

_____ BILL

54th LEGISLATURE—STATE OF NEW MEXICO—FIRST SESSION, 2019

**DISCUSSION DRAFT
4.0 VERSION (October 24, 2018)**

AN ACT

RELATING TO ETHICS; ENACTING THE STATE ETHICS
COMMISSION ACT; CREATING THE STATE ETHICS COMMISSION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW
MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.—This act may
be cited as the “State Ethics Commission Act”.

SECTION 2. [NEW MATERIAL] DEFINITIONS.—As used in the
State Ethics Commission Act:

- A. “candidate” means an individual who seeks an office covered by the Campaign Reporting Act;
- B. “commission” means the state ethics commission;
- C. “commissioner” mean a member of the commission;
- D. “complainant” means a person who files a verified complaint with the commission;
- E. “director” means the executive director of the commission;
- F. “government contractor” means a person who has a contract, as defined in the Governmental Conduct Act,

with a state agency or who has submitted a bid for a contract with a state agency;

G. “independent agency” means an agency, board, commission, office or other instrumentality, not assigned to an elected constitutional officer, that is excluded from any direct or administrative attachment to a department of state government and that retains policymaking and administrative autonomy from any other state agency;

H. “lobbyist” means a person required to register pursuant to the provisions of the Lobbyist Regulation Act. “Lobbyist” does not include:

- (1) a person who appears on their own behalf in connection with legislation or an official action;
- (2) a state official or an elected or appointed official of an Indian nation, tribe or pueblo who is acting in their official capacity;
- (3) a state employee specifically designated by a state official, when the employee appears before a legislative committee or during a rulemaking proceeding to explain the effect of legislation or a proposed rule on the employee’s agency; provided that the state official files the designation with the secretary of state and makes it available for public inspection;
- (4) a staff member of a state official specifically designated by the state official; provided that the state official files the designation with the secretary of state and makes it available for public inspection;
- (5) a legislator or legislative staff member;
- (6) a witness called to appear by a legislative committee in connection with legislation ;
- (7) a witness called to appear by an administrative agency in connection with an official action;
- (8) a person who provides oral or written testimony during a legislative committee hearing and whose

Commented [DHCI]: As noted before, it will raise issues down the line if we have this mix of a cross-reference to the LRA and include language from the LRA.

- name and the interest on behalf of which the person testifies have been clearly and publicly identified;
- (9) a person who provides oral or written testimony during a rulemaking proceeding and whose name and the interest on behalf of which the person testifies have been clearly and publicly identified; or
 - (10) a publisher, owner or employee of the news media while gathering or disseminating news or editorial comments to the general public in the ordinary course of business.

I. “official action” means the action or nonaction of a state official or state agency acting in a rulemaking proceeding;

J. “political party” means a political party that has been qualified in accordance with the provisions of the Election Code;

K. “respondent” means a person who is the subject of a verified complaint filed with or by the commission;

L. “state agency” means any branch, agency, instrumentality or institution of the executive or legislative branch of the state;

M. “state employee” means an employee of a state agency;

N. “state official” means a person elected to an office of the executive or legislative branch of the state or a person appointed to a state agency; and

O. “verified complaint” means a complaint that has been signed by the complainant and the complainant swears before a notary public that the information in the complaint, and any attachments provided with the complaint, is true and accurate.

