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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/07/11

SPONSOR Campos LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Enact "State Ethics Commission Act" SB 293

ANALYST Wilson

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
	\$500.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SB 293 relates to HB 154, HB 155, HB 195, SB 164, SB 172 SB & SB 182

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Administrative Office of the District Attorneys (AODA)  
 Attorney General's Office (AGO)  
 Corrections Department (CD)  
 Department of Transportation (DOT)  
 Secretary of State (SOS)

### SUMMARY

#### Synopsis of Bill

Senate Bill 293 appropriates \$500,000 from the general fund to the State Ethics Commission (SEC) to carry out the provisions of the State Ethics Commission Act. SB 293 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 SEC is created as an adjunct agency of the executive branch under the direction of seven commissioners, appointed as follows: 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 of whom shall be of the Democratic party and one of whom shall

be of the Republican party; and one commissioner, appointed by the Chief Justice of the New Mexico Supreme Court, who shall be a retired judge and who shall be the chair of the SEC.

The appointing authorities shall give due regard to geographic representation and to the cultural diversity of the state.

Commissioners shall be appointed for staggered terms of four years beginning July 1, 2011. The initial commissioners shall draw lots to determine which two commissioners serve an initial term of two years, which two commissioners serve an initial term of three years and which three commissioners serve an initial term of four years; thereafter, all commissioners shall serve four-year terms. A person shall not serve as a commissioner more than two consecutive terms.

Four commissioners that include at least two Democrats and two Republicans constitute a quorum for the transaction of business. No action shall be taken by the SEC unless at least four members, including at least two Democrats and two Republicans, concur.

A commissioner may be removed only for incompetence, neglect of duty or malfeasance in office. A proceeding for the removal of a commissioner may be commenced by the SEC or by the Attorney General upon the request of the SEC. The New Mexico Supreme Court has exclusive jurisdiction over proceedings to remove commissioners, and its decision shall be final. A commissioner shall be given notice of hearing and an opportunity to be heard before the commissioner is removed.

The commission shall appoint an Executive Director who shall be an attorney and knowledgeable about state ethics laws and who shall be appointed without reference to party affiliation and solely on the grounds of fitness to perform the duties of the office. The Executive Director shall perform investigations, prepare an annual budget, and perform other duties assigned by the SEC. The executive director may hire general counsel for the SEC and other necessary personnel. The SEC will receive and investigate complaints of ethics violations and hold hearings to determine whether there has been an ethics violation. The SEC 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 commissioner shall recuse from and not participate in a SEC proceeding in which the commissioner has a conflict of interest. The commissioner shall state the reason for the recusal.

A state official or state employee who is a respondent shall be entitled to representation by the Risk Management Division (RMD) of the General Services Department; provided, however, that if the respondent is found to have committed an ethics violation, the respondent shall reimburse RMD for the respondent's equitable share of reasonable attorney fees and costs. If the respondent was represented by an attorney employee of the RMD, the RMD must be reimbursed at the full cost incurred by the RMD

The SEC has the right issue public reprimands, censures, or recommendations for disciplinary against a respondent. Ethical violations that the SEC believe rise to the level of criminal behavior shall be referred to the AGO or the appropriate district attorney. Commission meetings must be scheduled within 90 days of the receipt of a complaint. In addition, the SEC will only have jurisdiction over actions taken within the prior three years. Complainants are protected from

retaliation by this bill.

Violations of the confidentiality of the State Ethics Commission Act would be deemed as misdemeanors.

The majority of the provisions in SB 293 will become effective July 2, 2011. However, the advisory opinion, complaint, investigations and hearings portions of this bill will be effective January 1, 2012.

### **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 2012 shall revert to the general fund.

### **SIGNIFICANT ISSUES**

The AGO offered the following:

Should New Mexico create an independent SEC to oversee ethics issues affecting the executive and legislative branches of government? Forty other States have created various forms of independent ethics commissions.

Does the proposed independent SEC adequately ensure bipartisan action, help restore and enhance the public's trust in government? Does the proposed legislation possess sufficient resources to do its job effectively and does it have safeguards to protect against abuses and the pursuit of unwarranted or frivolous complaints?

The SOS is statutorily responsible for the oversight of Lobbyist Regulation Act violations, Campaign Reporting Act violations, Governmental Conduct Act violations, and Gift Act violations. There is no provision in this bill to account for duplication of investigations. Further, investigations conducted by the SOS's office are subject to the Inspection of Public Records Act, which creates a potential conflict with the confidentiality provisions of this bill.

CD notes that certain citizens or groups could use this law to file frivolous or meritless complaints against public employees in order to harass or intimidate them. However, the bill does require that the complaint filed must be specific and verified, and also requires actual knowledge of an alleged ethics violation as opposed to second-hand or hearsay knowledge. It also does not preclude civil or criminal actions against a person who files a false complaint. All of these provisions should help deter the filing of frivolous or false complaints.

### **ADMINISTRATIVE IMPLICATIONS**

The AODA states that if enacted, this bill will increase complaints, both relevant and irrelevant. This will increase investigations and prosecutions in the AGO and the AODA offices.

Many of the cases to be investigated by the SEC and its Executive Director will also be subject to investigation by the SOS.

## CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB 293 relates to:

HB 154, No Election Expenditures from Corporations  
HB 155, Disclosure of Funds for Election Advocacy  
HB 195, State Ethics Commission Act  
SB 164, State Ethics Commission Act  
SB 172, State Ethics Commission Act  
SB 182, Limit Contributions in Certain Elections

## 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.

The 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 responds 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 public servants who operate with integrity and who take their jobs seriously.”

## **ALTERNATIVES**

The SOS suggests the possibility of expanding the existing Ethics Division within the SOS.

## **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 SOS 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.

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