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FISCAL IMPACT REPORT

SPONSOR HSIVC ORIGINAL DATE 3/04/17
 LAST UPDATED 3/04/17 HB 10/HSIVCS/aHSIVC

SHORT TITLE Public Accountability Act SB _____

ANALYST Esquibel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total			*\$117.9	**\$557.8	Recurring	GF

(Parenthesis () Indicate Expenditure Decreases)

***FY19 beginning fiscal impact of \$96,370 for Judicial Standards Commission to fund additional staff for its expanded role under the provisions of the bill; and \$21,600 for the first meetings of the Public Accountability Board.**

****FY20 beginning fiscal impact to hire staff, provide infrastructure, and train staff to fulfill the duties and responsibilities of the proposed Public Accountability Board.**

HB10/HSIVCS/aHSIVC relates to Senate Bill 72, Public Accountability Act; relates to SB96, proposing campaign finance changes (Sections 1-19-34.6, 34.7 and 35) and SB97, proposing public financing of campaign finance changes (Section 1-19A-17).

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Judicial Standards Commission
- Administrative Office of the Courts
- Administrative Office of the District Attorneys
- Office of Attorney General
- Administrative Hearings Office
- Secretary of State's Office
- New Mexico Finance Authority
- Regulation and Licensing Department
- State Fair Commission
- New Mexico Mortgage Finance Authority
- New Mexico Lottery Authority

SUMMARY

Synopsis of Bill and Amendments

The House State Government, Indian and Veterans' Affairs Committee substitute for House Bill 10 as amended by the House State Government, Indian and Veterans' Affairs Committee (HB10/HSIVCS/aHSIVC) would enact the Public Accountability Act (PAA) and would create as 12 member Public Accountability Board (PAB) with duties and powers to develop and administer a code of public accountability, including holding hearings on charges of ethical misconduct, corruption, abuses and noncompliance by members of state and local government. The PAB is given jurisdiction to administer and enforce several state laws including the civil compliance provisions of the Campaign Reporting Act, Financial Disclosure Act, Gift Act, Governmental Conduct Act, Inspection of Public Records Act, Lobbyist Regulation Act, Open Meetings Act, Procurement Code, Public Accountability Act, Voter Action Act, and Article 9, Section 14 of the State Constitution.

This bill proposes establishing a new Public Accountability Act which creates a 12 member Public Accountability Board (PAB) recommended and appointed by a variety of different entities including the governor, the Secretary of State (SOS), and the Chief Justice of the Supreme Court. Each member will serve for six years with no more than two consecutive terms. The bill also includes certain required qualifications of members appointed to the PAB.

A board member serving in the PAB is not allowed to be an officer or leader in a qualified political party or political committee, be in elected office, be a public employee, or make contributions to candidate or political committees.

The PAB is charged with enforcing applicable civil compliance provisions of the:

(1) Campaign Reporting Act (CRA); (2) Financial Disclosure Act (FDA); (3) Gift Act; (4) Governmental Conduct Act (GCA); (5) Inspection of Public Records Act; (6) Lobbyist Regulation Act (LRA); (7) Open Meetings Act; (8) Procurement Code; (9) Public Accountability Act; (10) School District Campaign Reporting Act; (11) Voter Action Act (VAA); and (12) Article 9, Section 14 of the constitution of New Mexico.

The duties and responsibilities of the board include receiving and investigating complaints, holding complaint hearings, promulgating rules and advisory opinions, drafting a code of public accountability, and preparing an annual report of activities and recommendations. The PAB would investigate complaints and oversee hearings regarding allegations of violations of the Acts under its jurisdiction filed against state officials, state employees, government contractors, candidates and lobbyists.

The PAB is required to assess complaints within 10 days and shall dismiss complaints that are deemed frivolous or for the purpose of publicity and shall forward complaints deemed outside of its jurisdiction to the appropriate entity. If a complaint is deemed frivolous, unfounded, or outside the PAB jurisdiction it is dismissed. Both the complainant and respondent are notified of the allegations and the dismissal and the complainant is informed of their right to appeal.

