ads and the state has the authority to enforce that right. *E.g., Citizens United v. FEC, supra*, 130 S.Ct. at 913-16.

Comment 4: The reporting requirements for independent spending in the rules are too burdensome on small organizations.

Reasons for Not Incorporating in Final Rule: The current definition and subsequent reporting requirements for political committees in the CRA are much broader and much more burdensome than what is defined in the rules. In fact, current law requires anyone who spends $500 for an ad or political purposes to register and report every single contribution and expenditure made or received thereafter. The rules actually narrow the definition and applicability of New Mexico law governing campaign participation by non-candidates in the wake of several recent court decisions that have drastically restricted the enforceability of the governing statutes.

Comment 5: The rules should adopt the three-part test adopted by the Federal Election Commission (FEC) to define "coordination."

Reasons for Not Incorporating in Final Rule: The FEC rules fail to address the full federal statutory definition of the kinds of "coordinated expenditures" that should be treated as contributions to candidates. The statutory definition covers any kind of "expenditures made by any person in cooperation, consultation or concert with, or at the request or suggestion of a candidate," and is not confined to expenditures for advertising, but also encompasses other campaign expenses such as polling, research, salaries etc. 52 U.S.Code §30116(a)(7)(B)(i). Although this definition was sustained and expressly approved on two occasions by the Supreme Court (*McConnell v. FEC*, 540 U.S. 93, 219-20 (2003); *Buckley v. Valeo*, 424 U.S. 1, 46 (1976)), the FEC decided to use a more narrow definition in its rules that covers only expenditures for advertising. This is inconsistent with both federal statute, and, more importantly, with the basic purpose of regulating coordinated expenditures, which is to prevent evasion of contribution limits.

Comment 6: The definition of "advertisement" is too broad.

Reasons for Not Incorporating in Final Rule: The current reporting requirements for advertisements in the CRA are much broader than what is proposed within the rules. Disclosure of independent expenditures for advertisements is triggered by dollar thresholds supported by applicable case law, which narrows current governing laws deemed to be unconstitutional.

Comment 7: The office should be careful when regulating "coordinated expenditures" to avoid impermissibly chilling speech.

Reasons for Not Incorporating in Final Rule: The current reporting requirements in governing law provide that candidates are both subject to contribution limits and must report all contributions

received by the candidate's campaign regardless of the amount. These provisions of the CRA are enforceable and have not been challenged. The rules simply clarify to candidates how coordinated expenditures shall be determined and how coordinated expenditures shall be reported under the current context of the governing laws.

Comment 8: The rules negatively impact charitable organizations and donor privacy.

Reasons for Not Incorporating in Final Rule: The rules require disclosure of independent expenditures in political spending; specifically when expressly advocating, appealing for a vote, or otherwise identifying a specific candidate or ballot measure in an advertisement once spending reaches a certain dollar threshold in an election cycle. Organizations and individuals not engaged in this type of political spending are not impacted by the rules and are not required to report spending to the NMSOS. Furthermore, the rules provide that donors to charitable organizations wishing to remain anonymous have the ability to expressly state that their donations may not be used for a political purpose in order to continue to remain anonymous.