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FISCAL IMPACT REPORT

ORIGINAL DATE 2/6/10

SPONSOR Keller LAST UPDATED HB

SHORT TITLE Attorney General Securities Enforcement SB 19

ANALYST Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY10	FY11		
	None		

(Parenthesis () Indicate Expenditure Decreases)
Relates to HB2

SOURCES OF INFORMATION

LFC Files

Responses Received From

Regulation and Licensing Department (RLD)

Educational Retirement Board (ERB)

State Investment Council (SIC)

SUMMARY

Synopsis of Bill

Senate Bill 19 amends sections of the Uniform Securities Act to:

- Clarifies the definitions of “fraud”, “deceit” and “scienter” in the definitions section of the Act to make the definition consistent with New Mexico cases under the prior Act and consistent with section 508 of the Act;
- Authorizes the Attorney General to institute criminal proceedings under the Act without obtaining a letter of declination from the appropriate District Attorney prior to instituting the proceeding;
- Provides specific authority for the Attorney General’s to enforce the civil and criminal provisions with respect to violations of the Act and cooperate with foreign jurisdictions in investigations of securities laws violations;
- Authorizes the Attorney General to conduct public or private investigations under the Act;
- Increases the statute of limitations for civil liability under the Act from two to four years from date of discovery if discovery should have been made with reasonable diligence and from five to ten years after the transaction constituting the violation; and
- Changes the citation form of cross-references within the Act.

SIGNIFICANT ISSUES

The Regulation and Licensing Department points out the following issues with SB19:

- As a general matter, the amendments would apparently provide concurrent jurisdiction by the Director of the Securities Division of the Regulation and Licensing Department and the Attorney General with regard to significant portions of the Act. The amendments consistently provide authority with regard whatever the issue might be to the “director *or* attorney general.” There is no language regarding priorities, cooperation or limitation on the actions of one or the other. Arguably, the literal construction of the language suggests that whoever acts first, has the authority for that specific incident. This could lead to conflicts in instances where, for example, the Director is currently engaged in an administrative action and the Attorney General chooses to institute a civil or criminal action. As another example of the potential conflicts, Section 4, Section 58-13C-602(A)(3) would authorize both parties to “publish a record” concerning an action, proceeding or investigation. Thus, the Director could publish the results of a “private” investigation that the Attorney General preferred to remain confidential, or vice versa. In any event, the potential lack of coordination may result in duplication, confusion and parties working at cross-purposes.
- Section 2 – 58-13C-508(J) – authorizes that the Attorney General may institute criminal proceedings under the Act without obtaining a letter of declination from the appropriate District Attorney prior to instituting the proceeding. This is a significant departure from current law, which requires that the Attorney General obtain a letter of declination prior to instituting an action
- Section 4 – authorizes the Attorney General to conduct public and private investigations to determine whether a person has violated, is violating or is about to violate the Act, or a rule or order under the Act, or to aid in enforcement of the Act or in the adoption of rules and forms pursuant to the Act. This authority is granted to allow the Director to enforce the Act through administrative actions. The Attorney General has no authority to engage in administrative enforcement, thus, it is not clear how this authority would be utilized. The Attorney General already has authority to engage in investigations in connection with civil and criminal matters, thus it is unclear why this authority is necessary.
- Section 4 – subsection F would authorize either the Director or the Attorney General to assist other states in conducting investigations. That assistance would be provided as deemed appropriate. Further, the Director or Attorney General may consider whether the requestor has agreed to reciprocate when requested, whether the request would violate or prejudice public policy in New Mexico and the availability of resources to carry out the request. As noted in comment 1 above, there is no requirement for coordination or consultation and the Director and Attorney General may be working towards different goals or may have different agendas.
- Section 6 – authorizes the Director or Attorney General to work with other states, foreign jurisdictions, and regulatory agencies to effectuate greater uniformity in securities matters among federal government, self-regulatory organizations, states and foreign governments. This does not appear to be substantive material within the expertise of the Office of the Attorney General. Further, it would appear to raise the problems described in comment 1 above

PERFORMANCE IMPLICATIONS

The bill would require RLD staff to expend additional time and resources in monitoring and coordinating efforts with the Office of the Attorney General. It is not possible to provide a reasonable estimate of cost of additional resources, as it would be dependent upon the activities of the Attorney General.

RELATIONSHIP

Relates to HB2, which includes \$150 thousand for the Attorney General's governmental accountability unit.

TECHNICAL ISSUES

Existing Statute for the SIC NMSA 1978 Section 6-8-7(E) provides that: "...In performing investment services for a state agency, the council and the state investment officer are exempt from the New Mexico Securities Act of 1986 [[58-13B-1](#) NMSA 1978]."

OTHER SUBSTANTIVE ISSUES

SB19 has been compared to the Martin Act in New York, which has been used not only to prosecute fraud criminally, but also as a powerful tool to recover both punitive and actual losses related to investment fraud or improprieties in that state's pensions and on Wall Street. These recoveries and legal penalties have amounted to tens of millions of dollars, and by themselves – even without criminal prosecution - send a strong message to investment firms and individuals who might be tempted to bend or break the rules for profit.

EO/mt