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FISCAL IMPACT REPORT

SPONSOR Beffort **ORIGINAL DATE** 02/12/10
LAST UPDATED _____ **HB** _____
SHORT TITLE Governmental Standards Commission Act **SB** 268
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 HB128, HB138, SB43 and SB154

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Attorney General's Office (AGO)

Department of Finance and Administration (DFA)

Office of the State Auditor (OSA)

New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

Senate Bill 268 appropriates \$200 thousand from the general fund to Governmental Standards Commission to carry out the provisions of the Governmental Conduct Act.

Senate Bill 268 creates an independent, bi-partisan 6 member governmental standards commission. The House and Senate Democrat and Republican caucuses each appoint one member of the Commission, for a total of four members. The Governor appoints two members, one Democrat, one Republican. All the appointments are from a list of 21 nominations submitted by the Supreme Court. A Commissioner may not be an elected or appointed state official, state employee, lobbyist, political party officer or government contractor. Four Commissioners are needed for a quorum, with at least two Democrats and two Republicans agreeing to any action the Commission may take.

The Commission will oversee Ethics issues affecting both the Executive and Legislative branches of government.

The Commission is mandated to:

- (1) Receive and investigate ethics violations by state officials, employees, contractors and lobbyists under the Gift Act, Governmental Conduct Act, Procurement Code, Lobbyist Regulation Act, Financial Disclosure Act, Section 1-19-1, NMSA 1978 *et seq.*; and the Voter Action Act or any code of ethics adopted pursuant to those laws or Section 5 of the State Ethics Commission Act;
- (2) Hold hearings on allegations of ethics violations;
- (3) Compile public access for all public opinions and reports;
- (4) Draft proposed code of ethics for the state officials and employees for state agencies to adopt; and
- (5) Submit an annual report of its activities including recommendations.
- (6) Compile an ethics guide for state officials, employees, lobbyists and government contractors; and
- (7) Provide ethics training for state officials, employees, lobbyists and government contractors.

The commission is also given discretionary authority to:

- (1) Initiate complaints;
- (2) Subpoena witnesses and compel production of documents;
- (3) Issue advisory opinions;

If the Commission finds by clear and convincing evidence that there has been an ethics violation, the Commission shall issue a public report and forward its conclusions and findings, along with the evidence, to the respondent, the attorney general, and (1) the appropriate legislative body if the respondent is a legislator, (2) the house of representatives if the respondent is a state official elected to the executive branch, (3) respondent's appointing authority if the respondent is an appointed official, (4) the appropriate state agency if the respondent is a state employee, (5) the appropriate state agency if the respondent is a government contractor, or (6) the respondent's employer and clients if the respondent is a government contractor.

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

The AGO explains that this bill proposes to transfer to the new ethics commission as of January 1, 2011 the responsibility that the Secretary of State currently has to administer the Campaign Reporting Act, the Voter Action Act, the Lobbyist Regulation Act, the Governmental Conduct Act and the Financial Disclosure Act. Other Ethics Commission proposals expressly exclude the Commission from reviewing election campaign ads. Since this bill does not exclude those, and shifts administrative responsibility for the Campaign Reporting Act to the new Commission, the significant issue that arises is whether the Ethics Commission should be so directly involved in overseeing campaign finance reports and activities.

The Lieutenant Governor points out the following:

This bill removes the sole discretion of appointments from the legislature or governor and provides a screening mechanism, whereby the New Mexico Supreme Court provides a panel of candidates for the commissioner. Allowing the courts to nominate candidates permits the candidates to be vetted by an independent third party and ensures the candidates are independent and truly representative of the state.

SB 268 provides a fair process for adjudicating ethics violations because respondents have the right to be represented by counsel and present witnesses and cross-examine witnesses against them. The clear and convincing standard of evidence places an appropriate burden on the complainant, through the executive director, to find the respondent has committed a violation. This middle standard of proof is fitting because the lower preponderance of evidence standard would allow a respondent to be found guilty of a violation if there was even slightly more evidence showing a violation than evidence that a violation was not committed. This vulnerability to easily be found guilty of an ethics violation may interfere with public employees' and officials' duties for fear that any unpopular action could motivate a malicious complaint that could easily result in a finding of an ethics violation. The higher standard of preponderance of evidence would also be problematic because the evidence required to show a violation would be so great that people would be discouraged from using the process, leaving the people an ethics commission that seeks to regulate the unaccountable once again.

