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FISCAL IMPACT REPORT

ORIGINAL DATE 02/25/11

SPONSOR Baldonado LAST UPDATED _____ HB 434

SHORT TITLE Lobbyist Registration Act Penalties SB _____

ANALYST Aledo

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Secretary of State (SOS)

Attorney General's Office (AGO)

Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of Bill

House Bill 434 amends the Lobbyist Regulation Act to impose penalties for lobbyists who violate "a substantive provision" of certain enumerated public "corruption statutes."

Section 1 of HB 434 defines "corruption statute" as including the following:

- (1) the Election Code;
- (2) the Campaign Reporting Act;
- (3) the Lobbyist Regulation Act;
- (4) the Governmental Conduct Act;
- (5) the Financial Disclosure Act;
- (6) the Gift Act;
- (7) the Procurement Code;
- (8) the New Mexico Uniform Securities Act;
- (9) the 1999 Public Accountancy Act;
- (10) fraud, as provided in Section 30-16-6 NMSA 1978;
- (11) embezzlement, as provided in Section 30-16-8 NMSA 1978;
- (12) forgery, as provided in Section 30-16-10 NMSA 1978;
- (13) misconduct by officials, as provided in Sections 30-23-1 through 30-23-7 NMSA 1978;
- (14) bribery, as provided in Sections 30-24-1 through 30-24-3.1 NMSA 1978;

- (15) non-disclosure of third-party marketers, as provided in Sections 6-8-22 and 22-11-54 NMSA 1978;
- (16) perjury and false affirmation, as provided in Section 30-25-1 NMSA 1978; and
- (17) tampering with public records, as provided in Section 30-26-1 NMSA 1978

Section 1 also inserts and defines the term “substantive provision” as a provision, the violation of which requires conduct involving misrepresentation, dishonesty, moral turpitude or corruption.

HB 434 amends the section of the Lobbyist Regulation Act which addresses compliance with the Act, arbitration of disputes, and civil penalties. The bill would amend Subsection (C) to establish that the secretary of state is to use a “preponderance of the evidence” to determine if a provision of the Act has been violated.

HB 434 would also add a new Subsection (H) to the statute providing that if the SOS determines that a person has violated a substantive provision of a corruption statute, the SOS shall revoke the person’s lobbyist registration and the person shall be permanently enjoined from registering as a lobbyist unless that person is acquitted in a court of law or pardoned. Appeal from the Secretary’s determination is governed by the provisions for appeal from an agency decision to district court set forth in 39-3-1.1 NMSA 1978.

Section 3 in the bill would amend the penalties section of the Act, to make a distinction between non-substantive and substantive violations of provisions of the Act. Under HB 434 in addition to any other penalties that may be assessed, any person who knowingly and willfully violates a nonsubstantive provision of the Act shall be punished by a fine of up to five thousand dollars (\$5,000) and may have the person's lobbyist registration revoked or the person's lobbying activities enjoined for up to three years. However, any person who is convicted of violating any substantive provision of a corruption statute shall be punished by a fine of up to five thousand dollars (\$5,000) and shall have the person's lobbyist registration revoked and the person's lobbying activities enjoined permanently.

SIGNIFICANT ISSUES

The AGO is concerned that Section 3 is unclear as to whether the penalty being imposed is a civil penalty or a criminal penalty. The AGO recommends explicitly stating that this is a civil penalty to avoid double jeopardy issues under State v. Nunez, 129 N.M. 63 (1999).

Section 3 of HB 434 includes a more severe civil penalty for a lobbyist who has been convicted of violating a substantive provision of a corruption statute. Essentially, as a consequence of committing and being convicted of violating a substantive provision of a corruption statute, the Secretary of State will have the person's lobbyist registration revoked and the person's lobbying activities prohibited permanently.

The SOS noted that the SOS does not oversee the Acts and criminal violations set forth in items 7 through 17 of the list of corruption statutes set forth in the bill, and thus may not be the proper agency to conduct investigations into criminal activity such as fraud, bribery, forgery, etc., particularly if the activity was not related to lobbying activities.

The SOS also stated the following concern:

Under this bill, Subsection H on page 9, the SOS would make determinations of criminal activity based on a preponderance of the evidence, rather than beyond reasonable doubt, and the appeal would be based on a whole record review of an administrative proceeding.

If the lobbyist were not ultimately charged with a crime, he or she might not be able to obtain an acquittal necessary to regain the lobbyist registration. This may present a violation of due process.

In Subsection H, the SOS will determine that a persona has violated a substantive portion of a corruption statute. It is unclear what that determination based on if there has been no conviction. The SOS's determination is based on a preponderance of the evidence standard for lobbyist registration revocation. Clearer direction for the SOS would be to limit its authority to only convictions of a corruption statute.

AMENDMENTS

The following amendment may help clarify Subsection H and address the SOS's latter concern:

Page 9, line 19, after the word "of" insert "the Lobbyist Regulation Act or that a person has been convicted of violating a substantive provision of".

This would only necessitate the Secretary of State determining if the person had been convicted.

Also, to address the AGO's double jeopardy concern to the following amendment is suggested:

Page 10, line 12, after the word "a" insert "civil".

Page 10, line 19, after the word "a" insert "civil".

MCA/svb