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FISCAL IMPACT REPORT

ORIGINAL DATE 02/10/10

SPONSOR Ortiz y Pino LAST UPDATED _____ HB _____

SHORT TITLE Additional Contribution Reporting SB 250

ANALYST Aubel/Ortiz

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$0.1*	\$0.1*	\$0.1*	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

*Indeterminate but could be material (See Fiscal Implications)

Relates to or conflicts with HB118, HB161, HB172, SB28, SB48, SB49, SB110

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Finance and Administration (DFA)
 Office of the Attorney General (AGO)
 Secretary of State (SOS)
 State Auditor (OSA)
 State Treasurer's Office (STO)
 Public Regulation Commission (PRC)
 Regulation and Licensing Department (RLD)

SUMMARY

Synopsis of Bill

Senate Bill 250 amends various sections of statute relating to the State Board of Finance (SBOF) to accomplish the following:

- Ensure financial expertise on the SBOF by requiring one of the seven members have no fewer than three years professional experience in the field of investments or finance;
- Strengthen oversight and transparency of investments held at STO by authorizing the SBOF specific supervisory power over investing in addition to its general supervision over fiscal affairs of the state and by adopting policies and enacting rules governing
 - procedures for investing and handling the state's short term investments held by the State Treasurer's Office (STO);
 - relationships with investment advisors or broker dealers who work with STO;
 - public disclosure of state investments; and

- establishment of public and internal reporting to increase transparency and ensure compliance of the rules established under this section;
- Ensure statute is kept current with best practices by recommending statutory changes to the Legislature governing the deposit and investment of public funds; and
- Encourage transparency of activities at STO by
 - establishing and supervising a whistleblower program for STO;
 - hiring an independent auditor to perform a fiduciary audit of STO;
 - undertaking investigations to perform these new duties;
 - employing the necessary experts, auditors, accountants and attorneys as required subject to legislative appropriation. This last provision is simply moved from one section to a new section for consistency.

Section 8-6-3 NMSA 1978 regarding duties of the State Treasurer is amended to include the directive that the State Treasurer shall comply with all directives, requirements and polices made applicable to the State Treasurer’s Office by the SBOF pursuant to the provisions added by the bill.

In addition to the Campaign Reporting Act, a new section places the SBOF in charge of accepting reports and monitoring campaign contributions of statewide elected officials and all candidates, including a “conflict of interest” provision that allows SBOF to prohibit an elected official or candidate from participating in a decision affecting a contributor. New material in all statutory sections relating to statewide elected officials (except State Land Office) is added for governing campaign contribution disclosures, restrictions, and conflict of interest issues.

The State Treasurer’s Investment Committee (STIC) is created, consisting of five members:

- The State Treasurer;
- One member of the SBOF appointed by the Chair of the SBOF;
- The Director of the SBOF; and
- Two public members with at least three years of professional experience in finance or investments, one of which is selected by the State Treasurer and one is selected from the SBOF.

Duties and powers of the STIC are defined, including:

- Periodically reviewing STO’s investment polices and recommending modifications;
- Providing advice on investment selection;
- Identifying potential violations of law and of the STO rules adopted by SBOF under this bill;
- Suggesting remedial action to conform with the applicable policies, rules and law;
- Providing periodic reports on STO activities and public funds; and
- Meeting monthly subject to the Open Meetings Act.

SB250 contains an emergency clause.

FISCAL IMPLICATIONS

The two public members of the newly created State Treasurer Investment Committee shall be paid per diem. SBOF estimates this cost at about \$3.3 thousand based on \$140 per member for 12 meetings.

The section instructing the SBOF Director to employ experts, auditors, accountants and attorneys as required is simply moved and renumbered from current statute and, therefore, could conceivably not represent an incremental cost. However, in its heightened policing role, it could also be assumed that the SBOF will incur additional costs for hiring experts to carry out the oversight functions inherent in the bill. Such experts are typically fairly expensive.

The bill does not specify how often a “fiduciary audit” is to be performed, but such reports can be quite costly. The intensive forensic audit and fiduciary review on STO, jointly performed by the law firm Hogan and Hartson and the accounting firm Deloitte and Touche in 2005, cost almost \$700 thousand. The recent fiduciary review of the three state investing agencies (State Investment Council, Educational Retirement Board, and Public Employees Retirement Association) performed by Ennis Knupp cost about \$414 thousand. An annual financial audit of STO has been requested by SBOF and funded by the Legislature for several years. The funding of \$25,000 was eliminated pursuant to Executive Order 2009-044 for FY10 and was not included in the LFC or executive recommendations for FY11.

Increased operating costs associated with rulemaking, supervising campaign contributions and conflict of interests, and added reporting could also be material. Based on the response from SBOF, it is reasonable to assume at least one additional staff member would be needed to fulfill the duties relating to campaign contributions as well as additional operating costs to develop and maintain information technology (IT) platforms to collect data and produce searchable reports related to this mandate. The added 1 FTE would cost about \$65 thousand, including salary and benefits, while the IT requirements would depend on the project plan.

