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December 18, 2013

Scott F. Gilles  
Deputy Secretary for Elections  
Office of the Secretary of State  
101 N. Carson Street, Suite 3  
Carson City, NV 89701

Dear Mr. Gilles:

On December 12, 2013, you asked this office to review and provide feedback regarding a draft of a proposed interpretation by the Secretary of State of the term "gift" as used in NRS 281.571(1)(e). That statute prescribes the information regarding gifts that certain candidates for public office and public officers must disclose on their statements of financial disclosure filed pursuant to NRS 281.558 to 281.581, inclusive.

As explained in the discussion below, the Legislature has expressly invested the Secretary of State with statutory authority to adopt "regulations" necessary to carry out the provisions of the financial disclosure statutes. NRS 281.571(2). However, in granting such authority to the Secretary of State under the financial disclosure statutes, the Legislature has not exempted the Secretary of State from the procedural and transparency requirements of the Nevada Administrative Procedure Act (APA), nor has the Legislature given the Secretary of State any express statutory authority in the financial disclosure statutes in NRS Title 23 to issue interpretations of those statutes without complying with the APA.

After reviewing the Secretary of State's proposed interpretation of the term "gift" as used in the financial disclosure statutes, it appears that the Secretary of State intends to adopt a rule, standard, directive or statement of general applicability which effectuates or interprets law or policy under the financial disclosure statutes, and it also appears that the Secretary of State intends to generally apply the proposed interpretation of the term "gift" to determine whether a person is in compliance with the financial disclosure statutes and to assess any fine, monetary penalty or monetary interest under those statutes. As such, it is the opinion of this office that the proposed interpretation constitutes a "regulation" as defined in the APA, and that the proposed interpretation cannot have the force of law and cannot be valid or effective against any person unless the Secretary of State first adopts the proposed interpretation in a regulation that complies with the procedural and transparency requirements of the APA. Consequently, it is the opinion of this office that if the Secretary of State desires to implement the proposed

interpretation of the term “gift” as used in the financial disclosure statutes, the Secretary of State must first follow the regulation-making provisions of the APA.

### DISCUSSION

Under Nevada’s financial disclosure statutes, certain candidates for public office and public officers are required to file with the Secretary of State statements of financial disclosure at certain times prescribed by the statutes. NRS 281.559, 281.561. If the candidate or public officer has received “gifts” in excess of an aggregate value of \$200 from a donor during the preceding taxable year, the statement of financial disclosure must contain a list of all such gifts, including the identity of the donor and value of each gift, except: (1) a gift received from a person who is related to the candidate or public officer within the third degree of consanguinity or affinity; or (2) ceremonial gifts received for a birthday, wedding, anniversary, holiday or other ceremonial occasion if the donor does not have a substantial interest in the legislative, administrative or political action of the candidate or public officer. NRS 281.571(1)(e).

The Legislature did not define the term “gift” for purposes of the financial disclosure statutes. However, the Legislature has expressly invested the Secretary of State with statutory authority to adopt “regulations” necessary to carry out the provisions of the financial disclosure statutes. NRS 281.571(2). When a state executive branch agency has been given statutory authority to adopt regulations to carry out statutes, the agency may adopt regulations that provide definitions for undefined terms in the statutes so long as the agency’s definitions do not conflict with the plain meaning of the statutes or with legislative intent. See State Farm Mut. Auto. Ins. v. Comm’r of Ins., 114 Nev. 535, 540-44 (1998). But unless the agency is exempted from the APA, the agency may exercise such statutory authority to adopt regulations only if the agency first complies with the procedural and transparency requirements of the APA. NRS 233B.040(1) (providing that agency regulations have the force of law only if “adopted and filed in accordance with the provisions of this chapter.”); State Farm, 114 Nev. at 543-44. As explained by the Nevada Supreme Court:

The APA was adopted to establish minimum procedural requirements, such as notice and hearing, for all rule making by non-exempt state government agencies. The notice and hearing requirements are not mere technicalities; they are essential to the adoption of valid rules and regulations.