SECTION 3. [NEW MATERIAL] STATE ETHICS COMMISSION
CREATED—APPOINTMENTS--MEMBERSHIP—TERMS—
VACANCY--REMOVAL.--

- A. The “state ethics commission” is created as an independent agency under the direction of seven commissioners, no more than three of whom may be registered members of the same political party, appointed as follows:
- (1) one commissioner appointed by the governor;
 - (2) as certified by the chief clerks of the respective chambers:
 - (a) one commissioner appointed by the president pro tempore of the senate;
 - (b) one commissioner appointed by the minority floor leader of the senate;
 - (c) one commissioner appointed by the speaker of the house of representatives;
 - (d) one commissioner appointed by the minority floor leader of the house of representatives; and
 - (e) two commissioners, who shall not be members of the same political party, appointed by the four legislatively appointed commissioners.
- B. The appointing authorities shall give due regard to the cultural diversity of the state and to achieving geographical representation from across the state. Each appointing authority shall file letters of appointment with the secretary of state.
- C. Commissioners shall be appointed for staggered terms of four years beginning July 1, 2019. The governor’s appointee shall serve an initial term of four years. The other initial commissioners shall draw lots to determine which two commissioners serve an initial term of two years, which two commissioners serve an initial term of three years, and which two commissioners serve an initial term of four years.. Thereafter, all commissioners shall serve four-year terms.

- D. A commissioner shall not serve for more than two consecutive terms.
- E. When any member of the commission dies, resigns or no longer has the qualifications required for the commissioner's original selection, the commissioner's position on the commission becomes vacant. The remaining members of the commission shall certify the existence of the vacancy to the appointing authority for the vacant position. The appointing authority shall select a successor in the same manner as the original selection was made. A vacancy shall be filled by appointment by the appointing authority no later than sixty days following certification of a vacancy, for the remainder of the unexpired term.
- F. The appointee of the governor shall be the chair of the commission. The commission shall elect a vice-chair from among the other commissioners.
- G. Four commissioners constitutes a quorum for the transaction of business.
- H. A commissioner shall be removed only for incompetence, neglect of duty or malfeasance in office. A proceeding for the removal of a commissioner may be commenced by the commission or by the attorney general upon the request of the commission. The New Mexico supreme court has exclusive jurisdiction over proceedings to remove commissioners and its decision shall be final. A commissioner shall be given notice of hearing and an opportunity to be heard before the commissioner is removed.
- I. Commissioners are entitled to receive per diem and mileage as provided in the Per Diem and Mileage Act and shall receive no other compensation, perquisite or allowance.

Deleted: [The commission shall elect a chair and a vice-chair.] [The governor's appointee shall serve as chair of the commission.]

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Deleted: consisting of two members of the largest political party in the state and two members of the second largest political party in the state,

- J. The commission shall meet as often as necessary to carry out its duties pursuant to the provisions of this act; provided that the commission shall meet at least on a quarterly basis. Meetings of the commission may be held at the call of the chair, the vice-chair, the director or at the request of a majority of the members of the commission. The commission may conduct meetings by telephone conference call.

SECTION 4. [NEW MATERIAL] COMMISSIONERS—
QUALIFICATIONS--LIMITATIONS.--

- A. To qualify for appointment to the commission, a person shall:
- (1) be a **[qualified elector] [resident and registered voter]** of the state of New Mexico for not less than two years;
 - (2) not have changed political party affiliation within two years prior to appointment; and
 - (3) not be or within the two years prior to appointment shall not have been, in the state of New Mexico, any of the following:
 - a. a state official;
 - b. a state employee;
 - c. a candidate;
 - d. a lobbyist;
 - e. a government contractor; or
 - f. an office holder in a political party.
- B. Before entering upon the duties of the office of commissioner, each commissioner shall review the State Ethics Commission Act and other laws and rules pertaining to the commission's responsibilities and to ethics and governmental conduct in New Mexico. Each commissioner shall take the oath of office as provided in Article 20, Section 1 of the constitution of New Mexico.
- C. During a commissioner's tenure, a commissioner shall not be:

Commented [DHC2]: I still think we should just go with "qualified elector".

- a. a state official;
- b. a state employee;
- c. a candidate;
- d. a lobbyist;
- e. a government contractor; or
- f. an office holder in a political party.