SIGNIFICANT ISSUES

SBOF provides the following key background information:

Following the indictments of former Treasurers Vigil and Montoya, DFA contracted with the law firm Hogan and Hartson and as well as the accounting firm Deloitte and Touche for a forensic and fiduciary audit of the State Treasurer's Office. Many of the provisions of this bill related to STO appear to be drawn from the recommendations made by those firms in their final report, which was delivered to SBOF in December 2005. The recommendations mainly revolve around increasing internal controls at STO, and awarding SBOF the authority to enforce those controls.

Leading up to the indictments of former Treasurers Vigil and Montoya, SBOF voiced concerns about investment activities of the State Treasurer's Office. However, current statute limits SBOF's role in overseeing STO to advice and consent (see 6-10-10) and ultimately, STO was not required to address SBOF's concerns. By amending Section 8-6-3 NMSA to require the State Treasurer to comply with all directives, requirements and policies made applicable to STO by SBOF pursuant to SBOF's legal authority, the bill would strengthen SBOF's oversight of STO.

The provisions of the bill related to campaign contribution disclosure reports to SBOF is similar to a recommendation made by Hogan and Hartson, but in the Hogan and Hartson report only would have applied to the State Treasurer (not any of the other elected officials). As these campaign contribution disclosure apply to the State Treasurer, it may make sense that they be reported to SBOF because the point of the bill appears to be to

strengthen SBOF oversight of STO. However, SBOF's expertise is in finance, not ethics, and as such, the disclosures the bill would require other statewide elected officials to make to SBOF appear misplaced (see "Alternatives.")

The “statewide” elected offices covered by the bill include the following:

- Governor
- Lieutenant Governor
- Secretary of State
- Attorney General
- State Auditor
- Treasurer
- Public Regulation Commissioner (See Technical Issues)

The Attorney General’s Office poses this bill may help address the potential for “pay-to-play” opportunities, although agencies associated with recent scandals are not subject to this bill.

AGO also notes the following two issues:

The bill may constitute an unconstitutional intrusion into the authority of each statewide elected public official by the extent to which it seeks to regulate decisions the separately elected constitutional officers are otherwise authorized to make. This bill arguably may be characterized as seeking to convert the SFB into an Ethics Commission with judicial authority to deny each specified independently elected executive official the power to make decisions when there is a purported conflict of interest. This may constitute an unconstitutional violation of separation of powers.

With regards to the ban on contributions, the US Supreme Court has repeatedly upheld limits on contributions to candidates -- which may be tightly regulated to avoid corruption or the appearance of corruption – even as recently as last month’s decision in Citizens United v. FEC Slip op. at 43. Other courts have also upheld specific bans on state contractors. Blount v. S.E.C., 61 F.3d 938 (D.C. Cir. 1995); Green Party of Connecticut v. Garfield, 590 F.Supp.2d 288 (D.Conn. 2008).

SOS provides this analysis:

SB 250 requires executive agency officials and candidates for those offices to complete campaign contribution reports (for contributions above \$250) and submit them to the State Board of Finance. These reports would be in addition to and separate from those reports which are submitted to the Ethics Division within the Office of the Secretary of State. In addition, this legislation gives the State Board of Finance the right to prohibit a holder of or candidate for public office from participating in the decision-making of issues regarding contributors. These reports will duplicate a portion of those which are already submitted to the Office of New Mexico Secretary of State.

STO provides insight on how the bill would impact that agency:

This would give State Board of Finance (SBOF) a more direct supervision role over the State Treasurer’s Office (STO). Currently, SBOF has a seat on the State Treasurer’s Investment Committee (STIC) and it must review and vote to adopt the Investment Policy which governs investment activity at STO. Also, STO reports monthly to the SBOF on its investment activity and performance of its portfolios. This bill would have

the SBOF play a more direct role in adopting policy and enacting rules over investment activity, selecting brokers/dealers, establishing public and internal reporting, proposing statutory changes, establishing a whistleblower program, hiring independent auditors, undertaking investigations, and hiring consultants to help with oversight.

PERFORMANCE IMPLICATIONS

BOF notes that “requiring one of the four public members appointed to the SBOF have at least three years of professional experience in the field of finance or investments would not result in a dramatic change from the historic membership of the Board. Staff believes that the current and recent past public membership of the SBOF would meet this new requirement.”

ADMINISTRATIVE IMPLICATIONS

SBOF maintains that while adding investments to the board’s scope of duties and oversight would cause a moderate administrative to SBOF, accepting and accounting for campaign contributions and tracking potential conflict of interests will cause “a significant administrative impact on SBOF.”

