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FISCAL IMPACT REPORT

ORIGINAL DATE 1/25/08

SPONSOR Moore LAST UPDATED _____ HB 344

SHORT TITLE State Ethics Commission Act SB _____

ANALYST Wilson

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY08	FY09		
	\$500.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Corrections Department (CD)
 Department of Finance & Administration (DFA)
 Department of Transportation (DOT)
 Public Education Department (PED)
 Secretary of State (SOS)

SUMMARY

Synopsis of Bill

House Bill 344 appropriates \$500,000 from the general fund to the state ethics commission for expenditure in fiscal year 2009 to carry out the provisions of the State Ethics Commission Act.

HB 344 establishes the State Ethics Commission Act and creates a twelve member State Ethics Commission as an adjunct agency. HB344 defines the membership, terms, powers and duties of the commission. The commission would consist of three commissioners appointed by the governor, four appointed by the legislature, two appointed by the attorney general, two commission appointed by majority of the supreme court and one commissioner appointed by the secretary of state. The commission 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. In addition, the commission would be required to promulgate rules necessary to implement and administer the Act and submit an annual report of its activities to the governor, legislature, attorney general,

chief justice of the supreme court and the secretary of state. The commission is also given the authority to initiate complaints alleging ethics violations, issue public reprimands or censures or recommend disciplinary action for ethics violations, subpoena information and witnesses needed to conduct investigations, and issue advisory opinions. If the commission finds criminal violations of state law, it must refer the matter to the attorney general or appropriate district attorney.

HB 344 allows the commission to appoint an executive director, and provides for the duties of the director. The director is tasked with hiring a general counsel for the commission and all other personnel required to enable the commission to carry out its responsibilities.

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 2009 shall revert to the general fund.

The bill provides that members of the commission 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 would begin operation, DFA states it is difficult to assess whether this appropriation level would be sufficient to adequately fund the agency and commission operations.

SIGNIFICANT ISSUES

The establishment of a State Ethics Commission is a Governor's initiative. The legislation is a result of recommendations by Governor Richardson's Task Force on Ethic Reform in its report submitted on October 4, 2006. The Task Force was established by Executive Order on May 3, 2006 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 State Ethics Commission to promote increased accountability for ethical behavior among state officials and employees, lobbyists and those that conduct business with the state. Legislation was proposed in the 2007 regular session, but failed to pass.

HB 344 establishes the commission 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 would be of critical importance to the effective functioning and administration of the commission.

CD provided the following:

Since the bill requires the complainant to sign the complaint under penalty of false statement and to provide the specific factual allegations or charges against the state official or employee, it should prevent the filing of anonymous charges and should limit the number of false claims filed against state employees and officials.

While the commission 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 commission'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 commission 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 commission's 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, for example.

It must be assumed that AFSCME will challenge the new law.

ADMINISTRATIVE IMPLICATIONS

The creation of the State Ethics Commission as an adjunct agency to maintain the independence of the agency from any direct or administrative attachment to a department may have 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, provide for investigations as well as mileage and per diem for commission members, the agency would be limited in its staff size. This level of appropriation would probably only support an estimated three to four positions, of which one would be an executive director and the other a general counsel. As has been the experience with other small agencies, administrative staff would probably be minimal and may serve multiple functions. This may present a problem for the agency to have an adequate level of expertise over 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.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 344 is similar but does not duplicate HB 309. HB 344 differs from SB309 as follows:

- Has different commission membership in number and makeup;
- Quorum is greater;
- Four of their duties are deleted (no training needed; no ethics guide needed; no code of ethics development needed);
- If commission is untimely, case gets dismissed;
- Adds penalty for disclosure of confidential information (a misdemeanor); and
- Commission's report on extension of state ethics jurisdiction to local governments must go to additional entities (e.g., Secretary of State, Attorney General).

HB 344 relates to SB 320, Ethical Conduct of Political Subdivisions and SJR 6, Create State Ethics Commission, CA.

TECHNICAL ISSUES

PED provided the following:

Page 16, Lines 7 – 16, addresses the interview of witnesses and the right of respondents to be represented by attorneys. Because the Commission will most likely be confronted with respondents who could claim the right against compelled testimony and self incrimination, this will invoke consideration of what the Commission will do when a person, who could face criminal proceedings, refuses to cooperate or to testify

Section 12 (Page 21) of the act prohibits retaliation against someone who files a complaint or provides testimony or documents pursuant to the act. Although the section notes that 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, the prohibitory language does not provide any consequences under the act if retaliation occurs. That could make this provision “directory” as opposed to “mandatory”.

DW/bb