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FISCAL IMPACT REPORT

ORIGINAL DATE 1/26/09

SPONSOR Feldman LAST UPDATED _____ HB _____

SHORT TITLE State Ethics Commission Act SB 140

ANALYST Wilson

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	\$500.0	Recurring	general fund

Duplicates HB151

Relates to Relates to HB 99, HB 252, SB 49, SB 94, SB 116, SB 139 & SB 163

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Attorney General's Office (AGO)
 Corrections Department (CD)
 Secretary of State (SOS)

SUMMARY

Senate Bill 140 appropriates \$500,000 from the general fund to the State Ethics Commission (SEC) for expenditure in fiscal year 2010 to carry out the provisions of the State Ethics Commission Act.

This bill establishes the State Ethics Commission Act (Act) and creates a ten-member SEC as an adjunct agency. The bill defines the membership, terms, powers and duties of the commission. The SEC is required to receive and investigate complaints against state officials, state employees, government contractors and lobbyists alleging ethics violations, report its findings and maintain public records as required pursuant to the act.

The SEC will also be required to draft a proposed code of ethics for all state officials and state employees of the executive branch and submit the proposed code to each elected state official of the executive branch for adoption. In addition, the SEC will be required to promulgate rules necessary to implement and administer the act. The SEC may offer annual ethics training to all state officials, state employees, government contractors and lobbyists and may provide both an ethics guide and a business ethics guide for all state officials, state employees, government contractors and lobbyists. The SEC may also request that the AGO issue subpoenas to compel the attendance of witnesses and the production of information. The SEC may issue public reprimands or censures or recommend disciplinary actions in accordance with the Act for ethics violations committed by state officials of the executive branch and state employees and issue advisory opinions.

SB 140 provides that a person who disclosed any information in violation of the Act is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than one year or both. Additionally, the court may impose a civil penalty not to exceed \$10,000 for each violation of confidentiality requirements under the Act.

SB 140 allows the SEC to appoint an executive director, and provides for the duties of the director. The director may hire a general counsel for the SEC and all other personnel required to enable the SEC to carry out its responsibilities.

SB 140 requires the SEC to submit a report by January 1, 2011 regarding the extension of commission jurisdiction to elected and appointed officials and employees of counties, municipalities and school districts.

The effective date of portions of the Act relating to the issuance of advisory opinions, complaints, investigations, findings and recommendations, required reports and criminal referrals, criminal violations and time limitations is January 1, 2010. The effective date of all other sections is July 1, 2009.

FISCAL IMPLICATIONS

The appropriation of \$500,000 contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of fiscal year 2010 shall revert to the general fund.

According to the December 2008 revenue estimate, FY10 recurring revenue will only support a base expenditure level that is \$293 million, or 2.6 percent, less than the FY09 appropriation. All appropriations outside of the general appropriation act will be viewed in this declining revenue context.

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary will be proportional to the enforcement of this law, applications for orders, and prosecutions commenced by the AG and DA. New laws, amendments to existing laws and new hearings have the potential to increase

SIGNIFICANT ISSUES

This legislation is a result of recommendations of a task force on ethic reform in its report submitted on October 4, 2006. The task force was established to study the issues of governmental ethics and campaign finance reform in an attempt to improve ethical behavior in state government.

The task force recommended establishing an independent SEC to promote increased accountability for ethical behavior among state officials and employees, lobbyists and those that conduct business with the state. In the 2007 and 2008 legislative session similar bills were introduced, but failed to pass.

This bill establishes the SEC as an adjunct agency, which is defined in Section 9-1-6 NMSA 1978 as an agency that is excluded from direct or administrative attachment to a department, and which retains policy making and administrative autonomy separate from any other instrumentality of state government.

The task force found that the SEC's political, administrative and legal independence will be of critical importance to the effective functioning and administration of the SEC.

The AODA believes prosecution of violations should be in the AGO office, not the district attorneys' offices. DA offices do not have the staff in attorneys and investigators to take on these complex cases in addition to their existing criminal case loads.

The AGO notes that 40 other states that have established independent ethics commissions like this bill proposes to review ethics issues. It can be strongly argued that the most important function of such a SEC will be education and training to help change the culture of government and awareness of ethical issues.

The AGO further notes there is currently no central public body with the responsibility to investigate all ethics violations. Instead, enforcement is piecemeal: for example, the SOS shares responsibility with the AGO for enforcing the Financial Disclosures Act; in addition, the General Services Department and SOS share responsibility with the District Attorneys and the AGO for enforcing the Procurement Code and the Governmental Conduct Act; finally, no agency is charged with enforcing the Gift Act.

ADMINISTRATIVE IMPLICATIONS

The legislation does not specify an approved level of staff for the agency, but allows for an executive director, a general counsel and all other personnel as may be necessary to carry out the responsibilities of the SEC.

Until the staffing requirements of the agency are determined and the agency will begin operation, it is difficult to assess whether this appropriation level will be sufficient to adequately fund the agency and SEC operations.

The DFA has noted in the past that the creation of the SEC as an adjunct agency to maintain the independence of the agency from any direct or administrative attachment to a department may have negative administrative ramifications for the agency. Although the agency is given the

authority to hire staff as necessary to carry out its responsibilities, with an appropriation of \$500,000 that must cover operating costs, publications of ethics manuals, training for all State officials, State employees, government contracts and lobbyists, as well as mileage and per diem for SEC members, the agency will be limited in its staff size.

CD states that this bill will require CD employees to participate or respond to investigations, but this administrative burden could probably be absorbed by the CD due to the anticipated low number of investigations.

The SOS suggests amending the Campaign Reporting Act and the Lobbyist Reporting Act as both acts currently assign investigation duties to the SOS.

DUPLICATION, RELATIONSHIP

SB 140 duplicates HB151, State Ethics Commission Act and overlaps SB 139, State Ethics Commission Act which does not cover an executive branch code of ethics or involve the AGO in the subpoena process.

The bill also relates to:

- HB 99, Prohibit Former Legislators as Lobbyists
- HB 252, Political Contributions to Candidates
- SB 49, Governmental Conduct Act For Public Officers
- SB 94, Prohibit Former Legislators as Lobbyists
- SB 116, Limit Contributions to Candidates & PACs
- SB 163, Prohibit Former Legislators as Lobbyists

ALTERNATIVES

The AODA suggests removing language on page 19, line 25 and page 20, line 1, so that the AGO will handle all the legal cases.

OTHER SUBSTANTIVE ISSUES

The CD has provided the following:

While the SEC cannot order state agencies to take disciplinary action against state employees it finds to have committed ethics violations, CD and other state agencies can and should use the SEC's records to pursue disciplinary action against its employees when appropriate.

It is unclear if this new law will conflict with the collective bargaining agreement (CBA) between the State and AFSCME, or the Public Employee Bargaining Act. For example, Article 24, Section 4 of the CBA normally requires employers to serve all disciplinary actions within 45 days of when the employer acquired knowledge of the employee's misconduct. If the SEC investigates a CD employee under this new law, it would not be acting as the employer, but it would be in essence acting as the state. So whether or not the commission would have to conclude its investigation and recommend any discipline within 45 days or whether or not CD would have to act on the SEC recommendation and impose disciplinary action on its employee

within 45 days of the beginning of the commission's investigation might be litigated or challenged by AFSCME. It must be assumed that AFSCME will challenge the new law, even though the CBA does exempt the agency from the 45-day rule whenever an outside agency such as the SEC is involved

DW/mc