D. A commissioner who violates Subsection C of this section is deemed to have resigned from the commission.

SECTION 5. [NEW MATERIAL] RECUSAL AND DISQUALIFICATION OF A COMMISSIONER.—

- A. A commissioner may recuse from a particular matter.
- B. A commissioner shall recuse from any matter in which the commissioner is unable to make a fair or impartial decision or in which there is a reasonable doubt about whether the commissioner can make a fair and impartial decision, including:
 - (1) when the commissioner has a personal bias or prejudice concerning a party or its representative or has prejudged a disputed evidentiary fact involved in a proceeding prior to a hearing. For the purposes of this paragraph, “personal bias or prejudice” means a predisposition towards a person based on a previous or ongoing relationship, that renders the commissioner unable to exercise the commissioner’s functions impartially;
 - (2) when the commissioner has a pecuniary interest in the outcome of the matter; or
 - (3) when in previous employment the commissioner served as an attorney, adviser, consultant or witness in the matter in controversy.
- C. If a commissioner fails to recuse when it appears that grounds exist, a party shall promptly notify the commissioner of the apparent grounds for recusal. If the commissioner declines to recuse upon request of a party, the commissioner shall provide a full explanation in support of the refusal to recuse.
- D. If the propriety of a commissioner’s participation in a particular matter is questioned, the issue shall be decided by a majority of the other commissioner’s present and voting.

- E. A disqualified commissioner shall not participate in any proceedings with reference to the matter from which the commissioner is disqualified or recused, and the commissioner shall be excused from that portion of any meeting at which the matter is discussed.
- F. Minutes of commission meetings shall record the names of any commissioner not voting on a matter by reason of disqualification or recusal.
- G. If two or more commissioners have recused themselves or are disqualified from participating in a proceeding, the remaining commissioners shall appoint temporary commissioners to participate in that proceeding. Appointments of temporary commissioners shall be made by a majority vote of the remaining commissioners in accordance with the political affiliation and geographical representation requirements and the qualifications set forth in the State Ethics Commission Act.
- H. The commission shall promulgate rules for the recusal and disqualification of members and for the appointment of temporary commissioners.

SECTION 6. [NEW MATERIAL] COMMISSION—DUTIES AND POWERS.—

- A. The commission shall:
 - (1) meet as often as necessary to carry out its duties; provided that the commission shall meet at least on a quarterly basis;
 - (2) administer the applicable civil compliance provisions of the laws set forth in Section 8 of the State Ethics Commission Act;
 - (3) receive and investigate verified complaints that allege an ethics violation;
 - (4) hold hearings when necessary to determine whether there has been an ethics violation;
 - (5) promulgate rules necessary to implement and administer the provisions of the State Ethics Commission Act and the applicable civil compliance provisions of the laws set forth in Section 8 of the State Ethics Commission Act;
 - (6) compile, index, maintain and provide access to all advisory opinions and reports required to be made public pursuant to the provisions of the State Ethics Commission Act;

- (7) draft a proposed code of ethics for state officials and state employees and submit the proposed code to elected state officials and state agencies for adoption;
- (8) compile, adopt, publish and make available to state officials, state employees, government contractors and lobbyists an ethics guide that clearly explains ethics requirements set forth in state law;
- (9) offer annual ethics training to state officials, state employees, government contractors and lobbyists;
- (10) prepare an annual report of its activities and submit the report to the legislature and office of the governor by December of each year; and
- (11) hire an executive director.

B. The commission may:

- (1) initiate complaints that allege an ethics violation; and
- (2) issue advisory opinions;

Deleted: and

SECTION 7. [NEW MATERIAL] EXECUTIVE DIRECTOR—DUTIES AND POWERS.—

- A. The director shall be:
 - (1) a retired state district court judge or an attorney licensed to practice law in New Mexico, who is knowledgeable about the laws listed in Section 8 of the State Ethics Commission Act;
 - (2) appointed without regard to political party affiliation; and
 - (3) appointed, retained and reappointed solely on the grounds of fitness to perform the duties of the position.
- B. The director shall serve for a term commencing on the date of appointment through December 31 of the fourth even-numbered year following the director's appointment.
- C. Prior to the end of the director's term of service, the director may only be removed by the commission for cause and with the concurrence of at least **[four] [five]** commissioners.
- D. Following appointment, the director shall take the oath of office as provided in Article 20, Section 1 of the constitution of New Mexico.
- E. The director shall:
 - (1) prepare an annual budget and submit it to the commission for approval;

