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FISCAL IMPACT REPORT

SPONSOR Campos, P. **ORIGINAL DATE** 01/28/10
LAST UPDATED _____ **HB** _____
SHORT TITLE State Ethics Commission Act **SB** 108
ANALYST Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY10	FY11		
	\$500.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB43, HB125, SB43, and SB154

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$500.0 apprx.	\$850.0 apprx.	\$1,350.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Lieutenant Governor's Office (Lt.Gov.)
 Attorney General's Office (AGO)
 Department of Finance and Administration (DFA)
 Secretary of State (SOS)

SUMMARY

Synopsis of Bill

Senate Bill 108 appropriates \$500 thousand from the general fund to the State Ethics Commission to carry out the provisions of the State Ethics Act.

It creates an independent, bi-partisan 10 member State Ethics Commission. The House Speaker and Senate President pro tempore each appoint two members of the Commission with advice and consent of the minority leader for one appointment, for a total of four members. The Governor appoints four members, with no more than two from the same political party. And the Supreme Court justice appoints two members from different political parties. The Commission will also employ an executive director and the executive director may hire a general counsel and other personnel necessary.

A Commissioner may not be an elected or appointed state official, state employee, lobbyist, political party officer or government contractor. Six Commissioners are needed for a quorum, and six Commissioners must agree before any action may be taken; that ensures that at least one member of the opposing political will have to concur.

The Commission will oversee ethics issues affecting both the Executive and Legislative branches of government.

The Commission is mandated to:

- (1) Receive and investigate ethics violations by state officials, employees, contractors and lobbyists under the Governmental Conduct Act, Procurement Code, Lobbyist Regulation Act, Financial Disclosure Act, Section 1-19-1, NMSA 1978 et seq.;
- (2) Report findings of probable cause to a respondent's appointing authority, employer or appropriate state agency or legislative body, and that finding is to remain confidential unless and until the appointing authority, employer, agency or legislative body decides to take public action on it;
- (3) Compile public access for all public opinions, complaints and reports;
- (4) Compile an ethics guide and a business ethics guide for state officials, employees, lobbyists and government contractors;
- (5) Provide annual ethics training for state officials, employees, lobbyists and government contractors; and
- (6) Submit an annual report of its activities including recommendations.

The commission is also given discretionary authority to:

- (1) Recommend disciplinary actions;
- (2) Subpoena witnesses and compel production of documents; and
- (3) Issue advisory opinions.

FISCAL IMPLICATIONS

The appropriation of \$500 thousand contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of fiscal year 2011 shall revert to the general fund.

SIGNIFICANT ISSUES

The Lieutenant Governor's office states the bill creates some structural issues:

- The legislation would create a commission evenly balanced between Republicans and Democrats, yet the appointments would be controlled by the majority party of each chamber and the Governor. This could result in an ineffective commission, dominated by a single political party. Under these conditions any such commission could become a tool of partisan struggles rather than a mechanism to ensure ethical behavior in government.
- The legislation would not establish a vetting procedure for appointees. Without such a vetting process it is conceivable that the commission will be populated by partisan

appointees from both parties or populated by members with potential conflicts of interest, further guaranteeing that the commission is ineffective and paralyzed by political actions.

- SB 108, as introduced, would not create the fully independent, non-partisan commission that's needed. The root of these issues appears to be the appointment process. An appointment process that allows the legislature or executive to control a plurality of the appointment process cannot avoid creating perceptions of and/or conflicts of interest. The combined number of appointments allowed by the legislature and executive creates a scenario in which the ethics commission is controlled by the individuals that it is charged with overseeing. To avoid this conflict of interest it follows that the appointment process should be controlled by an independent third party. At a minimum this third party should have authority to vet the proposed commissioners. As this commission is designed to oversee the legislative and executive branches of government, the obvious independent arbitrator for appointments would be the courts. It is clear that a tough and independent ethics commission will require a more independent appointment procedure and a commission structure that empowers the commission to take action without interference from politically connected individuals. Anything else would be watered down and a disservice to the people of New Mexico who deserve more accountability from their elected officials.

The Department of Finance and Administration weighs in with the following additional concerns.

- One wonders if the lack of language regarding hearings (giving the commission only the authority to perform investigations) is a benefit or a problem. Certainly, hearings can often give rise to further information resulting in additional violations being discovered. But there's nothing to say that an investigation could not do the same. In either case, this commission would appear to be hampered in following up on such discovered information since it does not seem to have the authority to bring complaints on its own but requires an outside source.
- The commission's ability to make recommendations for disciplinary actions to be taken against a respondent found to have violated ethical standards is also a plus which improves this bill over the other versions. Again, there is nothing which prohibits the governing authority of the respondent to ignore the commission's findings (and the commission itself still lacks all authority to exercise penalties directly), but it might be a bit more difficult to do so if the commission has recommended a harsh penalty, for example, thus demonstrating how grave the ethical violation is seen to be.
- The recusal provisions in the bill appear to be too narrowly drawn since, presumably, a member would only have to recuse him or herself when the matter implicated the governing authority of that member AND gave the appearance of impropriety -- a notably nebulous concept. This sort of issue, could, one assumes, be addressed in the rules promulgated by the commission, but having stricter language in the bill itself would not hurt it at all.
- The lack of confidentiality provisions as they impact the Open Meetings and Public Records Act are troublesome in the extreme. Such matters as the ethics commission would be investigating would be highly confidential and inflammatory by their nature and should not be arbitrarily or thoughtlessly released to the public. The bill could be strengthened by looking to HB 43, for example, and how it addressed these concerns.

- The lack of prohibition on political activity is troublesome. This could give rise to a perception that big contributors have a special inside to the commission (if such persons were made members).

According to the Attorney General's Office and the Secretary of State, the bill fails to include violations of the Gift Act and the Voter Action Act as an ethics violation.

- The SOS notes that 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 may be prudent to include the provision 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

Relates to the following bills.

HB43, which creates a seven member commission with jurisdiction over state elected officials and employees, state government contractors and lobbyists;

HB125, which creates an 11 member commission with jurisdiction over state elected officials and employees, state government contractors and lobbyists and includes a \$200 thousand appropriation;

SB43, which creates an 11 member commission and has jurisdiction over some but not all state employees, oversee state elected official complaints, contractors and lobbyist complaints; and

SB154, which creates an 11 member commission with jurisdiction over state elected officials and employees, state government contractors and lobbyists and would move the ethics division from the Secretary of State to the ethics commission using the current ethics division operating budget to fund the Ethics Commission.

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."

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

There is currently no central public body with the responsibility to investigate all ethics violations. Instead, enforcement is piecemeal: for example, the Secretary of State shares responsibility with the Attorney General for enforcing the Financial Disclosures Act; in addition, the Secretary of State shares responsibility with the District Attorneys and the Attorney General for enforcing the Procurement Code and the Governmental Conduct Act; finally, no agency is charged with enforcing the Gift Act.

EO/svb