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FISCAL IMPACT REPORT

ORIGINAL DATE 2/27/19
 LAST UPDATED 3/01/19

SPONSOR HJC HB 4/HJCS/aHAFC

SHORT TITLE State Ethics Commission Act SB _____

ANALYST Glenn

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Indeterminate	Indeterminate	Indeterminate		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to: CS/HB2&3, SB 3, SB 4, SB 372, SB 619

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)
 Secretary of State's Office (SOS)

Responses Not Received From

General Services Department (GSD)

SUMMARY

Synopsis of HAFC Amendments

The House Appropriations & Finance Committee Amendments to the House Judiciary Committee Substitute for House Bill 4 remove the \$1 million appropriation, and provide that if the general counsel determines there is probable cause to investigate a complaint, the notification to the hearing panel, complainant and respondent, the specific allegations and any response to the complaint shall be made public.

With the elimination of the appropriation, funding for the State Ethics Commission will come from the special appropriation of \$500 thousand in House Bill 2. See Fiscal Implications.

Synopsis of Bill

The House Judiciary Committee Substitute for House Bill 4 enacts the State Ethics Commission Act. The act provides for the appointment of members of the State Ethics Commission, created

under Article IV, Section 17, of the state constitution as an independent state agency. The commission has seven commissioners, no more than three of whom may be members of the same political party. One commissioner each is appointed by the governor, the president pro tempore of the Senate, the minority floor leader of the Senate, the speaker of the House, and the minority floor leader of the House. Two commissioners are appointed by the four legislatively appointed commissioners.

The commissioners are appointed for staggered terms of four years beginning on July 1, 2019, with initial terms specified in the bill. Commissioners are limited to two consecutive terms. A vacant position is filled by the appropriate appointing authority and the successor serves for the remainder of the unexpired term. A commissioner may be removed for incompetence, neglect of duty, or malfeasance in office, after notice and the opportunity to be heard. The Supreme Court has jurisdiction over proceedings to remove commissioners. A commissioner also is subject to impeachment under Article IV, Section 36, of the New Mexico Constitution.

HB4 sets forth criteria for qualifying for appointment to the commission. To qualify, a person must have been registered to vote for at least five years and not have changed political party affiliation within five years before appointment. A person who is or has been a state officer, a state employee, a candidate, a lobbyist, a government contractor, or an office holder in a political party within the two years prior to appointment is not qualified.

The bill permits a commissioner to be recused from participating in a particular matter before the commission. The bill requires commissioners to recuse themselves whenever a commissioner is unable to or there is reasonable doubt about whether the commissioner can make a fair and impartial decision, including specific circumstances described in the bill. A party to a proceeding may request the recusal of a commissioner. A disqualified commissioner is precluded from participating in any proceedings or discussions related to the matter underlying the disqualification.

Beginning January 1, 2020, the commission has jurisdiction to enforce the civil provisions of the following laws for state officers and employees in the executive and legislative branches, government contractors, and lobbyists: the Campaign Reporting Act, Financial Disclosure Act, Gift Act, Lobbyist Regulation Act, Voter Action Act, Governmental Conduct Act, Procurement Code and the State Ethics Commission Act. HB4 provides the commission shall receive and investigate complaints and hold hearings to determine whether a law under the Commission's jurisdiction has been violated. The Commission may issue advisory opinions, publish an ethics guide and offer annual ethics training.

The commission is required to hire an executive director. The executive director must be a former state or federal judge or an attorney knowledgeable about the laws enforced by the commission. The executive director is required to hire a general counsel and may appoint hearing officers and employ other personnel. The executive director may be removed only for cause.

The bill requires state agencies to forward to the commission all complaints alleging violations of the laws subject to the commission's jurisdiction. The Commission may choose to act on some or all allegations in a complaint or forward the complaint or allegations it chooses not to act on to another state agency with appropriate jurisdiction. By agreement with the Legislature, the commission may investigate a complaint referred by the Legislature or a legislative committee.

HB4 addresses the process for filing and investigating complaints. The respondent is provided notice of the complaint and an opportunity to file a response. The executive director reviews the complaints and refers those within the commission's jurisdiction to the general counsel. If the general counsel determines a complaint is frivolous or unfounded, the complaint will be dismissed and the complainant and respondent will be notified of the decision. If there is sufficient cause, the general counsel will investigate the complaint.

The respondent to a complaint has the right to be represented by legal counsel during an investigation. A state officer or employee against whom a complaint has been filed alleging a violation made in performance of the officer's or employee's duties is entitled to representation by the Risk Management Division of the General Services Department.