Complaints deemed to be legitimate and within PAB jurisdiction shall be investigated by the PAB. The PAB may request subpoenas in order to investigate the complaint and testimony related to the complaint shall be conducted under oath. Respondents related to the complaint are

entitled to representation. The bill requires notification to the respondent and move toward action on legitimate complaints within 60 days of filing.

The PAB is required to hold its first meeting no sooner than December 1, 2018.

Significant amendments to current statutes include:

Amendments to the various acts now under the jurisdiction of the PAB provide the PAB authority to submit issues directly to district court for civil enforcement rather than going first to the Attorney General or District Attorney.

The committee substitute further amends Section 1-22A-6 to move investigation and compliance enforcement of the school district reporting act to the PAB.

An amendment to Section 1-19-35 of the CRA requires the PAB to publish a list of persons who fail to file a required report or fail to pay a required penalty.

An amendment to Section 2-6-1 prohibits a bill from being pre-filed until after the beginning of the prohibited period of soliciting campaign contributions pursuant to Section 1-19-34.1.

An amendment to the definition of lobbyist in the LRA to explicitly not include an executive director of a nonprofit or a 501(c) organization.

An amendment to Section 2-15-7 establishing a full time legislative ethics committee to handle all matters pertaining to legislative ethics. The committee would include two nonvoting public members, one appointed by the speaker of the House of Representatives with the agreement of the majority and minority leaders of the house and one appointed by the president pro tempore of the senate with the agreement of the majority and minority leaders of the senate. The committee is required to issue an annual report listing complaints received including disposition and advisory opinions issued. The committee is required to maintain a web page on the legislature's website. The committee is required to handle complaint investigations in a substantially similar manner as the procedures used by the PAB. The committee is not allowed to publicly disclose the complaint or information related to the investigation, however, it strikes the complainant from this same requirement. Additionally, the bill proposes adding new language requiring all hearings in which the committee recommends sanctions against a legislature to be public and all documents introduced as evidence to be made public records.

An amendment requires the PAB to develop and provide training to all legislators biennially.

An amendment moves the ability to suspend or debar a contractor from the state purchasing agent to the PAB.

An amendment increases the duties of the judicial standards commission to have authority to oversee complaints against the PAB.

FISCAL IMPLICATIONS

The bill does not include an appropriation.

The transference of multiple roles and functions currently under the jurisdiction of other state offices and officers will require adequate staffing, infrastructure and a well-organized administrative operation for the proposed Public Accountability Board (PAB). How this staffing and infrastructure will be funded, hired and trained to perform the duties assigned to the PAB is not provided for in the bill, but will require substantial funding beginning in FY20. Additionally, HBHB10/HSIVCS/aHSIVC does not include funding for mileage and per diem for board members, a salary for the executive director or funds to pay for professional services as needed.

The Secretary of State's Office indicates PAB members are entitled to per diem and mileage as provided by the Per Diem and Mileage Act and are required to meet as necessary but at least once each quarter. In order for the PAB to become established it would likely need to meet each month for the first year. FY19 costs for a 12 member board to meet monthly and no sooner than December 1, 2018 as called for in the legislation, is estimated to be approximately \$21,600 (12 members * \$300 per diem and mileage * 6 months).

The Judicial Standards Commission reports under the bill's provisions to expand the scope of the Commission it would need additional funding in FY19 to complete thorough and timely investigations and trials including:

- 1) Restoration of appropriations for vacant FTE with the cost of a full-time FTE with benefits costing approximately \$80 thousand;
- 2) Contractual funding for evaluations for judges, commissioners, or hearing officers costing approximately \$5 thousand;
- 3) Funding for an additional estimated 10 percent for expenses related to investigations and trials including copying and supplies, staff travel for investigations, and other costs for trials and hearings and witness expenses totaling approximately \$11.4 thousand.