SB 268's exemption from the Public Records Act and its confidentiality provisions may frustrate the commission's objective to provide transparency and accountability in government. Though the government has important reasons for maintaining the confidentiality of ethics violation proceedings in some cases, those interests must be balanced with the commission's purpose of providing accountability and the public's right to know. In order to keep a matter confidential, the commission should be able to show it has an important interest in keeping the matter private and that keeping the matter private is substantially related to that interest.

Even if the commission is able to show that maintaining confidentiality in a case is substantially related to an important government interest, the documents should not be unavailable to the public indefinitely. If a person is found guilty of a violation, the commission's report will be made public, but a person who is investigated repeatedly and manages to avoid a finding of guilt can evade public notice of his or her actions. The purposes of SB 268 and the ethics commission would be better served if an investigation were made publicly available once the commission has decided there is sufficient cause to proceed with an investigation. This procedure is more in line with other state professional licensing and disciplinary boards. Unless the commission provides more public access to its actions, other than the ethics guide, advisory opinions and reports on violations, the efficacy and fairness of the commission will be impossible to evaluate.

SB 268 exempts commission hearings from the Open Meetings Act. A blanket exemption for hearings will undermine credibility for the same reasons as blanket confidentiality of documents, as discussed above. For a hearing to be closed to the public, the commission should show that closing the hearing is substantially related to an important government interest. The bill should also clarify that the exemption from the Open Meetings Act only applies to hearings where the commission has met its burden of showing the importance of closing the hearing and that it does not apply to other

meetings and actions of the commission. Opening hearings and commission meetings to the public would offer accountability and build public trust in the commission.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The AOC highlights differences of related bills in the table below.

SB 268	SB 154 and HB 125	SB 43 and HB 138
<p>The Supreme Court shall nominate with the assistance of the appellate judges nominating committee a list of 21 nominees for committee appointments. These nominations will be provided to the Governor and both the House and Senate, from this list, commissioners will be appointed as follows:</p>		
<p>Two commissioners appointed by the Governor, who are not members of the same political party and who are from different Congressional Districts.</p>	<p>Five commissioners appointed by the Governor, no more than three of the same political party and at least one appointed from each congressional District</p>	<p>Three commissioners appointed by the Governor, one Democrat, one Republican and a registered voter who is neither Democrat nor Republican. Members may not seek or hold elective or appointed office during their term of service, nor may they be a state employee.</p>
<p>One commissioner appointed by the Speaker of the House; one commissioner appointed by the minority floor leader</p>	<p>One commissioner appointed by the Speaker of the House; one commissioner appointed by the minority floor leader</p>	<p>Two commissioners appointed by the House of Representatives Democratic Caucus; two commissioners appointed by the House of Representatives Republican Caucus</p>
<p>One commissioner appointed by the President Pro Tempore of the Senate; one commissioner appointed by the minority floor leader</p>	<p>One commissioner appointed by the President Pro Tempore of the Senate; one commissioner appointed by the minority floor leader</p>	<p>Two commissioners appointed by the Senate Democratic Caucus; two commissioners appointed by the Senate Republican Caucus</p>
<p>Not Addressed</p>	<p>Two commissioners appointed by the Chief Justice of the Supreme Court, who shall be District Court Judges, not of the same political party or same congressional district.</p>	<p>Not Addressed</p>

ALTERNATIVES

SB 268, Section 3.M on p. 8 states “A commissioner may be removed only for incompetence, neglect of duty or malfeasance in office.” The reasons cited for removal may be incomplete given the nature of a commissioner’s duties.

In Section 3.M of SB 268, 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 3 of SB 268 should state that a potential commissioner 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.

POSSIBLE QUESTIONS

Per Section 64.B on p. 105, the effective date for Sections 7-10 is January 1, 2011. Does this mean that an advisory opinion (Section 7) cannot be requested or issued until after January 1, 2011? Does this mean that a complaint (Section 8) of an alleged ethics violation cannot be filed or initiated by the commission until January 1, 2011?

EO/mew