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## FISCAL IMPACT REPORT

ORIGINAL DATE 1/31/09

SPONSOR Ryan LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE State Bipartisan Ethics Commission Act SB 269

ANALYST Wilson

### APPROPRIATION (dollars in thousands)

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

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 99, HB 151, HB 252, HB 253, HB 272, SB 49, SB 94, SB 116, SB 128, SB 139, SB 140, SB 163, SB 262 & SB 346

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>	Indeterminate See Below	Indeterminate See Below	Indeterminate See Below	Indeterminate See Below	Recurring	General

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)

Attorney General's Office (AGO)

Department of Transportation (DOT)

Secretary of State (SOS)

### SUMMARY

#### Synopsis of Bill

Senate Bill 269 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 Bipartisan Ethics Commission Act (Act).

This bill establishes the Act and creates an eight member SEC as an adjunct agency. The bill

defines the membership, terms, powers and duties of the SEC. 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 AG 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 269 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 269 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 269 requires the SEC to submit a report by January 1, 2011 regarding the extension of SEC 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 provisions in the bill 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.

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.

DOT notes there may be some cost required of them send to ethics training all of its 2,600+ employees located throughout the state. The extent of this cost will be impacted by when and where such training is provided. There may also be some cost required of the DOT to respond to SEC requests for information, employee testimony or documentation.

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.

## **SIGNIFICANT ISSUES**

The AOC provided the following:

The bill includes an employee of the judicial branch within the definition of state employee. The definition of “state official” includes a person elected or appointed to an office of the judicial branch. The definitions of “state employee” and “state official” can be construed to include judges and justices. The SEC is granted the power to receive and investigate complaints against state officials and state employees and the discretion to provide ethics training to all state officials and state employees.

The following arguments may be made in favor of not applying the Act to judges and justices: not only are judges and justices governed by the New Mexico Code of Judicial Conduct and not only has the Supreme Court-appointed Advisory Committee on the Code of Judicial Conduct been responding since 1986 through advisory opinion letters to inquiries from judges seeking guidance on ethical dilemmas. The New Mexico Constitution creates the Judicial Standards Commission, which is governed by Judicial Standard Commission Rules, the stated purpose of which is to protect the public from any improper conduct and behavior of judges; to preserve the integrity of the judicial process; to maintain public confidence in the judiciary; to create a greater awareness of proper judicial behavior on the part of the judiciary and the public; and to provide for the expeditious and fair disposition of complaints of judicial misconduct. Any justice, judge or magistrate of any court may be disciplined or removed for willful misconduct in office, persistent failure or inability to perform a judge's duties, or habitual intemperance, or he may be retired for disability seriously interfering with the performance of his duties that is, or is likely to become, of a permanent character.

The bill requires the commission to transmit a report and collected evidence to a respondent, the Attorney General and the Judicial Standards Commission if the respondent is a judge or justice, it can be argued that judges and justices are already appropriately guided and disciplined regarding unethical behavior and that to include them within the purview of the Act is unnecessary.

It can be argued that to have an adjunct agency of the executive department providing discipline to and training for judges and justices is a violation of the constitution's separation of powers clause and thus impermissible, as not expressly directed or permitted within the constitution. The same argument may be made regarding the legislature and an adjunct agency of the executive department.

DOT argues that this bill will set up two classes of public officers and employees since neither judicial nor legislative officials or employees will be subject to the same public reprimand or censure to which executive branch employees are subject under the act.

In addition, DOT notes that State Personnel Board rules, which govern employees of the executive branch, have been promulgated pursuant to NMSA 1978, §10-9-10, and require that the confidentiality of disciplinary actions be maintained absent a lawful subpoena, court order or permission from the employee. This proposed act will allow the commission to publicly reprimand or censure a state officer or employees in the executive branch in conflict with the SPB rule.