SBOF explains:

The SBOF division of DFA has 5.0 FTE. Two of those, the Director and Deputy Director, analyze and brief board members on all items that require SBOF approval. Even a moderate administrative impact will be significant because the quantity and complexity of items appearing before SBOF has risen in recent years due a number of factors, including the proliferation of capital projects and building contracts requiring SBOF approval, the tendency for real estate transactions to become more complex, and the SBOF's relatively new role in analyzing requests by Tax Increment Development Districts.

It is not clear administratively how SBOF would take action to prohibit an elected official from participating in a decision in which the official may have a conflict of interest. SBOF does not have resources to compare campaign contribution forms against upcoming meeting agendas in which all of the affected elected officials participate, so would most likely rely on reports from outside entities that a conflict of interest may be present. If a conflict of interest were brought to the attention of SBOF, it is unclear whether SBOF could enforce its authority to prohibit participation in a timely manner. SBOF meets once per month except in August when no meeting is held. While SBOF may call special and emergency meetings on short notice, doing so is costly and can be an inefficient use of Board Member and staff time.

The bill does not specify how often SBOF is required to have an “independent auditor” perform a “fiduciary audit.” In addition, such studies are referred to as a “fiduciary review”, not an audit and can be performed by experts other than an auditor.

CONFLICT, RELATIONSHIP

Relating to the campaign contributions involving the statewide elected officials, Senate Bill conflicts or relates to the following bills:

House Bill 118 (Lobbyist and Contractor Contribution Ban)

House Bill 161 (Land Office Contractor Contributions)
House Bill 172 (Lobbyist and Contractor Contribution Ban)
Senate Bill 28 (State Contractor Contribution Disclosure)
Senate Bill 48 (Contribution by State Contractors)
Senate Bill 49 (Prohibit Certain Election Contributions)
Senate Bill 110 (Contributions by Land Office Contractors)

TECHNICAL ISSUES

PRC notes the following technical issues:

Section 6.1.1(H) in the bill gives SBOF the authority to oversee campaign contributions to holders of, or candidates for, “statewide public offices” and includes a conflict of interest provision that allows BOF to prohibit an elected official or candidate from participating in a decision affecting a contributor. However, PRC states that its commissioners are not elected “statewide” and questions whether this section would therefore apply to PRC commissioners. The statutory changes implementing the campaign contribution rules and restrictions, as well as those associated with the conflict of interest provisions, are included for PRC as amending Chapter 8, Article 8 NMSA 1978 in Section 10. Thus, PRC questions whether this section is enforceable without stipulating SBOF authority directly in this section.

PRC also points out that the statutory reference for adding the contribution rules and conflict of interest provision for the office of governor (Section 3 of the bill) is missing.

Finally, PRC maintains that the drafting language could be clarified as follows:

The new requirements regarding contributions of \$250 or more would prohibit employees of a public office or agency from giving other employees of the same office of agency “anything of value”. As drafted, this provision could be construed as prohibiting employees from routine activities such as car pooling, buying coffee or food for the office, or exchanging gifts outside or in the workplace. The drafters of the bill may want to consider better defining the phrase “anything of value” or setting forth specific circumstances in which the prohibition would or would not apply.

To accomplish the bill’s objectives, the phrase “public regulation commissioner’s office” should be replaced with “public regulation commission” wherever it appears in Section 10 of the bill.

The Office of the State Auditor states that the term “fiduciary audit” is “unclear and is not a term recognized by auditing standards” and suggests that the type, purpose and scope of the audit be clarified. However, this type of review has been commissioned by the SBOF in the past and presumably the agency knows what is being required. The language might be clarified as to intent: financial audit, financial review, fiduciary review, forensic audit are all forms of reviewing records, policies, and procedures with varying degrees and focuses of investigation.

OTHER SUBSTANTIVE ISSUES

The Secretary of State is currently involved in campaign contribution reporting through the Campaign Reporting Act. It is uncertain how much the additional reporting required by SB 250 will be duplicative. The bill does address the issue of how independent oversight of campaign contributions and conflicts of interest for the elected Secretary of State could be handled.

Section 1-13-191.1 of the Procurement Code bans contributions by prospective contractors while procurement process is pending. Section 10-16-13.3 of the Governmental Conduct Act bans contributions from “financial service contractors”.

ALTERNATIVES

SBOF maintains that “the aspects of the bill related to campaign contribution disclosures may be better administered by the Secretary of State's Office or a commission dedicated to ethics.”

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The added layer of oversight of the State Treasurer’s Office will not be implemented. The appearance of opportunities for “pay-to-play” activity and conflicts of interest regarding statewide elected officials may continue, undermining the public’s trust in state government. More intense review of short term state investments will not occur. Campaign contributions will be reported through the Campaign Reporting Act.

POSSIBLE QUESTIONS

1. Are there any states without a State Treasurer?
2. Could the duties be folded into DFA as part of government reduction?
3. Would the Secretary of State or a new Ethics Commission be more appropriate venue for the duties relating to campaign contributions and conflicts of interest?
4. Should these provisions be expanded to include non-statewide elected positions, i.e., PRC commissioners, legislators, district attorneys and others?

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