Additional costs to fund the PAB would likely be incurred in FY20 as follows:

The proposed legislation calls for the appointment of a full time executive director who may also hire a general counsel or enter into contracts and agreements to assist in the conduct of the duties of the board. Salary and benefits of a full time executive director with the qualifications outlined in the legislation is estimated at \$150,000 per year. A full time general counsel would likely be required for at least one year to ensure the board is fully functional, including assisting with drafting the code of public accountability and a number of advisory opinions and rules at an estimated \$150,000 per year. The general counsel may only be needed on a part time basis after the board has been fully established once a majority of the needed rules and opinions have been adopted and published.

The legislation requires the PAB to investigate complaints filed with its office, which will likely require additional staff support (in addition to the Executive Director and General Counsel). An estimated three additional FTE to support the Executive Director for tracking and investigating complaints and answering questions related to compliance and enforcement of the various acts is estimated at an additional \$210,000 per year in salary and benefits. The SOS estimates approximately 30 complaints per year are received regarding potential violations of the CRA, LRA, GCA, and FDS. It is presumed that the PAB may receive more complaints than this since it has a larger jurisdiction and more statutory authority than ever granted to the SOS.

Additional agency administrative startup and recurring costs are also anticipated including establishing office space, desk, computer and phone equipment, postage and supplies, and a

website. These costs can vary but could be estimated at \$10,000 - \$25,000.

The bill also proposes to amend the CRA, LRA, and FDA such that disputes are handled by an independent hearing officer instead of an arbitrator. This could provide for potential money savings as the arbitration cases are currently \$900-\$1200 per case to pay an independent arbitrator whereas a hearing officer could be provided by GSD without this cost. In 2016 there were 19 arbitration cases paid for by the SOS at a cost of \$22,800 related to violations of the CRA.

The legislation also amends Section 1-19-35 of the CRA such that any penalties collected by the PAB for failure to timely file required campaign reports or for violations of the Financial Disclosure Act to be deposited in the Public Election Fund rather than the state general fund. The SOS collected \$8,050 in 2016 for late filing of reports under the CRA.

The Administrative Hearings Office reports CS/HB10/HSIVCS/aHSIVC seeks to amend provisions of law to reassign or make available the services of the Administrative Hearings Office, including the Campaign Reporting Act, the Lobbyist Regulation Act, the Legislative Ethics Committee, and the Financial Disclosure Act. CS/HB10/HSIVCS/aHSIVC also amends the Administrative Hearings Office Act to expressly grant authority over the same. As such, the AHO estimates a FY20 fiscal impact of \$175.7 thousand for an additional paralegal (\$56.0), administrative law judge (\$107.2), conflict of interest contingency (\$10.0), and audit funds (\$2.5).

The State Fair Commission reports under the provisions of the bill elected officials or public employees are entitled to representation by the state Risk Management Division (RMD), local risk management or other insurance carrier, for representation in claims made against them. These provisions could result in an additional fiscal impact to agencies associated with justify increased risk management rates.

The Administrative Office of the Courts reports there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of the bill and commenced civil actions and the involvement of the courts in issuing subpoenas, appeals from the imposition of penalties, and challenges to actions taken subsequent to PAB report disclosure. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

The Judicial Standards Commission indicates CS/HB10/HSIVCS/aHSIVC would expand the Commission's jurisdiction requiring it to regulate the conduct and character of court-appointed commissioners and judicial hearing officers while acting in a judicial capacity. It estimates the bill would increase the scope of the Commission's jurisdiction by approximately 8 percent, based on current year numbers of judges (308) and court-appointed commissioners and judicial branch hearing officers (25 combined) currently serving/working in those positions.

The Administrative Office of the District Attorneys (AODA) reports under the provisions of CS/HB10/HSIVCS/aHSIVC the PAB is responsible for civil enforcement of many acts formerly enforced by the Secretary of State, the Attorney General and the district attorneys. However, the

bill does not address criminal enforcement, and repeals sections regarding criminal enforcement in the existing statutes governing the Governmental Ethics Oversight Committee and the Governmental Conduct Act.

