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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/29/10

SPONSOR Barela LAST UPDATED \_\_\_\_\_ HB 138

SHORT TITLE State Ethics Commission Act SB \_\_\_\_\_

ANALYST Ortiz

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY10	FY11		
	No Appropriation		

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB43, HB125, SB43, SB108 and SB154

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		\$500.0 Apprx.	\$850.0 Apprx.	\$1350.0 Apprx.	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Office of the State Auditor (OSA)

Administrative Office of the Courts (AOC)

Department of Finance & Administration (DFA)

Secretary of State (SOS)

### SUMMARY

#### Synopsis of Bill

House Bill 138 establishes the State Ethics Commission Act and creates the State Ethics Commission to be led by an Executive Director. The Commission is to provide annual ethics training and publication of ethic guides. The State Ethics Commission Act requires that an ethics code be developed and that the Ethics Commission be responsible for issuing advisory opinions, providing for the filing of complaints against state officials, state employees, government contractors and lobbyists for ethics violations, investigations and hearings and has subpoena powers. The Act requires confidentiality, prohibits retaliation, and specifies penalties. Differing from SB 43, HB 138 stipulates that the Act also has jurisdiction over certain school employees and officials in three years.

HB 138 also amends Section 10-15-1 NMSA 1978, Policies and Procedures for Open and Closed Meetings, making grammatical changes and adding as 10-15-1 H. 11 exempting meetings of the state ethics commission relating to complaints or investigations from open meetings requirements and keeping written minutes accessible to the public.

In terms of the Commission's authority, HB 138 defines "public agency" as any department, commission, council, board, committee, agency or institution of the executive or legislative branch of government of the state specifying several other instrumentalities of the state. HB 138 defines "public employee" as an employee of a state agency and "public official" as a person elected to an office of the executive or legislative branch or a person appointed to a state agency. The definitions of public employee and official include employees and officials of public and charter schools, differing again from SB 43.

### **Commission Membership**

The State Ethics Commission as established by HB 138 will be comprised of eleven commissioners: two commissioners appointed by the House of Representatives Democratic Caucus; two commissioners appointed by the House of Representatives Republican Caucus; two commissioners appointed by the Senate Democratic Caucus; two commissioners appointed by the Senate Republican Caucus; and three commissioners appointed by the Governor, one Democrat, one Republican and a registered voter who is neither Democrat or Republican. Members may not seek or hold elective or appointed office during their term of service, nor may they be a state employee.

### **Commission Duties & Powers**

The Commission will receive and investigate complaints alleging ethical violations; hold hearings as appropriate; develop and adopt procedural rules to administer the State Ethics Commission Act; maintain and provide access to all the Commission's advisory opinions and reports required to be made public; draft proposed code of ethics for state officials and state employees for adoption by each elected state official and state agency; employ the executive director, who shall be an attorney; and prepare and submit an annual report of its activities.

Additionally, the Commission may initiate complaints alleging ethics violations; petition the district court to issue subpoenas to witnesses or for the production of documents and other evidence; issue advisory opinions; develop and publish an ethics guide; offer ethics training. Any challenge to a subpoena shall be heard at the district court in a confidential proceeding.

SB 43 prohibits the hearing of complaints concerning conduct that occurred more than three years prior to the complaint being received by the Commission.

### **Executive Director**

Appointed by the State Ethics Commission, the Executive Director shall perform investigations; bring complaints before the commission; prepare the annual budget for approval; recommend rules or legislative changes. The Executive Director may hire a general counsel and other personnel; enter into contracts and agreements on behalf of the commission; and administer oaths and take depositions subject to the Rules of Civil Procedure for the District Courts.

### **Penalties**

HB 138 prohibits any retaliatory, disciplinary or other adverse action against complainants or witnesses acting in good faith. However, SB 43 does not preclude civil actions or criminal sanctions against any person believed to have filed a false claim under the act.

HB 138 stipulates that any person disclosing confidential information in violation of the Act, is guilty of a misdemeanor, the penalty for which is a \$1,000 fine and/or one year in jail.

HB 138 further stipulated that a civil court may impose an additional penalty of up to \$25,000 in addition to the above noted penalty, for each violation.

### **FISCAL IMPLICATIONS**

Although an appropriation is not included, it is likely there will be costs associated with an ethics commission. It is estimated that approximately \$500,000 would be needed to operationalize the commission during its first year.

### **SIGNIFICANT ISSUES**

The Office of the State Auditor identified the issues below.

- Section 3.I on p. 7 states “A commissioner may be removed only for incompetence, neglect of duty or malfeasance in office.” The reasons cited for removal may be incomplete. The bill could consider removal of a commissioner who commits a felony such as theft, embezzlement, fraud, and other illegal acts such as violations of the governmental conduct act or an act involving unethical behavior like those mentioned in the act. Given the nature of a commissioner’s duties, Section 4.A on p. 8 should also state that the person must not have been convicted of a felony.
- Section 4.A on p. 8 states to qualify for appointment to the commission, a person shall be a resident of New Mexico and be a member of the same political party for at least three years. The qualifications for appointment that are cited do not consider the results of background checks for a potential commissioner.

The Public Education Department notes the following issues.

