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FISCAL IMPACT REPORT

ORIGINAL DATE 02/17/10

SPONSOR HJC LAST UPDATED _____ HB 43/HJCS

SHORT TITLE State Ethics Commission Act SB _____

ANALYST Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY10	FY11		
	\$200.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB125, SB43, SB108, and SB154

SOURCES OF INFORMATION

LFC Files

SUMMARY

Synopsis of Bill

The House Judiciary Committee substitute to House Bills 43, 125 and 138 appropriates \$200 thousand from the general fund to State Ethics Commission to carry out the provisions of the State Ethics Act.

The bill establishes the State Ethics Commission Act and creates the State Ethics Commission to be led by an Executive Director. The Commission is to provide annual ethics training and publication of ethic guides. The State Ethics Commission Act requires that an ethics code be developed and that the Ethics Commission be responsible for issuing advisory opinions, providing for the filing of complaints against state officials, state employees, government contractors and lobbyists for ethics violations, investigations and hearings and has subpoena powers. The Act requires confidentiality, prohibits retaliation, and specifies penalties.

HB 43 also amends Section 10-15-1 NMSA 1978, Policies and Procedures for Open and Closed Meetings, making grammatical changes and adding as 10-15-1 H. 11 exempting meetings of the state ethics commission relating to complaints or investigations from open meetings requirements and keeping written minutes accessible to the public.

In terms of the Commission's authority, HB43 defines "state agency" as any department, commission, council, board, committee, agency or institution of the executive or legislative branch of government of the state specifying several other instrumentalities of the state. HB 43

defines “state employee” as an employee of a state agency and “state official” as a person elected or appointed to an office of the executive or legislative branch of state government. “State official” also includes a local school board member or superintendent of a school district and a member of the governing authority of a charter school.

Commission Membership

The State Ethics Commission will be comprised of seven commissioners: one commissioner appointed by the speaker of the House of Representatives; one commissioner appointed by the minority floor leader of the House of Representatives; one commissioner appointed by the majority floor leader of the Senate; one commissioner appointed by the minority floor leader of the Senate; two commissioners appointed by the Governor, one Democrat and one Republican; and one appointed by the chief justice of the Supreme Court, who shall be a retired judge and shall chair the commission. A commissioner cannot seek or hold a public office, public appointment or office in a political party and cannot be a state employee, government contractor or lobbyist. A commissioner may be removed only for incompetence, neglect of duty or malfeasance in office.

Commission Duties & Power

The Commission will receive and investigate complaints alleging ethical violations; hold hearings as appropriate; develop and adopt procedural rules to administer the State Ethics Commission Act; maintain and provide access to all the Commission’s advisory opinions and reports required to be made public; draft proposed code of ethics for state officials and state employees for adoption by each elected state official and state agency; employ the executive director, who shall be an attorney; and prepare and submit an annual report of its activities.

The Commission may initiate complaints alleging ethics violations; petition the district court to issue subpoenas to witnesses or for the production of documents and other evidence; issue advisory opinions; develop and publish an ethics guide; offer ethics training. The commission shall not accept or review complaints concerning conduct that occurred more than three years prior to the day the commission receives the complaint.

Executive Director

Appointed by the State Ethics Commission, the Executive Director shall perform investigations; bring complaints before the commission; prepare the annual budget for approval; recommend rules or legislative changes. The Executive Director may hire a general counsel and other personnel; enter into contracts and agreements on behalf of the commission; and administer oaths and take depositions subject to the Rules of Civil Procedure for the District Courts.

Penalties

HB 43 prohibits any retaliatory, disciplinary or other adverse action against complainants or witnesses acting in good faith. However, HB 43 does not preclude civil actions or criminal sanctions against any person believed to have filed a false claim under the act.

HB 43 stipulates that any person disclosing confidential information in violation of the Act, is guilty of a misdemeanor, the penalty for which is a \$1,000 fine and/or one year in jail.