- (2) make recommendations to the commission regarding proposed rules to improve administration of the State Ethics Commission Act;
 - (3) make recommendations to the commission regarding proposed legislation to improve administration of the State Ethics Commission Act;
 - (4) publish the commission's advisory opinions and annual reports on the commission's web site, and may post any other information pertaining to the Commission;
 - (5) at every commission meeting, report on the status of all open investigations; and
 - (6) at every commission meeting, report on the status of investigations closed since the previous commission meeting.
- F. The director may:
- (1) hire a general counsel and additional personnel needed to perform the duties of the commission; and
 - (2) enter into contracts and agreements on behalf of the commission.
- G. The director shall not seek or hold an office in a political party.
- H. A director who violates Subsection G of this section is deemed to have resigned from the commission.

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SECTION 8. [NEW MATERIAL] COMMISSION JURISDICTION.--

- A. The commission shall have **[exclusive] [primary] [concurrent]** jurisdiction to enforce the applicable civil compliance provisions of the:
- (1) Campaign Reporting Act;
 - (2) Financial Disclosure Act;
 - (3) Gift Act
 - (4) Lobbyist Regulation Act
 - (5) Governmental Conduct Act;
 - (6) School District Campaign Reporting Act;
 - (7) Voter Action Act; and
 - (8) Procurement Code.
- B. The commission may file a court action to enforce the civil compliance provisions of an act listed in Subsection A of this section.

Commented [DHC3]: A big discussion...

C. The court action shall be filed in the district court in the county where the respondent resides.

SECTION 9. [NEW MATERIAL] ADVISORY OPINIONS.—

- A. The commission may issue advisory opinions on issues related to the laws listed in Section 8 of the State Ethics Commission Act.
- B. Advisory opinions shall be requested in writing. A request for an advisory opinion shall present a question regarding whether the requester’s conduct would violate the provisions of a law listed in Section 8 of the State Ethics Commission Act.
- C. The commission shall issue an advisory opinion within sixty days following receipt of the request. If the advisory opinion is not issued on the sixtieth day following the request, the commission shall notify the requester in writing regarding the reason for the delay. The commission shall continue to notify the requester in writing every thirty days until the advisory opinion is issued; provided that the advisory opinion shall be issued no later than one hundred eighty days following the request.
- D. Advisory opinions shall be published on the commission’s web site. The commission shall redact the requester’s name and identifying information from the published advisory opinion.
- E. A request for an advisory opinion shall be kept confidential by the commission.
- F. Unless amended or revoked, an advisory opinion published by the commission shall be binding on the commission in subsequent proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory opinion.

SECTION 10. [NEW MATERIAL] COMPLAINTS--
INVESTIGATIONS—SUBPOENA POWERS.—

- A. A complainant may file a verified complaint with the commission that alleges an ethics violation committed by a candidate, state official, state employee, government contractor or lobbyist. The verified complaint shall detail the specific charges and the factual allegations that support the charges. The complainant shall sign the complaint under penalty of perjury.
- B. The commission may initiate an investigation of a possible ethics violation committed by a candidate, state official, state employee,

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government contractor or lobbyist without the receipt of a verified complaint.