The Attorney General's Office (AGO) reports the bill is a complete overhaul of how the applicable laws are enforced in the state. The AGO notes the bill creates a new exception under the Open Meetings Act that would allow the Board to close a meeting for matters related to complaints and investigations. The bill contains strict deadlines for the PAB to hold hearings and take action on complaints, and issue advisory opinions. It is unclear whether failure to meet any of these deadlines would deprive the PAB of jurisdiction to consider a matter.

The AGO indicates the bill imposes certain limitations on board members. There are substantial restrictions as to who may be board members and restrictions on their political speech.

The request for and research related to an advisory opinion is made exempt from disclosure under IPRA. Any exception to IPRA should be carefully considered.

In Section 10(H), the complaint review committee or the board may dismiss a complaint upon a finding that the complaint was filed for the primary purpose of publicity. This is a subjective standard that is ripe for interpretation. Publicity is not defined in the bill.

Section 11 has issues regarding hearings in front of the PAB. 1) The bill does not state who would prosecute such violations; 2) if the Board finds a willful breach, it will impose fines provided for by law; 3) Many of the laws under the jurisdiction of the board have fines which can only be awarded by a district court. Also, the willful violation standard is not the same a district court would follow in determining a fine; and 4) The bill does not address the procedure for appealing the Board's decisions. As soon as the final decision is issued by the Board, the decision is published and given to the Legislature or the employer of an employee against whom the complaint was filed. This process may implicate a respondent's due process rights.

Section 12 exempts information and reports from IPRA. This exemption should be analyzed carefully. Even the law enforcement exception of IPRA, 12-2-1(A)(4), is time sensitive, allowing for information to be released based on the phase of the investigation. Currently, the bill makes these records not subject to inspection at any time.

Section 14 (B) may be in conflict with New Mexico's state retention schedule for certain documents. New Mexico is now a functional retention state.

Amendments to oversight of our current state law would be a substantial change to oversight and enforcement. Section 15-40, and all sections in which the SOS is removed, takes away the SOS's ability to enforce the election code in the specified areas, areas in which our Legislature had entrusted the SOS with its oversight. Under the provisions of the bill, the SOS would only oversee the administration of the election code but not enforce it. Therefore, the Board needs to work very closely with the SOS for the SOS's statutory duty to seek voluntary compliance with the Act is still mandated to the SOS. And it is only after the SOS seeks compliance of a violation, that the fines associated with a violation of Act can be levied.

The Administrative Hearings Office (AHO) indicates the bill is unclear whether AHO's function is to conduct a de novo and/or new evidentiary hearing in a matter already heard by the Public

Accountability Board or have a much more limited quasi-appellate function under the Act. Also, there does not appear to be any provision that would allow for an appeal of the Administrative Hearings Office determination. This may suggest AHO's role is more limited to quasi-appellate function, but it is unclear.

The Administrative Hearings Office reports as an agency charged with conducting administrative hearings, both under general principles of administrative law and the controlling statute, the Administrative Hearings Office does not apply the rules of evidence in its proceedings. However, the Public Accountability Board will apply the rules of evidence in its proceedings, leading to a question of whether, with respect to matters forwarded by the Public Accountability Board to AHO, the AHO hearing will occur under the Rules of Evidence.

The Mortgage Finance Authority (MFA) reports it administers the Affordable Housing Act (Section 6-27-1 NMSA 1978) on behalf of the State of New Mexico. The Affordable Housing Act provides an exemption to the anti-donation clause for donations by state or local governments for affordable housing, and these donations are approved by MFA. In 2015, the Affordable Housing Act was amended to add a provision for violations, penalties and remedies. That provision assigned jurisdiction to the Attorney General for alleged violations of the Affordable Housing Act. Violations of the Affordable Housing Act include but are not limited to violations of the anti-donation clause; therefore it is unclear if CS/HB10/HSIVCS/aHSIVC introduces any conflict of jurisdiction between the Attorney General and the new Public Accountability Board if a violation of the anti-donation clause is also a violation of the Affordable Housing Act.

