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FISCAL IMPACT REPORT

ORIGINAL DATE 02/12/10

SPONSOR SRC LAST UPDATED HB

SHORT TITLE Governmental Conduct for All State Entities SB 44 & 211/SRCS

ANALYST Ortiz

APPROPRIATION (dollars in thousands)

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

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 43, HB 125, HB 138, SB 43, SB 108, SB 154 and SB 268

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Department of Finance and Administration (DFA)
 Public Education Department (PED)
 Office of the State Auditor (OSA)

SUMMARY

Synopsis of Bill

The Senate Rules Committee substitute for Senate Bills 44 and 211 amends and enacts sections of the Governmental Conduct Act, which define and include public officers and employees of all political subdivisions of the state and prohibits certain acts by public officers and employees. The key differences between the substitute bill and the original bill include the elimination of “local government agency,” which included state institutions of higher education and removes local government officials and employees from the definition of public official or employee as defined in the original bill.

Specifically, substitute for Senate Bills 44 and 211 does the following:

Section 1: amends the definition in Section 10-16-2 NMSA 78 and changes “state agency” to ‘agency” and expands the definition to include, “or other entity of the state or of a political subdivision.” Subsequently throughout the bill references to “state agency” or “state office” are changed to “agency. Sections below are those with substantive changes beyond the updating of language as required by the changes indicated in Section 1.

Section 2: amends Section 10-16-3.A NMSA 1978, Ethical Principles of Public Service by removing the phrase “incompatible with public interests as a descriptor for “pursue private interests.”

Section 3: edits language of **Section 10-16-3.1 NMSA 1978** consistent with Section 1 of the bill.

Section 4: adds the following to Section 10-16-4. B NMSA 1978, regarding Official Acts for Personal Financial Interest Prohibited, that a public officer or employee shall not be disqualified from engaging in an action that affects their personal finances if the action does not benefit them more than it benefits the general public. It also adds Section 10-16-4.C, which stipulates that no public officer or employee during their period of election or employment acquire a financial interest that may be affected by an official action they may take while holding their position.

Section 5: amends Section 10-16-4.2 by requiring a public officer or employee to disclose to the officer’s or employee’s agency all employment engaged in other than the employment with the agency.

Section 7: amends Section 10-16-7, Contracts Involving Public Officers or Employees, by requiring in sub section A. that officer or employees disclose their substantial interest through public notice and the contract must be awarded through competitive bidding. It also adds sub section B. prohibiting an agency from awarding a contract to a public officer or employee unless the provisions of sub section A. have been met.

Section 8: amends Section 10-16-8, Contracts Involving Public Officers or Employees, by replacing subsection B. with requiring that an agency shall not contract with a person or business 1) who is represented by a former public officer or employee if the contract is over \$1,000 and the contract is a direct result of an action of the public officer or 2) who is assisted by a former officer or employee. It also adds subsection D, which exempts precinct board members and jurors from the above provisions.

Section 11: amends Section 10-16-13.1, Education and Voluntary Compliance, by changing Secretary of State to Attorney General in terms of responsibility for educating those affected by the Act and ensuring compliance with the Act.

Section 12: amends Section 10-16-13.2, Certain Business Sales to Agencies and Their Employees by replacing current subsection A. with language that prohibits a public officer or employee from selling or entering into transactions to an individual who is supervised by a public officer or employee, unless the supervised employee initiates the transaction or the “seller” is not aware that the individual is under the supervision of a public officer or employee.

Section 13: adds a new Section to the Governmental Conduct Act, which clarifies that nothing in the Act precludes an agency from adopting or publishing ordinances, rules or standards which are more stringent than required under the Act.

Section 15: Sub SB 211 amends Section 10-16-14, Enforcement Procedures, beyond language updates, amends subsection E. to add language referring to “alleged” violations of the act.

SIGNIFICANT ISSUES

This bill erases the patchwork of ethics laws that currently apply to government, and in its place, this bill creates a uniform body of ethics laws that apply to all public bodies, officials, and employees.