State Farm, 114 Nev. at 543.

As defined in the APA, a “regulation” includes: (1) “[a]n agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy”; and (2) “[t]he general application by an agency of a written policy, interpretation, process or procedure to determine whether a person is in compliance with a federal or state statute or regulation in order to assess a fine, monetary penalty or monetary interest.” NRS 233B.038(1). However, the APA excludes certain agency matters from the definition of “regulation,”

including “[a]n interpretation of an agency that has statutory authority to issue interpretations.” NRS 233B.038(2)(h). The definition of “regulation” in the APA is a codification of the Nevada Supreme Court’s long-standing distinction between rules of general applicability, which are standards or directives that the agency applies to all persons who come within the scope of the statute, and interpretive rulings, which are statements of how the agency construes the statute according to the specific facts before it. See, e.g., Labor Comm’r v. Littlefield, 123 Nev. 35, 39-43 (2007); S. Nev. Op. Eng’rs v. Labor Comm’r, 121 Nev. 523, 528-32 (2005); State Farm Mut. Auto. Ins. v. Comm’r of Ins., 114 Nev. 535, 543-44 (1998); State, Dep’t Ins. v. Humana Health Ins., 112 Nev. 356, 360-62 (1996); Las Vegas Transit Sys. v. Las Vegas Strip Trolley, 105 Nev. 575, 576-78 (1989); Coury v. Whittlesea-Bell Luxury Limousine, 102 Nev. 302, 304-06 (1986); State Bd. of Equalization v. Sierra Pac. Power Co., 97 Nev. 461, 462-65 (1981).

As stated by the Nevada Supreme Court, a rule of general applicability is “a policy or rule that applies to multiple parties in a similar manner.” State v. Chrysler Group LLC, 129 Nev. Adv. Op. 29, 300 P.3d 713, 717 (2013). In most cases, “[a]n agency makes a rule [of general applicability] when it does nothing more than state its official position on how it interprets a requirement already provided for and how it proposes to administer its statutory function.” Coury, 102 Nev. at 305. For example, an agency makes a rule of general applicability when it states how it will define a term in administering a statute by establishing the limits of the term or stating exactly what the term means. Id. at 305-06; Las Vegas Transit Sys., 105 Nev. at 576-78. Because such a rule of general applicability affects how the statute will apply to “a large group of individuals,” the rule is subject to the procedural and transparency safeguards of the APA’s regulation-making process to ensure that those affected by the rule are given proper notice of the rule and a meaningful opportunity to participate in the process and comment on the rule *before* it becomes effective. See Littlefield, 123 Nev. at 41-43.

In addition, the procedural and transparency safeguards of the APA’s regulation-making process also ensure that the executive branch does not bypass the constitutionally-prescribed role that the legislative branch plays in the regulation-making process. The Nevada Constitution expressly empowers the Legislature to designate a legislative body to review regulations and determine whether they conform with statutory authority and carry out legislative intent. Nev. Const. art. 3, § 1(2). The stated purpose of this constitutional provision authorizing legislative review of regulations is to “ensure that the Legislature may suspend or reject any state regulation that exceeds the authority granted by the Legislature when it passed the law which authorized the agency to adopt the particular regulation.” Nevada Ballot Questions 1996, Question No. 5, at 1 (Sec’y of State 1996). To this end, the APA’s legislative review provisions provide that each regulation must be submitted for review by the Legislative Commission or its Subcommittee to Review Regulations to determine whether to approve the regulation or reject it because: (1) it does not conform to statutory authority or carry out legislative intent; or (2) the agency has not provided a satisfactory explanation of the need for

the regulation in its informational statement or the informational statement is insufficient or incomplete. NRS 233B.067.

