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FISCAL IMPACT REPORT

SPONSOR HJC **ORIGINAL DATE** 03/09/11
LAST UPDATED 03/10/11 **HB** CS/378/aHFL#1

SHORT TITLE Public Corruption Offenses & Convictions **SB** _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	NFI	\$31.0	\$93.0	\$124.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB 247 and 259
May conflict with HB 480

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
Attorney General's Office (AGO)
Educational Retirement Board (ERB)
Public Defender Department (PDD)
New Mexico Corrections Department (NMCD)

Note: Except as indicated, all responses were received on original bill. Comments from them are included in this analysis of the HJC substitute for HB 378 to the extent they appear to apply to the provisions of this substitute.

SUMMARY

Synopsis of HFL Amendment #1

The House Floor Amendment #1 removes the requirement for all public corruption offenses in which the basic sentence is enhanced by one year that that additional year must be served first and cannot be suspended or deferred.

Synopsis of Original Bill

House Bill 378 is anti-corruption legislation that amends various criminal statutes to increase the penalties for certain public corruption offenses. The increased penalties include:

- increasing the basic sentence of imprisonment by one year, which year must be served first and cannot be suspended or deferred, when the crime is committed by a person elected or appointed to a position with or employed by a public entity or when any person is convicted of having an unlawful interest in a public contract or bribing a public officer or employee;
- being barred from being a lobbyist or contracting with a public entity, which includes the state or one of its agencies, departments, institutions or political subdivisions (a knowing and willful violation of which would constitute a third degree felony); and
- forfeiting any state pension.

The “public corruption” offenses to which these increased penalties (and the forfeiture proceedings authorized in Section 10, as described below) apply are:

- embezzlement;
- paying or receiving public money for services not rendered;
- making or permitting false vouchers;
- having an unlawful interest in a public contract;
- soliciting or receiving an illegal kickback;
- offering or paying an illegal kickback;
- bribing a public officer or employee; and
- demanding or receiving a bribe by a public officer or employee.

Section 9 of the bill requires all public entities post notice of public corruption offenses and their penalties. The list of public corruption offenses in this section includes (in addition to the list above to which increased penalties apply) violating the ethical principles of public service and taking an official act of person financial interest (both of which are currently fourth degree felonies under the Governmental Conduct Act) and making or permitting false public vouchers (a fourth degree felony under the Criminal Code).

In addition, Section 10 of the bill requires that if public corruption charges are filed against a member or retired member of a state retirement plan and the alleged corruption relates, arises out of or is in connection to the member’s public office or employment, a civil proceeding must also be commenced seeking forfeiture of a state pension. Public corruption offenses for purposes of forfeiture proceedings do not include violations of the Governmental Conduct Act or tampering with public records. Forfeiture can occur only if the underlying public corruption conviction is directly related to, arises out of or is in connection to a member’s public office or employment, and any forfeiture order is subject to prior or contemporaneous court orders regarding community property and child support. In the event of forfeiture, accumulated member contributions are refunded. These forfeiture provisions are applicable to public corruption offenses committed on or after the bill’s effective date.

The effective date of the bill is July 1, 2011.

FISCAL IMPLICATIONS

The AGO anticipates the number of criminal cases under this bill would be small and could be handled with current staff. Both the AODA and the PDD, in its new analysis of the substitute, report that handling civil forfeiture actions is outside the experience of their staffs, and could impact training and staffing requirements.

NMCD reports that mandating some prison time (and thus limiting the period of probation) for a number of public corruption offenses will have a significant fiscal impact on the NMCD. As reflected in the table above, based on information provided the NMCD in response to the original bill, this bill could result in incarceration costs of approximately \$124,000 during the relevant three year period, and even higher costs in later years, as more people are convicted of these crimes. The NMCD also reported that increases in days incarcerated will also eventually result in NMCD's prison population reaching its rated or maximum capacity. Probation caseloads and costs will also be increased as these convicted offenders finally get out of prison and serve parole or probation terms.