There is, according to the AGO, no logical rationale for different standards of conduct for government officials and employees. For example, the Governmental Conduct Act currently prohibits the state from contracting with a former employee who created the contract as a state employee. There is no logical rationale for placing this ethical standard only on state government, and not on city government as well. And vice versa, state law prohibits city and county employees from acquiring a financial interest in a business affected by their decisions. There is no logical rationale for placing this ethical standard only on local government, and not on state government as well. This bill will correct these gaps. Below are the current conflicting and overlapping ethics statutes that apply to state and local government.

	CITY GOVERNMENT (§3-10-4 thru -60)	COUNTY GOVERNMENT (§4-44-21 thru -25)	STATE GOVERNMENT (§10-16-1 thru -18)
Prohibition on acquiring financial interest in business affected by decisions	§3-10-4A	§4-44-22B	N/A
Prohibition on use of Confidential Information	§3-10-4B	§4-44-23	§10-16-6
Disclosure of financial interest	§3-10-5 (applies only to elected officials)	§4-44-25	§10-16-3C A “guiding principle”
Disqualification from decisions affecting financial interest	§3-10-5B (Only if Governing body votes to disqualify city councilor)	§4-44-22A	§10-16-4 (a 4 th degree felony)
Elected official cannot contract with government without public notice and competitive bidding and full disclosure	N/A	§4-44-22C	§10-16-7

	CITY GOVERNMENT (§3-10-4 thru -60)	COUNTY GOVERNMENT (§4-44-21 thru -25)	STATE GOVERNMENT (§10-16-1 thru -18)
Governmental body cannot contract with business represented by employee where contract is direct result of that employee’s decisions	N/A	§4-44-24	§10-16-8

As a final point by the AGO, this bill strengthens the ethical requirements over the procurement process. The problem with the current Procurement Code is that there are 37 separate exemptions, including an exemption for home rule municipalities (i.e. Albuquerque, etc.).

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to the following ethics bills: HB 43, HB 125, HB 138, SB 43, SB 108, SB 154 and to SB 268 Governmental Standards Commission Act.

TECHNICAL ISSUES

Define “financial benefit to the general public”

ALTERNATIVES

OSA suggests the following:

- Require the agency to disclose the terms of all transactions with the public officials, employees and their family members (related party transactions) in the notes to their financial statements as required by generally accepted accounting principles. Also, the act should require the agency to document: a) the justification to proceed with the transaction after public notice was given by the public officer and employee; and b) the specific action taken by the agency during the transaction to control the potential conflict of interest reported by the public officer or employee.
- Section 10-16-2.E on p. 2 defines family as “an individual’s spouse, parents, children or siblings, by consanguinity or affinity.” The definition could be expanded to include uncles, aunts, first cousins, in-laws and step-relatives of the same degree.
- Section 10-16-3.1 on p. 4 could also prohibit a public officer from receiving political contributions from anyone that enters into a significant contract with the agency to purchase, sell, or lease any goods, services, or real property.
- Section 10-16-7 on p. 6-7 could also prohibit contracts for real property.
- Section 10-6-9.A on p. 9-10 could also prohibit contracts for real property and could also add the wording “through public notice” and “competitive bidding” like it was added in Section 10-16-7 on p. 7.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The Governmental Conduct Act and its ethical principles will expressly apply only to state government, and not all local public bodies. There will continue to be conflicting and overlapping ethics statutes—as well as serious gaps—that apply to state and local government.

The absence of a uniform set of ethical standards will undermine public faith in government and create confusion in the public mind.

POSSIBLE QUESTIONS

The end of Section 10-16-4.B on p. 5 states that “a public officer or employee shall not be disqualified from taking an official act if the financial interest involves a financial benefit that is not more than the benefit to the general public.” According to the Office of the State Auditor, it is unclear how compliance with this provision is to be tested when making the ultimate determination that the financial benefit is more or less than the benefit to the general public.

Is compliance determined by the monetary amount of the financial interest or another, more subjective standard?

Who will make the ultimate determination that the financial benefit is more or less than the benefit to the general public?

EO/svb