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FISCAL IMPACT REPORT

SPONSOR HJC **ORIGINAL DATE** 3/20/07 **LAST UPDATED** 3/22/07 **HB** CS/8/aHAFC
SHORT TITLE State Ethics Commission Act **SB** _____
ANALYST Baca/Wilson/Fernandez

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	500.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to relates to HB6 and HB7

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Finance and Administration (DFA)

Public Defender Department (PDD)

Public Education Department (PED)

SUMMARY

Synopsis of HAFC Amendment

The House Appropriation and Finance Committee amendment makes the following changes to definitions section of the bill: clarifies that a campaign contribution does not include the administrative or solicitation expenses of a political committee that are paid by an organization that sponsors the committee; separately defines legislative body and removes references of legislative body from the definition of a state agency and includes the judicial branch in the definition of a state official.

The amendment makes the following changes to the membership section of the bill: requires that one member of the commission appointed by the President Pro Tempore of the Senate be appointed with the advice and consent of the Senate minority floor leader; requires that one member of the commission appointed by the Speaker of the House be appointed with the advice and consent of the House minority floor leader and requires that no person whose party registration changed in the year prior to appointment shall be appointed to the commission.

The amendment makes the following changes to the commission powers and duties section of the bill: requires the commission to report findings of probable cause of an ethics violation to the legislative body in addition to the employer, appropriate state agency or respondent's appointing authority.

The amendment makes the following changes to the commission complains, investigations, findings, recommendations, required reports and criminal referral required section of the bill: requires subpoenas to be signed by the chair of the commission rather than "any member" and requires approval of a majority of the members of the commission and requires the commission to report its findings in writing and evidence collected during its investigation to the legislative body in addition to the employer, appropriate state agency or respondent's appointing authority.

The amendment makes the following changes to the prohibited actions section of the bill: inserts a new subsection "Nothing in the State Ethics Commission Act precludes civil actions or criminal sanctions for libel, slander or other civil or criminal claims against a person who files a false claim under that act."

Synopsis of Original Bill

House Bill 8 appropriates \$500,000 from the general fund to the state ethics commission for expenditure in fiscal year 2008 to carry out the provisions of the state ethics commission act.

HB 8 establishes the state ethics commission act and creates a ten member state ethics commission (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 commission is also required to submit an annual report of its activities, including any recommendations regarding state ethics laws or the scope of its powers and duties, in December of each year to the Governor, the Legislature and the Chief Justice of the Supreme Court. The commission shall promulgate rules for the recusal of members to avoid the appearance of impropriety and conflicts of interest.

The SEC will also be required to publish an ethics guide to clearly and plainly explain ethics requirements in state laws and a business ethics guide relating to conducting business with the State. The SEC must provide annual ethics training to all state officials, state employees, government contractors and lobbyists. In addition, the SEC will be required to promulgate rules necessary to implement and administer the act. The SEC is also given the authority to subpoena information and witnesses needed to conduct investigations, recommend disciplinary action for ethics violations, issue advisory opinions in accordance with the provisions of the State Ethics Commission Act and contract for the provisions of goods and services.

This bill allows the SEC to appoint an executive director, and provides for the duties of the director. The director is tasked with hiring a general counsel for the SEC and all other personnel required to enable the commission to carry out its responsibilities.

This bill would prohibit the executive director of the commission for one year prior and one year following their term of office to be a state employee, government contractor or lobbyist. Also for one year prior and one year following their term of office, they are prohibited from holding or seeking an elective public office, holding an appointed public position or public employment, representing a person or entity who appeared before the commission, accepting employment or

providing services to a person or entity who appeared before the commission, and from holding or seeking office in a political party.

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 2008 shall revert to the general fund.

The bill provides that members of the SEC are entitled to receive per diem and mileage reimbursement but will not receive any other form of compensation. 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 commission. 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 commission operations.

SIGNIFICANT ISSUES

The establishment of a SEC is a Governor's initiative. The legislation is a result of recommendations of a task force on ethic reform set up by the governor 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.

CSHB 8 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 commission's political, administrative and legal independence will be of critical importance to the effective functioning and administration of the SEC.

PED provided the following:

Page 5, Lines 7 – 8, which excludes judges from the definition of “state employee”, will immunize judges from the scope of the state ethics commission act. In *State v. Maestas*, the supreme court reversed five convictions for official acts prohibited under the governmental conduct act and five counts of criminal sexual penetration during the commission of official acts against a municipal judge because the governmental conduct act, just as this act will, excludes judges from the “public office or employee” definition.

Page 9, Lines 4 – 6, is a mammoth undertaking; it requires the SEC to provide annual ethics training to all those within its jurisdiction. That will include all state employees, all legislators, all government contractors and all lobbyists. Unless individuals must pay for this training, this will be a significant cost as well as a logistical challenge. Whatever the nature of the training given by the SEC, this will create a legal standard of care for those who are trained.

Page 14, Lines 5 – 14, addresses the interview of witnesses and the right of respondents to be represented by attorneys. Because the SEC will most likely be confronted with respondents who claim the right against compelled testimony and self incrimination, this will invoke consideration of what the SEC will do when a person, who could face criminal proceedings, refuses to cooperate or to testify.

Page 15, Lines 14 – 20, requires the Commission to report the existence of probable cause about a respondent “to the respondent’s appointing authority, employer or appropriate state agency.” There is no similar provision for reporting if the respondent is a state official (e.g., a legislator).

Page 17, Section 9 of the act prohibits retaliation against someone who files a complaint or provides testimony or documents pursuant to the act. However, the prohibitory language does not provide any consequences if retaliation occurs. That could make this provision “directory” as opposed to “mandatory”.

ADMINISTRATIVE IMPLICATIONS

The DFA claims 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 commission members, the agency will be limited in its staff size. This level of appropriation will probably only support an estimated 3 to 4 staff positions, of which one will be an executive director and the other a general counsel. As has been the experience with other small agencies, administrative staff will probably be minimal and may serve multiple functions. This may present a problem for the agency to have an adequate level of expertise over both policy and programmatic issues as well as administrative functions. In order for the agency to remain independent, these functions could not be supplemented by support from any existing agency.

RELATIONSHIP

CSHB 8 relates to HB 6 and HB 7

POSSIBLE QUESTIONS

1. Why are judges excluded?
2. Should an executive agency have the right to oversee other branches of government?
3. Will the SEC serve as an “inspector general”?
4. Are local government officials and employees affected by this act?

DW/CF/mt:csd