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FISCAL IMPACT REPORT

ORIGINAL DATE 02/05/10

SPONSOR Egolf LAST UPDATED _____ HB 125

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)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$200.0 Apprx.	\$850.0 Apprx.	\$1,050.0 Apprx.	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB43, SB43, SB108, and SB154

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the Lieutenant Governor (LtGOV)
 Administrative Office of the Courts (AOC)
 Office of the State Auditor (OSA)
 Department of Transportation (DOT)
 Department of Finance & Administration (DFA)
 Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

House Bill 125 appropriates \$200 thousand from the general fund to the State Ethics Commission to carry out the provisions of the State Ethics Commission Act. HB125 establishes an independent ethics commission to oversee the filing of complaints against state officials, state employees, government contractors and lobbyists, develop an ethics code, provide annual ethics training, and issue advisory opinions.

The commission consists of eleven members, five appointed by the governor, no more than three of whom are of the same political party, with at least one appointed from each congressional district; one appointed by the Senate's president pro tempore; one appointed by the senate minority leader; one appointed by the speaker of the House; one appointed by the House minority leader; and two appointed by the Chief Justice of the New Mexico Supreme Court, who shall be district court judges, not of the same political party, and not from the same congressional district. No more than five of the appointees may be of the same political party. Members of the commission shall be appointed for staggered terms of four years and cannot serve more than two consecutive terms.

Six members of the commission constitute a quorum for the transaction of business. A person elected from among the governor's appointees will chair the commission. The commission may elect other officers as it deems necessary. Commissioners can only be removed for cause, and the New Mexico Supreme Court has exclusive jurisdiction over the removal process. No commissioner may hold office in a political party or public office, except the commissioners who are district court judges appointed by the judiciary, or be a state employee, contractor or lobbyist.

The commission shall employ an executive director who is an attorney. The executive director shall perform investigations, prepare an annual budget, and perform other duties assigned by the commission. The executive director may hire general counsel for the commission and other necessary personnel and may administer the business of the commission.

The commission will receive and investigate complaints of ethics violations and hold hearings to determine whether there has been an ethics violation. The commission may initiate investigations and complaints, issue subpoenas, issue advisory opinions, and promulgate any other rules necessary to implement the Act and shall submit an annual report of its activities and recommendations.

A respondent who is a state official or employee is entitled to representation by the risk management division and must reimburse the division for the representation if he is found to have committed a violation. Hearings will be presided over by one of the judicial appointees, and a finding of an ethics violation must be supported by clear and convincing evidence. Violations that may constitute a criminal violation will be referred immediately to the attorney general or district attorney. The Act does not preclude civil or criminal penalties against a person who files a false claim.

The commission shall develop a plan by January 2012 for the extension of the commission's jurisdiction to include officials and employees of political subdivisions of the state. The Act applies to conduct that occurs on or after January 1, 2011 and the statute of limitations for filing a complaint is three years from the date of the alleged 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 fiscal year 2011 shall revert to the general fund.

SIGNIFICANT ISSUES

HB 125 would create an ethics commission to oversee state officials, state employees, government contractors, and lobbyists. Yet, according to the Lieutenant Governor's Office, several structural issues as proposed by HB125 would create a commission dominated by the executive and legislative branches. It would not, based on the bill's appointment process, create the fully independent, non-partisan commission - the governor's office has five appointments, and the legislature has four, which creates a commission that is dominated by the very branches the Act seeks to regulate. An appointment process that allows the executive or legislature to control a plurality of the appointments cannot avoid creating the appearance of or actual conflicts of interest. To avoid the appearance of impropriety, the appointment process should be controlled by a neutral third party. At a minimum this third party should have authority to vet the proposed commissioners. The courts are best situated to act as the independent arbiter of appointments. The combined number of appointments allowed by the legislature and executive far exceeds the number of appointments allowed by the New Mexico Supreme Court. An independent ethics commission will require a more independent appointment procedure and a commission structure that empowers the commission to take action without interference from politically connected individuals. Anything else would be watered down and a disservice to the people of New Mexico who deserve more accountability from their elected officials.

