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FISCAL IMPACT REPORT

SPONSOR Keller **ORIGINAL DATE** 01/27/14
LAST UPDATED 02/13/14 **HB** _____

SHORT TITLE NMFA Membership & Audits **SB** 24

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Finance Authority (NMFA)
 Attorney General’s Office (AGO)
 Department of Finance and Administration (DFA)
 Economic Development Department (EDD)
 Energy, Minerals and Natural Resources Department (EMNRD)
 Office of the State Auditor (OSA)

SUMMARY

Synopsis of Bill

Senate Bill 24, for the New Mexico Finance Authority Oversight Committee, amends several provisions of the New Mexico Finance Authority Act. It adds experience requirements for non-ex-officio (including any designee of an ex-officio member) of the NMFA governing body and proposes other changes to the internal operations of and methods by which the NMFA conducts its fiduciary and management responsibilities.

Some of the significant changes in this bill include:

- Designees of ex-officio members (certain specified cabinet secretaries and the executive directors of the New Mexico municipal league and the New Mexico association of counties) and non-ex-officio members (appointed by the governor) must have at least ten years’ experience in institutional investment, accounting, law, public finance, banking or public project planning or engineering, and shall not hold office or employment in a political party;

- Ex-officio members may appoint only one designee, and any change in designee must be made in writing and approved by the chair;
- The chair as well as the vice-chair is to be elected by the governing body from its membership (rather than appointed by the governor as under existing law);
- The governing body must meet at least quarterly, with a quorum of six members, and must provide an opportunity for public comment at each meeting. The minutes of all meetings of the governing body must be approved in open session and maintained by its secretary;
- The governing body must name an audit committee from among its membership. Committee minutes must be recorded for all meetings and maintained pursuant to the provisions of the Audit Act and the rules of the state auditor. Audit committee members must be provided annual training related to their duties. At a minimum, the committee shall attend the entrance and exit conferences for annual and special audits, and shall meet with the certified public accounting firm performing the external financial audit at least monthly after audit field work until the conclusion of the audit;
- Members of the governing body and the officers, and employees of the NMFA are subject to the provisions of the Governmental Conduct Act, but an officer of a financial institution is not prohibited from participating as a member of the governing body in setting general policies of the NMFA nor is the NMFA prohibited from depositing funds under the jurisdiction of the NMFA in any financial institution.
- A member of the governing may be deemed to have resigned if that member misses three meetings in any 12-month period. A member may be removed for cause in the same manner as members of the board of regents as provided by Article 12, Section 13 of the Constitution of New Mexico (allowing for removal for incompetence, neglect of duty, or malfeasance in office following a notice of hearing and the opportunity to be heard). Any resulting vacancy is filled by the appointing entity for the unexpired term only.
- The Authority shall provide no less than eight hours of orientation and training for new members regarding the mission, goals, strategic plans, operations, programs, and funds of the NMFA, and public entity finance and ethics;
- The governing body must develop an annual work plan and a staffing review analysis of authority staffing levels, training and adequacy. Both the annual work plan and the staffing review analysis must be provided annually to the New Mexico Finance Authority Oversight Committee; and
- After the state auditor releases an audit report and becomes a public record, that report shall be approved in an open meeting of the authority.

The effective date of the bill is July 1, 2014.

FISCAL IMPLICATIONS

Responding agencies do not report a fiscal impact on the state general fund.

SIGNIFICANT ISSUES

Annual Audit

OSA advises that this bill strengthens oversight of the audit process by the NMFA and directly addresses a number of issues cited in the December 2012 OSA's Special Audit of the NMFA,

which was conducted as a result of the NMFA’s distribution of the fraudulent audit report. As one example, OSA emphasizes the need for and importance of the new language in Section 2(D) requiring presentation of the annual audit report to the NMFA:

The Special Audit found that the fake audit report was presented to the NMFA Board as legitimate and it was presented twice to the Board: once by the NMFA’s Executive Director and once by NMFA’s Audit Committee members. The Audit Rule, specifically Section 2.2.2.10(J)(3)(d) NMAC, provides that once an agency’s audit report is officially released by the State Auditor and becomes public record, the audit report shall be presented by the independent public accountant (who conducted the audit) to a quorum of the governing authority of the agency at a meeting held in accordance with the Open Meetings Act. The bill addresses this issue by requiring that after the authority’s report has been officially released by the State Auditor and becomes a public record, the independent public accountant must present the report to the Board.

NMFA objects to the requirement in this subsection that NMFA’s governing body approve the audit report, noting that OSA’s rule governing annual audits, NMAC Section 2.2.2.10(J)(3)(d), requires only that the external auditor present the final audit report to the governing body of the agency, in accordance with the Open Meetings Act; approval is not required. OSA raises no objection to nor otherwise comments on this specific approval requirement.

Further, OSA explains the need for the new language contained in Section 1(O) concerning minutes of audit committee meetings:

The bill provides that “Minutes shall be recorded for all meetings of the audit committee and be maintained pursuant to the Audit Act and the rules of the State Auditor.” This provision is necessary since current law and regulations provide that information about the audit and the audit report is confidential until the audit report becomes public record. The Audit Act provides that audit reports do not become public record until five days after the State Auditor officially releases the reports, or earlier if the five-day period is waived by the agency audited. See Section 12-6-5(A) NMSA 1978. Additionally, the Audit Rule, 2.2.2 NMAC, prohibits agency personnel from publicly releasing information about the audit until the audit report is released and becomes a public record. Disclosure of audit information prior to the State Auditor’s review and prior to the report becoming public record could impede an independent public accountant’s ability to do its job with the agency. For example, in cases where there may be suspicions of fraud, etc., premature public disclosure of audit information may undermine effective audit procedures designed to investigate fraud. Moreover, if the conduct of certain employees of the agency is being audited, public discussion about specific audit information may subject those employees to unreasonable public scrutiny. Premature public disclosure of audit information could also impede management’s ability to ensure the audit is timely completed and the auditor is provided access to information and data it needs.

