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FISCAL IMPACT REPORT

ORIGINAL DATE 01/25/12

SPONSOR HJC LAST UPDATED 02/11/12 HB CS/111/aSPAC

SHORT TITLE Public Corruption Offenses SB _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$30.0-32.4*	\$30.0-32.4*	\$60.0-64.8*	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

*See Fiscal Implications for data provided by NMCD and discussion by DPS.

May Duplicate or Conflict with HB 170 and HB 210
 May Relate to HB 163 and HB 234

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorney (AODA)
 Attorney General's Office (AGO)
 Educational Retirement Board (ERB)
 Public Defender Department (PDD)
 Public Employees Retirement Association (PERA)
 New Mexico Corrections Department (NMCD)
 Department of Public Safety (DPS)

Note: Except as otherwise noted, references to agency responses are to those received on the original bill that remain relevant to the provisions of this substitute bill.

SUMMARY

Synopsis of SPAC Amendment

The Senate Public Affairs Committee amendment to the House Judiciary Committee substitute for House Bill 111:

- 1) Strikes language increasing the basic sentence for specified public corruption offenses by one year; and
- 2) Strikes language barring a person convicted of a public corruption offense from, either individually or in association with others, submitting a bid or entering into a contract with a public entity or acting as a lobbyist.

The bill as amended continues to require public entities to post information relating to public corruption offenses and to provide for forfeiture of certain rights and benefits under the state retirement systems upon conviction of certain public corruption offense.

Synopsis of Original Bill

The House Judiciary Committee Substitute for House Bill 111 is anti-corruption legislation that amends various criminal statutes to increase the penalties for certain public corruption offenses. The increased penalties include:

- increasing the basic sentence of imprisonment by one year when the crime is committed by a person elected or appointed to a position with or employed by a public entity or when any person is convicted of having an unlawful interest in a public contract or bribing a public officer or employee;
- barring the offender from being a lobbyist or contracting with a public entity, which includes the state or one of its agencies, departments, institutions or political subdivisions (a knowing and willful violation of which would constitute a third degree felony); and
- forfeiting a portion of any state pension.

The “public corruption” offenses to which these increased penalties (and the forfeiture proceedings authorized in Section 14, as described below) apply are:

- embezzlement;
- paying or receiving public money for services not rendered;
- making or permitting false vouchers;
- having an unlawful interest in a public contract;
- soliciting or receiving an illegal kickback;
- offering or paying an illegal kickback;
- bribing a public officer or employee; and
- demanding or receiving a bribe by a public officer or employee.

Section 13 of the bill requires all public entities post notice of public corruption offenses and their penalties. The list of public corruption offenses in this section includes (in addition to the list above to which increased penalties apply) violating the ethical principles of public service and taking an official act for person financial interest (both of which are currently fourth degree felonies under the Governmental Conduct Act) and tampering with public records (a fourth degree felony under the Criminal Code).

In addition, Section 14 of the bill requires that if public corruption charges are filed against a member or retired member of a state retirement plan and the alleged corruption relates, arises out of or is in connection to the member’s public office or employment, an ancillary claim for forfeiture of pension may be filed at the discretion of the district attorney or the attorney general. Public corruption offenses for purposes of forfeiture claims do not include violations of the Governmental Conduct Act or tampering with public records. Forfeiture can occur only if the underlying public corruption conviction is directly related to, arises out of or is in connection to a member’s public office or employment, and any forfeiture order is subject to prior court orders regarding community property and child support.

The amount of the pension to be forfeited shall not exceed the greater of: 1) five times the benefit received by the offender from the public corruption offense; or 2) five times the quantifiable harm to state, excluding any costs and fee associated with the criminal matter and forfeiture proceeding. The member is given the option to pay in full the amount that would otherwise be deducted from the member's pension. During the forfeiture proceeding, the judge may entertain claims of community property or child support.