The Regulation and Licensing Department indicates CS/HB10/HSIVCS/aHSIVC removes the Attorney General's and District Attorneys enforcement powers under the Open Meetings Act (OMA), Governmental Conduct Act (GCA), Inspection of Public Records Act (IPRA) and Procurement Code. These provisions may constitute an encroachment on the powers and duties of the Attorney General to "prosecute and defend all actions and proceedings brought by or against any state officer, or head of a state department, board or commission, or any employee of the state in his official capacity." §8-5-2(C) NMSA 1978.

The State Fair Commission indicates there are currently mechanisms in place to investigate claims against public officials and employees. The process by which complaints would be investigated by the proposed PAB could interfere with ongoing internal investigations and create conflict with regard to the ability of agencies and public officials to take disciplinary action up to and including termination of an employee when a violation needs to be addressed immediately.

PERFORMANCE IMPLICATIONS

The Administrative Hearing Office reports so long as the mandates of CS/HB10/HSIVCS/aHSIVC are adequately funded to address the expansion of AHO's mission, AHO does not anticipate performance implications. Inadequate funding of the mandates in CS/HB10/HSIVCS/aHSIVC could adversely affect AHO's ability to address all hearing types assigned by their statutorily mandated deadlines and as promptly as the public desires, as AHO will not have sufficient hearing officer resources to conduct all hearing types, including the new hearings described in this bill, in a timely manner with current staffing levels.

ADMINISTRATIVE IMPLICATIONS

The Secretary of State's Office indicates the bill amends the Lobbyist Regulation Act (LRA) changing authority to examine lobbyist reports for compliance from the SOS to the PAB and changes the authority to write advisory opinions from the SOS to the PAB. The SOS is still charged with the administration of the LRA, including educational efforts and providing for the filing of required reports, and would need to work closely with the PAB to assist with or refer actions to the PAB for enforcement.

RELATIONSHIP

CS/HB10/HSIVCS/aHSIVC relates to SB72.

CS/HB10/HSIVCS/aHSIVC differs from SB72 in several respects, but in relation to the Judicial Standards Commission, the bill's proposed expansion of the jurisdiction and duties of the Judicial Standards Commission is much narrower than what is proposed by SB72. Cs/HB10/HSIVCS/aHSIVC limits the expansion to add court-appointed commissioners and judicial hearing officers.

TECHNICAL ISSUES

The Administrative Office of the Courts (AOC) indicates under the provisions of the bill granting the Judicial Standards Commission the same authority to regulate the conduct and character of board members of the PAB, court-appointed commissioners, judicial hearing officers, administrative law judges or special masters while acting in a judicial capacity, some of whom will not be members of the judiciary and some of whom will be members of an adjunct agency of the executive department, potentially violates the separation of powers clause of the constitution. The same argument may be made regarding the Legislature. There is a question whether court-appointed commissioners and judicial hearing officers acting in a judicial capacity can be considered judges or part of the judiciary, such that discipline and monitoring by the commission is appropriate.

The AOC indicates CS/HB10/HSIVCS/aHSIVC granting the Judicial Standards Commission the authority to potentially regulate the conduct and authority of individuals outside of the judiciary, lends to the confusion as to whether judges and justices are subject to the provisions of the PAA. Judges and justices are currently guided and disciplined regarding ethical/unethical behavior, to include them within the purview of the PAA is unnecessary. Specifically excluding judges and justices from the Act's definitions of public employee and public office, if the intent of the legislation, will dispel the confusion.

The AOC indicates CS/HB10/HSIVCS/aHSIVC and the PAA do not provide any mechanism for appealing or otherwise challenging the finding of the PAB prior to Section 11(E)'s required public disclosure of a report, nor at any time. Section 10(I) does provide for appeal of the dismissal of a complaint by a complainant. Section 12(A) requires that only a finding of a breach be a public record. A dismissal shall be a public record only upon the request of the respondent.