SIGNIFICANT ISSUES

As to the increased periods of incarceration under this bill, the AODA questions the imposition of mandatory time for public corruption offenders since other non-violent offenders do not face mandatory time and sentencing rationales are designed to treat similar categories of offenses in a similar manner.

The NMCD expresses concern that if numerous new crime or increased penalty bills such as HB 378 are passed, the NMCD will eventually reach its rated capacity for its prison population. At that point, the NMCD and/or the State will have three options: house inmates out of state, consider early release of inmates in accordance with the Corrections Population Control Act or other applicable state laws, or build more prisons or add space to existing prisons. All of these options have negative consequences: the early release of inmates jeopardizes public safety, and housing inmates out of state or building new prisons is expensive.

The balance of agency responses focus on provisions of the bill related to the forfeiture of state pensions for public corruption offenders. The AOC reports:

The National Association of State Retirement Systems compiled an analysis of selected state policies governing the termination or garnishment of public pensions in December 2010. New Mexico was included in the 41 states for which state policies were described. Of the 41 states included in the compilation, 23 have some provision for the forfeiture or revocation of a public employee's pension due to a variety of felony convictions, most related to the individual's employment. In at least one state, the forfeiture of all or part of the pension or retirement benefit can be made due to "misconduct...which renders the member's service or part thereof dishonorable." Four states included in the report allow pension benefits to be garnished for various types of restitution.

Based on this report, HB378 as proposed is consistent with similar policies in other states and seems to fall somewhere in the middle in terms of defining the type of criminal act that could result in pension forfeiture.

Further, the AGO advises that many states—including California, Florida, Michigan and Pennsylvania—have enacted anti-corruption legislation that includes forfeiture of retirement benefits only for felonies relating to the misuse of public monies, such as bribes, extortion, theft or embezzlement of public money and forgery.

The AGO also notes that HB 378 is drafted in a manner that complies with a recent New Mexico court decision that concluded that since forfeiture of property (such as money associated with the crime) was punishment, a second and separate forfeiture proceeding would constitute double jeopardy under the New Mexico constitution and statutes.

Since the same jury hears both the criminal case, during which guilt must be proven beyond a reasonable doubt, and any civil forfeiture proceedings, where the standard of proof is clear and convincing evidence, the AODA expresses concern that the difference between these two standards of proof may confuse the jury in its deliberations.

ERB raises this concern in its analysis of the substitute:

The application of the section on pension forfeiture in HB 378 to members and retirees who have met the minimum service requirements of a state pension system prior to enactment of the bill raises a significant issue. The New Mexico Constitution grants a member of a retirement plan created by law a vested property right with due process protections under the applicable provisions of the New Mexico and United States constitutions once that member has met the minimum service requirements for the plan. N.M. Const. Art. XX, § 22 (D). Thus, it is questionable whether the pension and other retirement benefits of a retiree or member whose interests in those benefits vested prior to effective date of HB 378 could be forfeited. This issue might be resolved by an amendment to the pension forfeiture section providing that HB 378 either would apply to (1) all members whose pension rights have not vested as of the effective date of the act, or (2) all members first hired after the effective date of the act.

In that same analysis, ERB also points out:

HB 378 does not address the issue of whether pension rights would be restored in the event a convicted member or retiree is subsequently pardoned and, if so, how that would be accomplished. This also involves the question of calculating the cost of repurchasing service credit. The bill should be amended to address this issue.

Further, agency analyses of provisions relating to recognition of court orders regarding child support and community property interests prior to or at the time of entry of a forfeiture order in a related bill (SB 247, which seeks forfeiture of state pensions upon conviction of misuse of public monies arising out of conduct while in public employment) argue that the bill could potentially deprive family members of their property rights if forfeiture orders are not stayed in instances where a final order settling community property interests or child support has not yet been obtained, or provision made for reopening the forfeiture order to address those issues within a reasonable time after the order is first entered. Such concerns appear to be applicable to the forfeiture provisions of HB 378 as well. In a related vein, the AGO points out that HB 378 raises potential problems related to overlapping jurisdiction over community property or child support issues.