The substitute bill also provides generally if a member has been terminated because of an allegation of a public corruption offense, the state system shall hold and not disburse the accumulated member contribution until pension forfeiture proceedings are resolved or until public corruption charges are no longer pending. Further, after receiving a forfeiture order issued under this section (pending a final appeal), the state system shall suspend any pension if the member is retired and shall not permit withdrawal of a member's accumulated contribution. After notification that an order was not appealed or was upheld on appeal, the system is to deduct the forfeited amount, subject to any court order addressing community property or child support obligations, whether such order was prior to or part of the forfeiture proceedings, or issued in another proceeding. That part of any pension that relates to previous employment shall not be affected by a forfeiture order if the public corruption offense did not arise from conduct related to the previous employment.

The forfeiture provisions are applicable to public pensions earned on or after July 1, 2012, the substitute bill's effective date.

Further, to enable any forfeiture proceedings, the substitute bill also contains in Sections 1 through 4 amendments to the Public Employee Retirement Act, the Judicial Retirement Act, the Magistrate Retirement Act and the Educational Retirement Act to add forfeiture provisions pursuant to the substitute bill to the list of exceptions to the general bar against assignment or other legal process against pensions or other benefits provided for in those acts.

The effective date of the bill is July 1, 2012.

FISCAL IMPLICATIONS

The NMCD notes that this bill would increase the basic sentences (by one year) of public officials convicted of the designated public corruption offenses, and would result in some public employees being convicted of a new third degree felony (as discussed above). This could result in minimal increases in NMCD's prison population and probation/parole caseloads. The NMCD notes that, because the capacities of medium and higher custody state prisons are essentially at capacity, any net increase in inmate population will likely have to be housed at a contract/private facility, which costs \$30,093 per year for a male inmate and \$32,408 for a female inmate. The numbers set out in the table above reflect the cost for each additional year for each defendant convicted of a public corruption offense under this bill.

Both the AODA and the PDD note that handling civil forfeiture proceedings such as those provided for in this bill is outside the experience of their staffs, and could strain each agency's resources and impact staffing and training requirements. The DPS reports that, as no new crime is being defined, it is already required to enforce the provisions of the crimes defined to be public corruption offenses, although it predicts it is likely to investigate more alleged instances of public corruption should this legislation be enacted.

SIGNIFICANT ISSUES

Agency responses focus primarily on the provisions of the bill related to the forfeiture of state pensions upon conviction of public corruption offenses. The AOC reports:

The National Association of State Retirement Systems compiled an analysis of selected state policies governing the termination or garnishment of public pensions in December 2010. New Mexico was included in the 41 states for which state policies were described. Of the 41 states included in the compilation, 23 have some provision for the forfeiture or revocation of a public employee's pension due to a variety of felony convictions, most related to the individual's employment. In at least one state, the forfeiture of all or part of the pension or retirement benefit can be made due to "misconduct....which renders the member's service or part thereof dishonorable." Four states included in the report allow pension benefits to be garnished for various types of restitution.

Further, the AGO advises that many states—including California, Florida, Michigan and Pennsylvania—have enacted anti-corruption legislation that includes forfeiture of retirement benefits only for felonies related to the misuse of public monies, such as bribes, extortion, theft or embezzlement of public money and forgery.

This substitute bill also requires that any proceedings to forfeit state pensions as a result of public corruption must be brought in the same proceeding as the criminal prosecution and presented to the same trier of fact (be it judge or jury). The AGO advises that such a process is required by New Mexico law. Both the AOC and the AODA point out, however, that as a result, a jury would have to find in the criminal matter that the offender was guilty beyond a reasonable doubt, while in the civil forfeiture part of the proceedings the standard of proof is clear and convincing evidence. These agencies express concern that the difference between these two standards of proof may confuse the jury in its deliberations.

In its analysis, the ERB also points out that the bill does not address the issue of whether lobbying, contracting or pension rights are to be restored in the event a convicted member or retiree is subsequently pardoned, and, if so, how the costs of repurchasing service credit would be calculated.

The AODA amplifies its comments on the performance implications on prosecutors:

The bill requires District Attorney prosecutors to enter into the civil practice of law which is significantly different than practicing criminal law. Training would need to be provided to prosecutors to teach them civil law as it applies to forfeitures and civil rules of procedure. It also puts additional responsibilities on the prosecutors as they will have to monitor the appellate process and notify the appropriate state system when the appeal is final and what the final result was. If there is a reversal of the forfeiture, the prosecutor's office would have to file the appropriate civil order, reinstating the person's pension or eligibility for a pension.

