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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/6/08

SPONSOR Rawson LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Create State Ethics Commission, CA SJR 6

ANALYST Wilson

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY10	FY11		
Indeterminate	Indeterminate	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

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

### SUMMARY

#### Synopsis of Bill

Senate Joint Resolution 6 proposes a constitutional amendment to Articles 5 and 6 of the New Mexico Constitution to create a State Ethics Commission (commission). The commission will have the authority to investigate and adjudicate alleged ethical violations committed by elected officials, appointed officials, and employees of the state and its political subdivisions. The bill will also abolish the Judicial Standards Commission.

The bill provides for the creation of an eight member commission, appointed by various Legislative representatives, and sets forth certain requirements for member qualifications and diversity. It establishes prohibited activities of commission members both during and for a period of three years after service on the commission.

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The commission will draft an ethics code to be adopted by a two thirds majority vote of both the House and Senate. The code will include penalties, and will govern the ethical conduct of all elected officials, appointed officials, and employees of the state and its political subdivisions.

The bill provides that if a state official or employee is retired by order of the commission, that official or employee will retire with the same rights as he or she had under the statutory retirement program in which they participated.

All papers filed with the state ethics commission and proceedings before the commission will be confidential; except that the commission will be required to issue a report upon the final disposition of a complaint. The commission will also be required to submit an annual report of its activities to the Governor and legislature in December of each year.

This proposed amendment to the New Mexico Constitution at the next general or special election.

### **FISCAL IMPLICATIONS**

The bill does not provide an appropriation, but designates the SEC will receive an annual appropriation from the legislature sufficient to enable it to perform its duties. The bill requires the commission to employ an executive director and other staff, including attorneys, to fulfill its duties. Commission members will be entitled to receive per diem and mileage but no other compensation. The executive director will receive a salary equal to that of a district court judge.

It is difficult to determine what constitutes a sufficient appropriation level and the staffing requirements needed for this new commission. The current Judicial Standards Commission has a budget of approximately \$800,000 and 8 FTE. In order to oversee all other officials and employees of the state and its political subdivisions, will most likely require a substantially higher level of appropriation. Until the staffing requirements of the commission are determined and the commission will begin operation, it is difficult to assess what appropriation level will be sufficient to adequately fund the operations of the new commission.

### **SIGNIFICANT ISSUES**

The establishment of a State Ethics Commission is a Governor's initiative. The recommendations for such a commission were made 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.

DFA notes the resolution provides that all eight commission members are appointed by the legislature. This eliminates the executive and judicial branches of government from having a voice in the establishment of an ethics code and its administration. The Task Force recommendations reported that the commission's political, administrative and legal independence will be of critical importance to the effective functioning and administration of the commission. Having all members appointed by one branch of government does not provide the checks and balances required to maintain such independence.

The AGO provided the following:

Should independently elected constitutional officers be removed from office by a new commission like this, rather than through the time-honored process of impeachment by the House and conviction by the Senate?

Another significant issue is the Commission's narrow partisan membership: the membership consists entirely of appointments by Democratic Party and Republican Party legislative leaders from both chambers, which may lead to excluding members of other political parties and registered Independents.

Since the resolution also mandates that no more than four members may belong to the same political party, it is highly likely that the eight-member commission will be evenly split between Republican and Democratic Party members, thus leading to a strong possibility of gridlock.

The resolution keeps in place the current piecemeal enforcement of ethics legislation. For example, the Secretary of State shares responsibility with the Attorney General for enforcing the Financial Disclosure Act; in addition, the Secretary of State shares responsibility with the District Attorneys and the Attorney General for enforcing the Procurement Code and the Governmental Conduct Act; finally, no agency is specifically charged with enforcing the Gift Act.

CD noted the following:

The commission can order disciplinary action against state employees it finds to have committed ethics violations. The bill does not clearly give the disciplined employee or official any appeal rights, whereas the current State Personnel Board rules give disciplined classified employees appeal rights and procedural protections. If the commission gets a complaint and examines it, it will appear that the state agencies will have to await the outcome of the commission's investigation/disciplinary process before seeking or taking independent disciplinary action against the employee. The commission's code of ethics could supplement or even conflict with CD's current code of ethics. If CDL wanted to take disciplinary action against an employee for violations of CD's code, it will have to make sure that the commission had received no complaint on that employee and/or that the alleged violation of CD's code was for conduct not prohibited by the commission's code of ethics.

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 disciplines an employee under this new law, it will not be acting as the employer, but it will be in essence acting as the state. So whether or not the commission will have to order any discipline within 45 days might be litigated or challenged by AFSCME, for example. It must be assumed that AFSCME will challenge the new law.

**ADMINISTRATIVE IMPLICATIONS**

SJR6 does not specify if the agency will be considered a legislative, judicial or executive entity for appropriation and administrative purposes. Although the agency is given the authority to hire staff as necessary to carry out its responsibilities, with no specific appropriation to cover salaries, operating costs, provide for investigations as well as mileage and per diem for commission members, it can't be determined if the agency will have to limit its staff size. 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 commission to have an adequate level of expertise over both policy and programmatic issues, as well as administrative functions. In order for the commission to remain independent, these functions could not be supplemented by support from any existing agency.

**CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

SJR 6 relates to the following ethics bills:

- HB 160, Amend Gift Act Allowable Amounts
- HB 309, State Ethics Commission Act
- HB 344, State Ethics Commission Act
- HJM 24, Study Bipartisan State Elections Commission
- SB 132, Whistleblower Protection Act
- SB 320, Ethical Conduct of Political Subdivisions
- SB 376, State Ethics Commission Act
- SB 437, State Ethics Commission Act

DW/bb