- HB 138 provides strong confidentiality provisions with severe penalties of a misdemeanor conviction and \$1,000 fine or imprisonment or both for a breach of confidentiality. In addition, it allows a civil penalty of up to \$25,000 for each violation of the confidentiality provisions. In contrast, a finding of ethical violation only allows for public disclosure and reporting to the attorney general and applicable public agency. The strong confidentiality provisions may discourage a thorough investigation and hearing into ethical violations for fear of repercussions regarding collection and use of documents and evidence. Further, although HB 138 prohibits retaliation against someone who files a complaint or provides evidence during an investigation or hearing under the Ethics Commission Act, the strict confidentiality provisions may hamper an individual from proving a prima facie case of retaliation. Exemption from both the Open Meetings Act and the Inspection of Public Records Act goes against the policy of open government that “all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.” Open Meetings Act, 10-15-1(A) NMSA 1978.
- HB 138 establishes a “clear & convincing” standard required to reach a finding of an ethics violation. This is a higher standard than in most civil court and administrative cases which require only a “preponderance of the evidence.” For example, in administrative hearings regarding suspension, revocation or other disciplinary action for

educators due to alleged ethical violations, the burden of proof needed to be established at administrative hearing is “a preponderance of the evidence” (except in cases alleging fraud). See 6.68.3.11 NMAC. Providing for a higher standard before the Ethics Commission creates an inconsistency in the framework for determining ethical violations by education administrators.

- It is not specified what action is expected of the PED after an adverse finding against a public official/public employee is forwarded to the PED. In the case of a local school board member, they are elected officials who can only be removed from office by a recall petition [see, "Local School Board Member Recall Act" Sections 22-7-1 to 22-7-16 NMSA 1978] or through a district court action against the person called *quo warranto*. See, *State v. Padilla*, 94 N.M. 31 (1980) (Involving three school board members who were sued and removed from office by use of a civil action of *quo warranto* for misfeasance and malfeasance in office.).
- Under state law, the PED does not have authority to remove a board member from office by recall; only registered voters in the school district of the board member at issue can use the recall route. Likewise, the PED cannot use the *quo warranto* procedure to remove an unethical school board member. The *quo warranto* law [44-3-4, NMSA 1978] provides, “An action may be brought by the attorney general or district attorney in the name of the state, upon his information or upon the complaint of any private person, against the parties offending in the following cases.”
- An additional issue raised by reporting Ethics Commission findings of ethics violations of charter school governing body members to the PED is that the PED does not have authority in the Charter Schools Act to remove governing body members from their positions. Such an action would require amendment of that Act.

The Secretary of State listed the issue below.

- Ethics violations committed by political candidates are often examined by the Ethics Division within the Office of the Secretary of State. Because many of these candidates go on to become public officials, it is prudent to include and discuss provisions for the filing of complaints against political candidates for legislative and/or statewide races. This will avoid a duplication of effort on the part of the State Ethics Commission and the Ethics Division within the Office of the Secretary of State.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

The Office of the State Auditor listed the following duplications and conflicts:

- HB 138 duplicates and conflicts with HB 125, HB 43, SB 43, and SB 154 which are all titled as the State Ethics Commission Act. HB 138 is practically the same bill as SB 43 and HB 43 except for the following main differences: HB 138, Section 2.M on p. 5, includes public school districts and charter schools within the definition of a public agency as of January 1, 2013. HB 138, Section 2.O on p. 5, includes a local school board member, superintendent and a board member of a charter school within the definition of a public official as of January 1, 2013. Also, HB 138, Section 11.C (7) and (8) on p. 19, requires the commission to provide the investigative report to the public education department and/or the local school board.

- HB 138 conflicts with HB 125 as follows: in Section 3.A on p. 6, the appointments to the commission differ in each bill. In Section 3.H, what constitutes a quorum of the commission differs in each bill. Section 4.A.(2) of HB 125 states that to qualify for appointment to the commission, a person shall not have changed political party affiliation for a least one year prior to appointment, whereas Section 4.A.(2) in HB 138 states that a person shall have been a member of the same political party or no political party for a least three years prior to appointment. Section 6.D in HB 125 states the director shall not seek or hold an elective public office, an appointed public position or public employment whereas Section 6.D in HB 138 does not contain this restriction. Section 9.H in HB 138 requires the concurrence of at least eight commissioners to petition a district court for subpoenas whereas Section 9.H in HB 125 is silent about the concurrence of any commissioners. Section 14.B of HB 138 states that the commission shall not take action on a complaint on or after the filing date for a primary election through election day, whereas Section 14 of HB 125 does not contain this limitation. Section 14.C of HB 138 states the commission shall not investigate allegations of misconduct involving campaign advertisements whereas Section 14 of HB 125 does not contain this limitation. Section 16.A-B of HB 138 contains penalties for noncompliance whereas HB 125 does not contain a section for any penalties.
- HB 138 duplicates and conflicts with SB 154 in many areas. SB 154 contains 108 pages; transfers and requires the commission to administer the provisions of the following acts: a) Campaign Reporting Act; b) Voter Action Act; c) Lobbyist Regulation Act; d) Governmental Conduct Act; e) Financial Disclosure Act; and f) Gift Act; and reconciles multiple amendments to the same section of law by repealing the Laws of 2009, Chapter 68, Section 2.
- Like SB 43, HB 138 does not define a campaign contributor in Section 2 on p. 2 or include a campaign contribution as an ethics violation.
- HB 138 relates to SB 44, Governmental Conduct for all State Entities.

## TECHNICAL ISSUES

According to PED, page 5, lines 15 – 16 defining a public employee in a school district or charter to only include an employee who works *in an administrative capacity* is unclear. It is unclear because as written it would include clerical staff or other individuals performing administrative functions without regard to whether they held licensure issued by the PED.

## 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 recuse 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.

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, would respond 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 an appearance of unethical behavior when the vast majority of legislators are ethical public servants who operate with integrity and who take their jobs seriously."

EO/svb