PERFORMANCE IMPLICATIONS

NMCD anticipates substantial increases in prison populations under this bill, which would negatively impact its ability to perform prison-related and probation/parole supervision services at current levels of staffing.

ADMINISTRATIVE IMPLICATIONS

NMCD also predicts increased workloads due to anticipated increases in prison populations. Further, both ERB and PERA will be required to comply with the forfeiture requirements of HB

378. Also, both pension plans likely will need to promulgate rules concerning the administration of forfeiture proceedings as they apply to pension benefits payable, refunds of member contributions, and compliance with division of community property and child support orders.

RELATIONSHIP, CONFLICT

The state pension forfeiture provisions of HB 378 (Section 10) relate to SB 247 and 259, which both provide for forfeiture of state pensions when the member or retiree commits certain felonies. In this bill (HB 378) the triggering event is a public corruption crime; for SB 247 it is a felony that arises from the misuse of public money and is related to the offender's public employment; and for SB 259 it is a felony that relates to, arises out of or is in connection with the offender's holding of an elected office.

SB 247 also differs from HB 378 by: (1) authorizing forfeiture proceedings within 3 years of a triggering conviction in another state or in federal court (HB 378 requires a forfeiture proceeding be brought simultaneously with the underlying prosecution of the public corruption charge); (2) allowing a retiree whose pension has been suspended pending appeal to continue to be entitled to health insurance benefits under the Retiree Health Care Act; and (3) providing that if a pension is reinstated, the retiree is entitled to interest.

In addition to differences in its forfeiture provisions, SB 259 also differs from HB 378 by imposing an additional fine not to exceed the value of the offender's salary and benefits paid to the offender following the commission of the first act that was the basis for the conviction. Unlike HB 378, SB 259 does not impose mandatory time nor bar an offender from acting as a lobbyist or a state contractor.

HB 378 may also conflict with HB 480, which among its provisions provides for treble damages and attorney fees from persons convicted of certain public corruption offenses.

TECHNICAL ISSUES

In its analysis of the substitute, ERB again notes that in what is now Section 10(A)(4), the court is directed to serve a pension forfeiture order on the applicable retirement system, but all other notices are given by either the attorney general or district attorney, whomever prosecutes the forfeiture. Similarly, subsection (C) requires notice to the retirement system when an order is not appealed or upheld on final appeal but does not indicate who gives that notice. Requiring the entity prosecuting the forfeiture proceeding to serve any forfeiture order and all other notices would clarify the process in both instances.

OTHER SUBSTANTIVE ISSUES

ERB's analysis of the substitute also calls attention to another situation involving community property that is not addressed in the substitute:

In situations where a spouse remains in a marriage and does not seek divorce the spouse is entitled to a community property interest in the pension. A spouse of a member or retiree of a state pension system who was subject to a forfeiture order might challenge forfeiture of the *entire* pension on the basis that it is in effect a taking of the non-convicted spouse's community property interest in the pension. On Page 17, Lines 9-10,

HB 378 CS authorizes forfeiture “...after determining issues related to community property and child support obligations and issuing orders to that effect...” Given the commonly held perception that community property interests are issues arising only during a pending divorce it might be advisable to clarify that prior to forfeiture, the spouse’s community property interest is to be determined even in the absence of a pending divorce.

On a different topic, the AGO calls attention to an existing conflict in the penalties for bribery that this bill fails to resolve. The Governmental Conduct Act prohibits bribery and classifies it as a fourth degree felony (for which an 18 month basic sentence is imposed), while the Criminal Code (being amended for other purposes in Section 5 of this bill) makes bribery a third degree felony (with a basic sentence of 3 years). The AGO advises that since the elements of both crimes are identical, only the Governmental Conduct Act offense would be enforceable currently since it provides the lesser penalty.

MD/svb