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

### **ADMINISTRATIVE IMPLICATIONS**

The Campaign Reporting Act, Lobbyist Reporting Act, and Voter Action Act enforcement responsibility will be removed from the Office of the Secretary State.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

DOT provided the following distinguishing between SB 269 and SB 139, HB 151 and SB 140:

#### Definitions Section:

- This bill excludes the definition of “campaign contribution” that is provided in SB 139;
- Like HB 151 and SB 140, this bill includes violations of the Gift Act as “ethics violations” while SB 139 does not;
- Like HB 151 and SB 140, this bill implies but does not specifically require that the designation by an elected or appointed officer of an employee to appear before a legislative committee or rulemaking proceeding be done in writing, as does SB 139;
- Like HB 151 and SB 140, this bill does not define “political purpose”, as does SB 139;
- SB 139 exempts from the definition of “state employee” a judge or justice, whether elected or appointed, of any court; neither this bill, nor HB 151 or SB 140 include that exemption.

#### Make up of the SEC:

- In this bill, the SEC will be created through appointments by Legislative representatives only, while in SB 139, SB 140 and HB 151, both the Governor and the Chief Justice of the NM Supreme Court will also make appointments to the SEC;
- Like HB 151 and SB 140, this bill sets forth certain prohibitions on the members’ activities during and after their terms, but does not contain prohibitions to activities prior to appointment, as does SB 139.

#### SEC Powers and Duties:

- Under this bill, the SEC may issue public reprimands or censures or may recommend disciplinary actions for ethics violations by state officials and employees of the executive branch; this is similar to HB 151 and SB 140. SB 139

subjects all state officials, rather than only the executive branch, to recommend disciplinary actions, and does not empower the SEC to issue its own public reprimands and censures;

- As in HB 151 and SB 140, the Attorney General will issue subpoenas on the SEC's behalf, while under SB 139 bill, the SEC itself will have subpoena powers;
- Under this bill, the SEC may provide for the recusal of members to avoid conflicts of interest; this is similar to HB 151 and SB 140. Distinguish SB 139, which provides for recusal for both the appearance of impropriety and conflicts of interest;
- Like HB 151 and SB 140, SEC may represent and provide services to persons against whom ethics complaints have been brought if that representation was initiated prior to the complaint being filed; SB 139 does not provide for that exception to prohibited representation.

Executive Director:

- Under this bill, the executive director appears to have less discretion than in SB 139 with respect to the evaluation and investigation of ethics complaints.

Complaints and Investigations:

- Like HB 151 and SB 140, this bill provides no time limitations for when a complaint may be filed after an alleged ethics violation was committed. SB 139 provides a three year statute of limitations for such complaints;
- Under this bill, if the complaint has not been disposed of within 12 months the investigation may continue indefinitely so long as a status report from the executive director is provided to the SEC every six months. SB 139 requires the complaint be brought to a final conclusion within 6 months.

Confidentiality:

- While all four bills provide that the investigation report is confidential, this bill, like HB 151 and SB 140, provides specific penalties through fines and imprisonment for a breach of confidentiality, while SB 139 does not.

Possible extension to Local Governments:

- Like HB 151 and SB 140, this bill requires the SEC to report to the Governor, Legislature and Chief Justice of the Supreme Court regarding whether the Act should be extended to counties, municipalities and school districts, and if so, how, while SB 139 is silent on that issue.

In addition the following bills relate to SB 269:

HB 99, Prohibit Former Legislators as Lobbyists  
HB 252, Political Contributions to Candidates  
HB 253, Quarterly Filing of Certain Campaign Reports  
HB 272, Quarterly Campaign Report Filing  
SB 49, Governmental Conduct Act For Public Officers  
SB 94, Prohibit Former Legislators as Lobbyists  
SB 116, Limit Contributions to Candidates & PACs  
SB 128, Require Biannual Campaign Reports  
SB 163, Prohibit Former Legislators as Lobbyists

SB 262, Political Contributions to Candidates  
SB 269, State Bipartisan Ethics Commission Act  
SB 346, Political Contributions to Candidates

DW/mc