After an investigation is completed and a hearing panel receives the general counsel's recommendations, the hearing panel will dismiss the complaint or set a public hearing as provided in HB4. After the hearing, the panel is required to issue a written decision and if it finds by a preponderance of the evidence that the respondent committed a violation, the decision may include recommendations for disciplinary action and impose fines provided for by law. A finding of fraudulent or willful misconduct requires clear and convincing evidence. The bill provides the respondent with the right to an appeal before the full commission.

Under HB4, a complaint determined to be frivolous or unsubstantiated is not public, unless requested by the complainant or respondent. The commission is required to publicly disclose a hearing panel's decision, including a dismissal or settlement. Pleadings, briefs, and other information related to the decision are public unless privileged or confidential by law or court rule. Complaints, reports, files, and other records obtained or generated by the commission, a hearing panel or the executive director may not be disclosed by the commission or its employees unless necessary to pursue an investigation, the records are offered into evidence at a judicial, legislative or administrative proceeding, or required by law. The commission is required to produce a public quarterly report showing the number of complaints received by the commission and the type of violation alleged in and disposition of the complaints.

If the commission determines that a respondent's conduct amounts to a criminal violation, the matter may be referred to the attorney general or appropriate district attorney.

The bill includes time limitations on the Commission's jurisdiction. Complaints must be filed with the commission within the later of two years from the date the alleged conduct occurred or the alleged conduct could reasonably have been discovered. The commission may not adjudicate a complaint filed against a candidate, except under the Campaign Reporting Act or Voter Action Act, less than 60 days before an election.

HB4 amends the Campaign Reporting Act, Financial Disclosure Act, Gift Act, Lobbyist Regulation Act, Voter Action Act, Governmental Conduct Act, and Procurement Code to conform to the State Ethics Commission Act's provisions conferring enforcement jurisdiction on the commission. The amendments to the Campaign Reporting Act, Lobbyist Regulation Act and Voter Action Act provide the commission shall share jurisdiction to investigate and adjudicate complaints with the secretary of state under a memorandum of understanding.

The effective date of Sections 1-7 and 36 of the bill, which provide for the creation of the commission, the qualifications of commissioners, the recusal of commissioners, the executive

director’s responsibilities, the commission’s duties, and the appropriation, is July 1, 2019. The effective date of the remaining sections, which address the commission’s jurisdiction, and complaint, investigation, and hearing procedures, is January 1, 2020.

FISCAL IMPLICATIONS

The appropriation of \$1 million contained in HB4 is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of FY20 shall revert to the general fund.

House Bill 2 makes a special appropriation of \$500 thousand for expenditure in FY19 and FY20 to the Department of Finance and Administration for the State Ethics Commission, contingent on the enactment of ethics commission-related legislation. Any unexpended balance of the appropriation remaining at the end of fiscal year 2020 shall revert to the general fund. *See* HB 2, § 5(29), pp. 171-72, 176.

SIGNIFICANT ISSUES

HB4 implements Article V, Section 17, of the New Mexico Constitution, which establishes the State Ethics Commission and was approved by the state’s voters in the 2018 general election.

SOS states the HAFC substitute addresses concerns expressed in its analysis of HB4 as originally introduced about the bill’s provisions transferring to the commission enforcement authority and authority to advise and educate under the Campaign Reporting Act, Voter Action Act, and Lobbyist Regulation Act.

ADMINISTRATIVE IMPLICATIONS

NMAG notes HB4 requires NMAG to prosecute criminal violations referred by the State Ethics Commission. NMAG states this would increase the number of criminal prosecutions and require additional staff time.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to:

- SB 3 Campaign Finance Reporting
- SB 4 Campaign Public Financing Changes
- SB 372 Public Contracts Ethics Act
- SB 619 State Ethics Commission Act
- CS/HB2&3 General Appropriations Act of 2020

TECHNICAL ISSUES

Section 15(A)(2) provides that one of the triggers for the two-year limitations period is the date “the alleged conduct could reasonably have been discovered.” It might be advisable to add “by the commission” after the word “discovered” to avoid any confusion or misunderstanding about when the limitations period begins.

NMAG notes the following issues:

- Section 2(H) defines “instrumentality of the state” to include the Water Quality Control Commission. NMAG notes that the Water Quality Act describes the Water Quality Control Commission as “the state water pollution control agency for this state” and “administratively attached to the department of environment.” *See* NMSA 1978, § 74-6-3(E), (F).
- The word “requested” in the first sentence of Section 9(B) should be changed to “made”.
- The State Ethics Commission Act should address whether and to what extent the Open Meetings Act applies to the Commission’s meetings and proceedings.

OTHER SUBSTANTIVE ISSUES

SOS states Section 10(E)’s requirement that frivolous or unfounded complaints not be made public unless requested by the respondent or complainant is problematic. SOS is concerned the provision may be misused for campaign purposes or may result in public disclosures that do not accurately or fairly reflect the information contained in the complaint submitted to the commission or other agency.

BG/al/sb