Board Member Removal

The amendments proposed in Section 1(I) governing termination of a board member for failure to attend three board meetings over a 12-month period raise concerns. First, the discretion

granted the authority in the phrase “may be deemed” may result in inconsistent treatment—one board member who misses three meetings may be deemed to have resigned, while a second, similarly-situated member may not. Secondly, as NMFA notes, if the member is an ex-officio member, application of that provision to an ex-officio member (be it a cabinet secretary or the executive director of either the municipal league or association of counties) may cause an unintended consequence that interferes with the governor’s or the organization’s appointment or hiring authority.

EMNRD points out two legal issues relating to this new language to the extent it conflicts with other provisions of NMFA’s enabling act as well as one provision of the state constitution. Subsection 1(I)(2) allows removal from the authority for “other cause”, “in the manner provided for removal” under the constitutional provision governing removal of members of boards of regents of educational institutions. That provision provides that regents may be removed for certain causes only, but NMFA’s governing statute allow at least members to be removed for any reason: one section provides that appointed authority members serve at the pleasure of the governor, while another allows an ex-officio member to replace any designee at any time. See NMSA 1978, section 6-21-4(B) and (G).

EMNRD also calls attention to the reference to the constitutional removal language. That provision provides for a hearing before the state supreme court, which is given exclusive original jurisdiction. By directing that NMFA members may be removed in the manner provided in this constitutional provision, SB 24 would require the Supreme Court preside over removals of Authority members. In light of the separation of powers doctrine contained in our state constitution, EMNRD suggests this language in SB 24 could be challenged as an unconstitutional delegation of power to that court.

Designees, Non-Ex-Officio Members and Appointment of Chair

As to the limitation on the appointment of designees in Section 1(G), DFA and EDD suggest that the appointment of more than one designee by each ex-officio member should be at that member’s discretion as availability, or expertise, of a particular designee may be impacted by membership obligations of the ex-officio or that officer’s staff on any number of boards, commissions, councils and the like. Additionally, DFA, EMNRD and EDD all raise concerns that the experience requirement for non-ex-officio members and designees alike in Section 1(H) would limit the pool of applicants. DFA notes it would have the effect of removing capable applicants from a talent pool, which pool is already limited by the size of our population and geographic issues. Additionally, it believes the list of acceptable fields in the bill is not comprehensive; there may be qualified individuals with experience which does not fit neatly within one of these industries, and because there is no clear definition for some of these fields, there could be disagreement regarding whether a candidate's experience fits within the proposed requirements.

EDD goes on to note the reduction in the variety of experiences, outlook and practicality needed to comprehend and ultimately provide oversight, given the complexity of NMFA programs. Further, EMNRD notes that SB 24 does not specify the basis for approval or disapproval of a new designee by the NMFA chair. In addition, it is unclear why the chair must approve a change in designee under Section 1(G), but not the original appointment.

DFA also comments on the requirement that the chair be appointed by the members of the governing body. It advises that there is essential interaction between the ex-officio members and the work of the staff of NMFA, and as such it is important that the Governor retain the ability to select the chair.

More generally, DFA comments the NMFA board and the staff of the NMFA have worked very hard together to successfully recover from the fraudulent audit of 2011. A number of positive steps have been taken and the reputation of the agency has been restored, particularly in the eyes of the ratings agencies. It is apparent that many of the outcomes intended by this bill have been achieved already through the diligence of the current board members.

PERFORMANCE IMPLICATIONS

NMFA notes that eliminating multiple designees will streamline the required board member training and will reduce confusion that has arisen in the past, as well as providing for greater continuity at board meetings from month to month.

However, the experience requirement may adversely impact the municipal league's and the association of counties' ability to appoint designees.

TECHNICAL ISSUES

In light of the requirement in OSA rules governing annual audits that that independent public accountant who conducted the audit present the audit report to a quorum of the governing authority, see NMAC Section 2.2.2.10(J)(d)(d), LFC staff suggests that the phrase "presented in person by a representative of the certified public accounting firm" on page 9, lines 7-8, be deleted from that location and instead inserted following the phrase "shall be" at the end of line 5, so the audit report is presented in person by a representative of the accounting firm who conducted the audit to the governing board, who then must approve it, while copies of that audit report are submitted to the governor and the oversight committee.

OTHER SUBSTANTIVE ISSUES

In her veto message of a similar bill (SB 12) that passed the legislature in 2013, the Governor objected to the changes in the composition of the governing board contained in that bill. In this bill, there is no change to the make-up of the membership of the board other than the experience requirements for non-ex officio members and designees. As to other concerns raised in the veto message, this bill does not bring NMFA under the State Budget Act and the Procurement Code.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

EDD advises that, while the intent of this bill may be to improve NMFA's operation, management and fiduciary duties in light of the fraudulent 2011 audit situation and national negative publicity, the NMFA board has taken action to ensure better practices, policies, and oversight provisions are in place to prevent such a situation in the future. EDD reports that national credit rating agencies have since affirmed NMFA's top bond rating, one class of bonds was upgraded, and a special audit spearheaded by the state auditor ultimately found no evidence of theft or embezzlement related to that audit.