Thus, the primary purpose of the APA's regulation-making process is to guarantee that when an agency proposes a rule of general applicability, the agency provides the public and the legislative branch with proper notice of the rule and a meaningful opportunity to review the rule *before* it becomes effective. See Littlefield, 123 Nev. at 43 ("APA notice and hearing requirements allow for greater participation by the public and oversight by the Legislative Counsel."). If an agency fails to follow the APA's regulation-making process when it proposes a rule of general applicability, the rule cannot have the force of law, and it is not valid or enforceable against any person. NRS 233B.040(1) & 233B.0617 ("No regulation adopted after July 1, 1965, is valid unless adopted in substantial compliance with this chapter."); Public Serv. Comm'n v. Sw. Gas Corp., 99 Nev. 268, 275 (1983) ("a state agency's failure to follow the Administrative Procedure Act will invalidate any regulation issued in violation of the notice and hearing requirements.").

Based on our review of both the APA and financial disclosure statutes, the Legislature has not exempted the Secretary of State from the procedural and transparency requirements of the APA, nor has the Legislature given the Secretary of State any express statutory authority in the financial disclosure statutes in NRS Title 23 to issue interpretations of those statutes without complying with the APA. See NRS 233B.039 (listing the agencies that are exempt from the APA); NRS 281.558 to 281.581, inclusive. In reaching this conclusion, we note that the Legislature has granted the Secretary of State express statutory authority in the Elections Code in NRS Title 24 to "provide interpretations and take other actions necessary for the effective administration of the statutes and regulations governing the conduct of primary, general, special and district elections in this State." NRS 293.247(4). However, the Legislature has not extended similar statutory authority to the Secretary of State in the financial disclosure statutes in NRS Title 23, which apply to both elected and appointed public officers and which have application outside of the conduct of primary, general, special and district elections in this State.

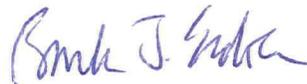
Moreover, the Legislature has expressly specified the method by which the Secretary of State may adopt general interpretations of the financial disclosure statutes in NRS Title 23 by investing the Secretary of State with statutory authority to adopt "regulations" necessary to carry out the provisions of the financial disclosure statutes. NRS 281.571(2). Because the Legislature has expressly specified the appropriate method as "regulations," the Secretary of State may not adopt general interpretations of the financial disclosure statutes by any other method. See Kelly v. Murphy, 79 Nev. 1, 2-4 (1963) (holding that the Secretary of State's oral interpretation of the election recount statutes was unenforceable because the statutes mandated the Secretary of State to adopt such interpretations by "regulation"); Nev. State Democratic Party v. Nev. Republican Party, No. 58404, 256 P.3d 1; 2011 Nev. LEXIS 57 (Nev. July 5, 2011) (holding that the Secretary of State's published interpretation of the congressional special

election statutes was unenforceable because the statutes mandated the Secretary of State to adopt such interpretations by "regulation").

After reviewing the Secretary of State's proposed interpretation of the term "gift" as used in the financial disclosure statutes, it is the opinion of this office that the Secretary of State is proposing a rule of general applicability and that the Secretary of State may adopt such a rule of general applicability only by a regulation that complies with the procedural and transparency requirements of the APA. Specifically, it appears that the Secretary of State's proposed interpretation of the term "gift" establishes several general rules, standards, directives and statements that the Secretary of State intends to apply to all persons who come within the scope of the financial disclosure statutes. Additionally, it appears that the Secretary of State intends to use the proposed interpretation of the term "gift" in the Secretary of State's general application of the financial disclosure statutes to determine whether a person is in compliance with those statutes and to assess any fine, monetary penalty or monetary interest under those statutes. Based on the plain language of the APA and the Nevada Supreme Court's long-standing caselaw, it is the opinion of this office that the proposed interpretation constitutes a "regulation" as defined in the APA, and that the proposed interpretation cannot have the force of law and cannot be valid or effective against any person unless the Secretary of State first adopts the proposed interpretation in a regulation that complies with the procedural and transparency requirements of the APA.

If you have any further questions regarding this matter, please do not hesitate to contact me.

Very truly yours,



Brenda J. Erdoes  
Legislative Counsel

cc: Kevin Benson, Senior Deputy Attorney General