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FISCAL IMPACT REPORT

ORIGINAL DATE 3/13/19

SPONSOR SEC _____ LAST UPDATED _____ HB _____

SHORT TITLE State Ethics Commission Act _____ SB 668/SECS/aSJC/
aSF1#1 - #7

ANALYST Glenn _____

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		See Fiscal Implications			Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

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

Conflicts with: HB 4

SOURCES OF INFORMATION

LFC Files

SUMMARY

Synopsis of SJC Amendment and SF1 #1-7 Amendments

The Senate Judiciary Committee amendment and Senate Floor #1 through #7 amendments:

- Amend the definition of “complaint” to require that it be attested under oath by the complainant and subject to penalty of perjury;
- Change the definition of “public agency” by deleting school districts and charter schools and providing that, beginning on July 1, 2021, the definition will include a political subdivision of the state;
- Specify the initial terms for the commissioners initially appointed to the commission;
- Change the bill’s provision allowing respondents to be represented by legal counsel during an investigation to provide that a respondent is only entitled to legal representation as provided for public officials and state public employees who are subject to a complaint alleging a violation made in the performance of their duties and entitled to representation by the Risk Management Division of the General Services Division. In effect, this change appears to limit the right to legal counsel during an investigation to public officials and state employees with access to legal counsel provided by Risk Management;

- Provide for public hearings on complaints;
- Requires the Interim Legislative Ethics Committee to issue an annual report regarding its activities and to maintain a web page on the Legislature’s website;
- Amends the Open Meetings Act to change responsibility for enforcement from the attorney general to the State Ethics Commission and to provide that meetings of the commission or its committees that relate to complaints or investigations are not required to be public;
- Deletes the bill’s provision authorizing the commission to investigate complaints against contractors, transfers authority to suspend or debar contractors under the Procurement Code from the state purchasing agent or central purchasing office to the State Ethics Commission, and authorizes the commission to bring civil actions to enforce the Procurement Code;
- Amends the Inspection of Public Records Act to change responsibility for enforcement from the attorney general to the State Ethics Commission;
- Amends the responsibilities of the Judicial Standards Commission to provide that it has the same authority to discipline or remove members of the State Ethics Commission, court-appointed commissioners, judicial hearing officers, administrative law judges or special masters acting in a judicial capacity as the Judicial Standards Commission has with regard to justices, judges and magistrates; and
- Provide that the effective date of Sections 9 through 38 and 40 through 44 of the bill is January 1, 2020, and the effective date of Section 39, which amends the duties of the Judicial Standards Commission, is July 1, 2020.

Synopsis of Original Bill

The Senate Education Substitute for Senate Bill 668 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. 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 president pro tem 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. One commissioner is appointed by the governor, who is required to be a retired judge and to chair the commission.

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.

SB 668 sets forth criteria for qualifying for appointment to the commission. To qualify, a person must not have changed party registration in the two years preceding appointment to the

commission if the person's prior party registration would make the person ineligible to serve. A person who is or has been a public official or 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 duties of the commission include receiving and investigating complaints against public officials and employees, government contractors and lobbyists; holding hearings to determine whether violations have merit; promulgating rules necessary to implement and administer the act; compiling and providing public access to advisory opinions and reports; drafting a code of ethics for public officials and employees; and submitting an annual report to the governor. Discretionary duties of the commission include initiating alleged ethics violations complaints, petitioning courts to issue subpoenas, publishing an ethics guide and offering ethics training.

The commission may issue advisory opinions as provided by the bill. Advisory opinions are public, except for the requester's name and identifying information. A request for an advisory opinion is confidential.

The commission is required to appoint an executive director, who must be an attorney and knowledgeable about state ethics laws. The executive director is limited to serving two six-year terms, and may be removed only for cause. The executive director's duties and powers include performing investigations, bringing complaints and investigation results before the commission for consideration, and preparing an annual budget. The executive director is required to hire a general counsel and may appoint hearing officers and employ other personnel.

The commission has jurisdiction to enforce the civil provisions of the following laws for public officials and employees, candidates, 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, Article IX, Section 14 of the state constitution (commonly referred to as the "antidonation clause"), Open Meetings Act, Inspection of Public Records Act, and the School District Campaign Reporting Act.

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, the commission shares jurisdiction with other agencies having authority to act on a complaint. By agreement with the Legislature, the commission may investigate a complaint referred by the Legislature or a legislative committee.

The bill provides that complaints alleging an ethics violation may be filed by a person with actual knowledge of the violation. The respondent is provided notice of the complaint and an opportunity to file a response. The executive director reviews the complaints and initiates an investigation of those within the commission's jurisdiction.

If the director finds that a complaint is frivolous or unfounded, the complaint will be dismissed and the complainant and respondent notified of the decision. A complaint that has been dismissed is not public. The director and respondent may reach a settlement on a complaint, subject to the commission's approval. The complaint and the settlement are subject to public

disclosure.

If the executive director determines there is probable cause, the director will notify the hearing officer, respondent and complainant that the complaint is being investigated. As part of an investigation, executive director may administer oaths, interview witnesses and ask the commission to petition a district court to issue a subpoena under seal. 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 officer receives the executive director's recommendations, the hearing officer will dismiss the complaint or set a public hearing as provided in the bill. After the hearing, the hearing officer is required to issue a written decision. If the hearing officer 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.

A decision that a respondent's conduct constituted a violation is a public record. 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 officer or the executive director may not be disclosed by the commission or its employees unless necessary to pursue an investigation, or the records are offered into evidence at a judicial, legislative or administrative proceeding.

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.

The bill 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 bill adds a provision to the Procurement Code authorizing the commission to investigate complaints against contractors who have a contract or have submitted a competitive sealed bid or proposal for a contract with a state agency, school district or charter school. 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 an agreement.

The commission is required to submit a report to the Legislature and governor regarding whether to extend the commission's jurisdiction by October 1, 2021.

The effective date of Sections 1-8 of the bill is July 1, 2019. The effective date of Sections 9-35

is January 1, 2020.

FISCAL IMPLICATIONS

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

SB 668 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.

The bill broadly defines a “public agency” whose officials and employees are subject to the State Ethics Commission Act to include any department or agency of the executive or legislative branch of government, state instrumentalities, and “a school district and a charter school.”

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

Conflicts with HB 4

TECHNICAL ISSUES

Throughout the bill, there are references to a “candidate” and “candidates” subject to the bill’s requirements. See, e.g., Section 9(A), which refers to the commission’s jurisdiction to enforce the provisions of specified laws for “candidates.” The bill does not include a definition of “candidate.” A definition of “candidate” might be advisable to avoid any confusion or misinterpretation regarding the State Ethics Commission Act’s coverage.

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.

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