HB 43 further stipulates that a civil court may impose an additional penalty of up to \$25,000 in addition to the above noted penalty, for each violation.

FISCAL IMPLICATIONS

The appropriation of \$200 thousand contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of FY11 shall revert to the general fund.

SIGNIFICANT ISSUES

In an analysis provide by DFA to the original bill, DFA identified the following concerns:

- It lacks disciplinary action against someone who makes a frivolous complaint. The bill currently states only that the complaint will be dismissed. Presumably, a new complaint could be made against the person making the frivolous complaint, but it would seem quicker and more efficient simply to say the Commission has the authority to penalize anyone who makes a frivolous complaint which both wastes the Commission's time and reflects badly upon the person complained against.
- It lacks authority for the Commission to penalize or punish those respondents found to have violated an ethical standard. Where the Commission finds such a violation, the Commission's recourse is to refer such violations to the AG and the appropriate governing authority over the respondent. If for example, this would be the Legislature, what does the Legislature do? Are the members compelled to accept the findings of the Commission and act upon them? Or can they ignore them or refuse to accept them? The AG, presumably, can surely decline to prosecute based upon his/her discretion/resources/time constraints/etc. So this appears to be a possible weakness in the effect of the Commission.
- The contraction of the Commission to seven total members would seem to make its composition more workable and less cumbersome. However, the problems of party affiliation still remain which could lead to deadlock situations or jockeying to get a quorum of agreeable persons together for a vote.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to

SB43, which creates an 11 member commission and has jurisdiction over some but not all state employees, oversee state elected official complaints, contractors and lobbyist complaints;

SB108, which creates a 10 member commission, with jurisdiction over state elected officials and employees, state government contractors and lobbyists and includes a \$500 thousand appropriation;

SB154, which creates an 11 member commission, with jurisdiction over state elected officials and employees, state government contractors and lobbyists and would move the ethics division from the Secretary of State to the ethics commission using the current ethics division operating budget to fund the Ethics Commission.

OTHER SUBSTANTIVE ISSUES

A review of governmental ethics was part of the 2009 work plan of the Courts, Corrections and Justice Committee.

New Mexico is among the ten states without an ethics commission. Of the states with ethics commissions, they all have the authority to investigate allegations of violations of the ethics code sections it administers. Members of 38 ethics commissions have the authority to initiate an investigation by filing a complaint, although in some states ethics commission staff cannot initiate an investigation. Only in Florida does the complaint have to come from outside the commission's office. In Alabama and Kentucky, commissioners who file complaints must recuse themselves from involvement in the investigation and hearings related to that case.

Every ethics commission has the authority to issue advisory opinions. Only in Florida and North Carolina must the requester take the advice in the opinion. In several states, including Texas, Washington and Nevada, the commission does not have to be asked, but can render an opinion on any issue.

Excerpt below is from the National Conference of State Legislators.

The challenge facing legislative ethics committees is how to ensure their "credibility" with the press or the public. Most professions - including doctors, lawyers and teachers - discipline their own members through internal committees without facing accusations of attempts to protect their own. However, legislators who intend to discipline their fellow members face a higher level of scrutiny, one resulting from a commitment to public service.

In his book *Drawing the Line*, Dr. Alan Rosenthal, professor of public policy and political science at the Eagleton Institute of Politics, Rutgers University describes the two viewpoints, saying, "On one side, colleagues want to be treated fairly and have their actions assessed in a broader context. On the other side, the media want guilt established and punishment dispensed."

Former Delegate Kenneth Montague, Jr., who was House Chair of Maryland's Joint Committee on Legislative Ethics and Chair of the Center for Ethics in Government Executive Board, would respond to both sides by saying, "Both state ethics committees and commissions play essential and consistent roles in ensuring that our public servants behave ethically. Let's justly punish the bad apples. But let us not forget that the basis of effective government is public confidence. Media and others choose, at times, to create an appearance of unethical behavior when the vast majority of legislators are ethical public servants who operate with integrity and who take their jobs seriously."

EO/svb:mew