Other related issues brought forth by the Lieutenant Governor's Office include:

- The appointment of two sitting district court judges may create a conflict under Article III, Section I and Article IV, Section 19 of the New Mexico Constitution, under Distribution of Powers the Judicial Department. While the presence of sitting judges on the commission might encourage impartiality and lend procedural know-how, the diversion of sitting judges to an adjunct agency of the executive branch may be problematic.
- HB125 requires a finding of clear and convincing evidence supporting a violation. This stringent standard increases the burden of proof required to show a violation and makes a finding of a violation unlikely. The high standard of proof is likely to have a chilling effect on the filing of complaints if the process is perceived as a sham where the commission is allowed to protect its own through an impracticable standard of proof. Requiring the high standard of clear and convincing evidence is likely to undermine the commission's appearance as a neutral body and its efficacy in dealing with ethics violations.
- The provision of counsel for respondents may also have a chilling effect on the filing of complaints and undercut the commission's appearance of neutrality, because respondents are represented from within and are not required to bear the costs unless they are found to have committed a violation. If the standard of proof is clear and convincing evidence, the finding of a violation will be much more difficult, and respondents will be able to enjoy free representation by risk management.

DFA also expressed concern related to appointments saying, "the format for appointing members to the commission might prove problematical in this since the Governor can choose five members, only three of which can be of the same party, and since the Governor will, historically, either be of the same party as the majority or the minority in the legislature, that would be two more of the same party, or five. That leaves the Chief Justice who must choose two members for the commission which cannot be of the same party. Obviously, one of these parties will have to choose an independent but the bill does not say which one -- which makes one wonder whether a

first-come, first-served situation will exist in the choosing of members. (Once the five members are chosen from a particular party, whoever hasn't made their choices yet would have to choose the independent.)”

PERFORMANCE IMPLICATIONS

There is, according to DFA, nothing in the bill that would force governing authorities to which cases are referred to follow the recommendations or accept the opinions of the commission on a particular respondent.

ADMINISTRATIVE IMPLICATIONS

HB125 does not set forth a timeline for completion of the ethics guides.

RELATIONSHIP

HB43, which creates a seven member commission with jurisdiction over state elected officials and employees, state government contractors and lobbyists;

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; and

HB138 is a near duplicate of SB43 and HB 43 except for the following main differences: HB138, Section 2.M on p. 5, includes public school districts and charter schools within the definition of a public agency as of January 1, 2013. HB138, Section 2.O on p. 5, includes a local school board member, superintendent and a board member of a charter school within the definition of a public official as of January 1, 2013. Also, HB138, Section 11.C (7) and (8) on p. 19, requires the commission to provide the investigative report to the public education department and/or the local school board.

TECHNICAL ISSUES

Section 4.A on p. 8 states to qualify for appointment to the commission, a person shall be a resident of New Mexico and not have changes political party affiliation for at least one year prior to appointment. The qualifications for appointment that are cited do not consider the results of background checks for a potential commissioner.

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 excuse 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."

ALTERNATIVES

The Office of the State Auditor explains that Section 3.I on p. 7 states "A commissioner may be removed only for incompetence, neglect of duty or malfeasance in office." The reasons cited for removal appear incomplete given the nature of a commissioner's duties. In Section 3.I, the act should state that a commissioner may also be removed for the commission of a felony such as theft, embezzlement, fraud, and other illegal acts such as violations of the governmental conduct act or an act involving unethical behavior like those mentioned in the act. Given the nature of a commissioner's duties, Section 4.A should also state that the person must not have been convicted of a felony.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

There is currently no central public body with the responsibility to investigate all ethics violations. Instead, enforcement is piecemeal: for example, the Secretary of State shares responsibility with the Attorney General for enforcing the Financial Disclosures 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 charged with enforcing the Gift Act.

EO/mt