The AOC identifies the additional technical issues:

1) The title to Section 11 contains the description, "Appeal of Dismissal," yet Section 11 does not address appeals. Language regarding the appeal of a dismissal is instead found in

Section 10(I);

2) Section 2: Specifically excluding judges and justices from the Act’s definitions of public employee and public office, if the intent of the sponsors, will dispel any confusion as to whether judges and justices fall within these definitions and are subject to the provisions of the PAA; and

3) Section 46: there is no definition as to what is meant by “court-appointed commissioners” in the Subsection A amendment to Section 34-10-2.1.

The AODA indicates CS/HB10/HSIVCS/aHSIVC does not address criminal enforcement, except to remove criminal provisions in the statute governing the Governmental Ethics Oversight Committee and the Governmental Conduct Act. The bill also does not address situations in which a civil investigation conducted by the PAB uncovers a possible crime. Such cases should be referred to the Attorney General or the district attorneys for prosecution.

The AGO reports throughout HB10/HSIVCS/aHSIVC, executive director and director are used interchangeably. The bill should stay consistent with the use of executive director in every instance.

The New Mexico Finance Authority indicates Section 7 of the bill allows for removal of the executive director only for cause, yet cause is undefined. The bill discusses Board appointments in different provisions, namely Sections 3 and 13. Interpretation of the bill using principles of statutory construction is likely to be confusing and increases the risk for error in following terms of office and other guidelines.

The bill discusses the potential confidentiality of complaints and investigations in both Sections 7(D) and 12, yet the language of the bill is ambiguous as to when such documents and discussions are confidential and what information reported to the Board will be confidential. This inconsistency in the language will introduce risk as to the confidentiality requirements and potentially allow unsubstantiated or immature complaints to be publicly reported without the opportunity for rebuttal or prior to full investigation.

The Regulation and Licensing Department indicates the bill is unclear as to what office or agency, if any, would have oversight or authority regarding any possible allegations that the PAB has violated the Open Meetings Act.

The State Fair Commission indicates the bill is unclear if the creation of the PAB would change the role of the State Personnel Office and agency human resource managers for investigating and acting on personnel matters. Additionally, the bill would make advisory opinions and reports public and accessible online, which could violate some current personnel privacy protections for individual employees.

The Mortgage Finance Authority indicates the Affordable Housing Act (Section 6-27-1 NMSA 1978) assigns jurisdiction to the Attorney General for violations of the Affordable Housing Act and may conflict or overlap with the jurisdiction of the enforcement of the anti-donation clause by the proposed PAB.

OTHER SUBSTANTIVE ISSUES

The Judicial Standards Commission reports court-appointed commissioners and judicial hearing

officers are at-will employees of the judicial branch and hold employment rights that could expose the State to liability for damages under local, state, or federal law by enactment and implementation of this bill.

The Administrative Office of the District Attorney reports it is not clear why Section 6 of CS/HB10/HSIVCS/aHSIVC gives the PAB the responsibility of enforcing the applicable civil compliance provisions of Article 9, Section 14 of the Constitution of New Mexico as that constitutional provision addresses aid to private enterprise, veterans' scholarship programs, job opportunities and affordable housing and does not contain civil compliance provisions.

The Administrative Hearings Office reports an expansion to AHO's jurisdiction could result in a moderate to significant increase in caseload. An increase in caseload and the additional FTE would also require additional physical space. AHO would also need the ability to hire a contractor to serve as a hearing officer in case of a real or perceived conflict of interest that would require recusal of AHO employees from conducting the hearing (No AHO employee could hear a complaint alleged against any AHO employee. Since AHO is administratively attached to DFA, any complaint involving a DFA employee arguably may raise an appearance of a conflict issue).

POSSIBLE QUESTIONS

The Judicial Standards Commission questions if there are any employment rights held by court-appointed commissioners and judicial hearing officers who are at-will employees of the judicial branch, and not elected officials, that could expose the State to liability for damages under local, state, or federal law by enactment and implementation of the provisions of this bill.

RAE/sb/al