- C. The director shall bring all complaints or commission-initiated investigations before the commission. The director shall advise and make recommendations to the commission regarding whether the conduct alleged in a complaint is within the jurisdiction of the commission and warrants further investigation.
- D. The commission shall dismiss complaints that are frivolous, unfounded or outside the jurisdiction of the commission. If the commission dismisses a complaint pursuant to this subsection, the director shall promptly notify the complainant and respondent in writing. The commission shall make public complaints that have been dismissed and the reason for the dismissal.
- E. If the commission determines there is sufficient cause to proceed with an investigation, the director shall investigate the complaint. The director shall promptly notify the respondent:
- (1) that a verified complaint has been filed and is being investigated; and
 - (2) of the specific allegations in the complaint and the specific ethics violations charged in the complaint.

XXX. Notwithstanding the provisions of subsection E of this section, the commission may delay notifying the respondent, if it is deemed necessary to protect the integrity of an investigation. A decision to delay notifying the respondent shall be taken by a majority vote of a quorum of the commission. A delay in notifying the respondent shall be documented in writing, with reasonable specificity.

F. As part of an investigation, the director may administer oaths, interview witnesses and examine books, records, documents and other evidence reasonably related to the complaint. All testimony in an investigation shall be under oath, and the respondent has the right to be represented by legal counsel. If the director determines that a subpoena is necessary to obtain the testimony of a person or the production of books, records, documents or other evidence, the director shall request that **[the commission] [a district court]** issue an appropriate subpoena.

Commented [DHC4]: I thought that we should let the Commission determine its own processes for initiating investigations.

Deleted: The commission chair shall sign a complaint initiated by the commission. The complaint shall detail the specific charges against the candidate, state official, state employee, government contractor or lobbyist and the factual allegations that support the charges.

G. **The commission** may issue a subpoena for the attendance and examination of witnesses or for the production of books, records, documents or other evidence reasonably related to an investigation. A subpoena shall be signed by **the chair of the commission** and shall command the person to whom it is directed to attend and give testimony or to produce and permit the inspection of books, records, documents or other evidence. A subpoena shall state the general nature of the investigation, shall describe with reasonable specificity the nature of the information to be produced, the time and place where the information shall be produced, and the consequences of failure to obey the subpoena. If a person neglects or refuses to comply with a subpoena, **the commission may apply to a district court for an order enforcing the subpoena and compelling compliance.**

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H. A state official or state employee who is a respondent shall be entitled to representation by the risk management division of the general service department. If the respondent is found to have committed an ethics violation, the respondent shall reimburse the risk management division for the respondent's equitable share of reasonable attorney's fees and costs.

SECTION 11. STATUS OF INVESTIGATION—REPORTS TO COMMISSION.—

- A. If the commission has not scheduled a hearing concerning the disposition of a verified complaint within ninety days after the complaint is received, the director shall report to the commission on the status of the investigation. The commission may dismiss the complaint or instruct the director to continue the investigation of the complaint. Unless the commission dismisses the complaint, the director shall report to the commission every ninety days thereafter on the status of the investigation.
- B. Upon dismissal of a complaint or a decision to continue an investigation of a complaint, the commission shall notify the complainant and respondent in writing of its action. If the commission has not notified the respondent pursuant to subsection XX of Section 10 of this Act, the commission shall vote again on whether to notify the respondent. A decision to continue to delay

notifying the respondent shall be taken by a majority vote of a quorum of the commission. A continuation of a delay in notifying the respondent shall be documented in writing, with reasonable specificity.

Commented [DHC5]: I deleted this last sentence as it should be part of the section (and discussion) on confidentiality,

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SECTION 12. [NEW MATERIAL] —INVESTIGATION REPORT--
COMMISSION HEARINGS—FINDINGS OF FACT AND
CONCLUSIONS OF LAW—DISCLOSURE OF AN ETHICS
VIOLATION.—

SECTION 13. [NEW MATERIAL] CONFIDENTIALITY OF
RECORDS.--

SECTION 14. [NEW MATERIAL] CRIMINAL VIOLATIONS—
REFERRAL .—If the commission finds at any time that a respondent’s
conduct may amount to a criminal violation, the commission shall
immediately refer the matter to the attorney general or an appropriate district
attorney. The commission shall provide the attorney general or district
attorney with all evidence collected during the commission’s investigation.
Nothing in this section prevents the commission from taking any action
authorized by the State Ethics Commission Act.