The AODA expresses concern about public perception of the impact of this bill:

A further issue is the potential chilling effect on keeping good, ethical people from applying for or staying in public jobs, out of fear that a misapplication of this law on them may cause them to forfeit all they have worked towards. Many staffers don't follow the bureaucratic aspects of public employment, and will misunderstand how this law may affect them, and may choose other occupations.

Additionally, the AODA comments that the change from forfeiture of the entire amount of a pension to a formula based on illegal benefits flowing to the offender or quantifiable harm to the state set out in the substitute bill changes the forfeiture from punishment to restitution or punitive damages. However, in its analysis of the substitute bill, the AGO comments that the change in amount forfeited avoid potential problems under the constitutional bar against excessive fines.

The AGO also advises that limiting the applicability of the forfeiture provisions to pensions earned after July 1, 2012 avoids potential problems under the ex post facto clause of the constitution.

Additionally, as to the substitute bill, the AGO continues to point out an issue regarding community property and child support obligations:

The bill raises potential problems related to overlapping jurisdiction where an existing court, whether in-state or out-of-state, already exercises jurisdiction over community property and/or child support issues but has not yet issued a final order. The bill only addresses situations where another forum has already issued an order, but fails to address the situation where another forum is exercising jurisdiction but has not yet issued an order.

PERFORMANCE IMPLICATIONS

The NMCD does not anticipate any negative impact in its ability to perform prison-related and probation/parole supervision-related services because it does not believe the bill will result in significant increases in the prison population.

ADMINISTRATIVE IMPLICATIONS

The PERA notes that it will be required to comply with the forfeiture provisions of the bill, including promulgating new rules concerning the administration of forfeiture proceedings as they apply to pension benefits payable, refunds of member contributions and compliance with prior domestic relation and child support orders.

DUPLICATION, RELATIONSHIP, CONFLICT

The AOC in its analysis of the substitute bill notes these duplications, relationships, and conflicts:

HB 163 – Employee" and "Public Officer" Definitions - contains definitions of employee, employment and public officer that may conflict with or relate to definitions of these same terms in this substitute bill.

HB 170 - Public Corruption Offenses - may duplicate or conflict with this substitute bill to the extent it specifies criminal acts that qualify as public corruption offenses.

HB 210 - Removal Of Public Officials From Office – may duplicate, relate or conflict with this substitute bill as to definitions of public office and penalties for conviction of public corruption.

HB 234 - Hospital Districts As Public Employees – may relate to definitions of public employment and public employees.

TECHNICAL ISSUES

The AOC notes that in Section 14(A)(4), the court is directed to serve a pension forfeiture order on the applicable retirement system, but all other notices are given by whomever prosecutes the forfeiture (either the attorney general or the district attorney). Additionally, Section 14(D) requires notice to the retirement system when an order is not appealed or upheld on final appeal but does not indicate who gives that notice. Requiring the entity prosecuting the forfeiture to serve any forfeiture order and all other notices would clarify the process in all instances.

The AGO suggests that instead of amending each criminal statute, the bill should amend the Criminal Sentencing Act to provide for these enhanced penalties.

OTHER SUBSTANTIVE ISSUES

The AGO recommends this bill also resolve a conflict under current law between the penalties for bribery: the Governmental Conduct Act prohibits bribery and classifies that offense as a fourth degree felony, while the Criminal Act prohibits bribery and classifies it as a third degree felony.

The PERA provides this additional background as to existing law addressing forfeiture of state pensions:

Currently, only members of the judicial and magistrate retirement systems are subject to a forfeiture of pension benefit provision. Under both the Judicial and Magistrate retirement systems, if a judge or magistrate is removed from office by the Judicial Standards Commission, the judge's only entitlement from the retirement fund is a refund of the judge's own contributions. The forfeiture provisions of the Judicial and Magistrate retirement systems only pertain to active members and cannot be exercised against a retired member already receiving pension benefits (The Judicial and Magistrate Retirement Acts bar retirees from returning to work with another state system).