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resolution of any criminal charges

SECTION 15. [NEW MATERIAL] TIME LIMITATIONS ON
JURISDICTION.—

- A. The commission shall not accept or consider a complaint unless the complaint is filed with the commission within three years from the date on which the alleged conduct occurred.
- B. The commission shall not take action on a complaint filed against a candidate on or after the date that is **[thirty days]** **[sixty days]** before a primary election. During that time period, the commission may dismiss complaints that are frivolous, unfounded or outside the jurisdiction of the commission.

Commented [DHC6]: I would strike this section entirely - it ties the hands of the Commission. The decision on whether to take up an issue should be in the Commission's hands. See my longer explanation in my email.

- C. The commission shall not take action on a complaint filed against a candidate on or after the date that is **[thirty days]** **[sixty days]** before a general election. During that time period, the commission may dismiss complaints that are frivolous, unfounded or outside the jurisdiction of the commission.
- D. A complainant shall be notified in writing of the provisions of Subsections B and C of this section and shall also be notified in writing that the complainant may refer allegations of criminal conduct to the attorney general or the appropriate district attorney.
- E. When commission action on a complaint is suspended pursuant to the provisions of Subsection B or C of this section, the respondent shall promptly be notified that a complaint has been filed and of the specific allegations in the complaint and the specific ethics violations charged in the complaint.

SECTION 16. [NEW MATERIAL] PROHIBITED ACTIONS.--.—

- A. A person shall not take or threaten to take any retaliatory, disciplinary or other adverse action against another person who in good faith:
 - (1) files a verified complaint with the commission that alleges an ethics violation by a candidate, state official, state employee, government contractor or lobbyist; or
 - (2) provides testimony, records, documents, or other information to the commission during an investigation or at a hearing.
- B. Nothing in the State Ethics Commission Act precludes civil or criminal actions for libel or slander or other civil or criminal actions against a person who files a false claim under that act.

SECTION 17. [NEW MATERIAL] DISCLOSURE OF CONFIDENTIAL INFORMATION—PENALTY.—

SECTION 18. TEMPORARY PROVISION—REPORT ON EXTENSION OF JURISDICTION.—

- A. By October 1, 2022, the state ethics commission shall submit a report to the legislature and the office of the governor regarding

whether to extend commission jurisdiction to elected and appointed local government officials and elected and appointed public school officials.

- B. If the report recommends extension of the commission's jurisdiction, the report shall address:
- (1) a detailed plan for implementation of an extension of the commission's jurisdiction and a proposed time line for the implementation;
 - (2) the estimated number of additional employees and other resources needed by the commission to perform its expanded duties;
 - (3) estimated budget increases needed for the commission to perform its expanded duties; and
 - (4) whether any changes are needed to existing law.

SECTION 19. APPROPRIATION.—_____ dollars (\$_____) is appropriated from the general fund to the state ethics commission for expenditure in fiscal year 2020 to carry out the provisions of the State Ethics Commission Act. Any unexpended or unencumbered balance remaining at the end of fiscal year 2020 shall revert to the general fund.

SECTION 20. SEVERABILITY.—If any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

SECTION 21. APPLICABILITY.—The provisions of the State Ethics Commission Act apply to alleged ethical violations that occur on or after January 1, 2020.

Commented [DHC7]: I would strike this section for reasons related to my concerns with Section 15.

SECTION 22. EFFECTIVE DATE.—

- A. The effective date of the provisions of Sections 1 through 7 and Sections 12 through 19 of this act is July 1, 2019.
- B. The effective date of the provisions of Sections 8 through 11 of this act is January 1, 2020.

