

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

**SPONSOR** Brown **ORIGINAL DATE** 02/28/11  
**LAST UPDATED** \_\_\_\_\_ **HB** 480  
**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
<b>Total</b>	NFI	\$31.0	\$93.0	\$124.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with HB 378

Duplicates, to some extent, HB 378 and HB 383

Relates to SB 247, SB 259 and HB 432

Relates, as well, to HB 67, HB 154, HB 164, HB 195, HB 376, HB 434, SB 172, SB 181, SB 182 and SB 293

### **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)

New Mexico Corrections Department (NMCD)

Department of Transportation (NMDOT)

New Mexico Municipal League

### **SUMMARY**

#### Synopsis of Bill

House Bill 480 expands the Governmental Conduct Act to include officers and employees of political subdivisions of the state within its scope. It also amends other provisions of that Act and other criminal statutes to increase the penalties for certain public corruption offenses.

As to political subdivision officer and employees and the Act generally, the bill:

- expands and clarifies the definition of a public officer or employee covered by the Act and the prohibitions against certain designated political activities to include elected or appointed officials or employees of both state and local government agencies;
- provides a definition of what constitutes a contract under the Act, setting a threshold value of greater than \$1,000;
- prohibits public officers during their elected terms and public employees during their employment periods from acquiring a financial interest when the public officer or employee believes or should have reason to believe that the new financial interest will be directly affected by the officer's or employee's official act;
- clarifies that the Act prohibits state and local government agencies from entering into any contract with a public officer or employee or his or her business or that officer's or employee's family member or business unless the contract is awarded pursuant to a competitive process and the officer or employee has provided public notice of this fact;
- extends the prohibitions against state agencies entering into contracts with former state agency employees to local government agencies;
- extends the prohibitions regarding bidding, certain business sales and contributions currently applicable to state agencies to local government agencies; and
- adds a provision expressly allowing state or local government agencies from adopting and publishing ordinances or standards more stringent than those required by the Act.

In addition, HB 480 also contains anti-corruption provisions. It amends the Governmental Conduct Act and other criminal statutes to increase the penalties for certain public corruption offenses. The increased penalties include:

- reclassifying all public corruption offenses that are currently fourth degree felonies (subject to 18 months imprisonment) to third degree felonies (subject to three years imprisonment), except for bribery (already a third degree felony);
- requiring one-half of any sentence imposed be served and not suspended, deferred or taken under advisement;
- imposing treble damages and reasonable attorney fees (including fees for prosecutors) upon conviction, except for bribery and tampering with public records;
- limiting the eligibility for meritorious deductions up to a maximum of four days per month of time served; and
- forfeiting any state pension.

The “public corruption” offenses to which these increased penalties apply are:

- requesting or receiving something of value in exchange for promising performance of an official act;
- taking official action for personal financial interest;
- paying or receiving public money for services not rendered;
- making or permitting false vouchers;
- having an unlawful interest in a public contract;
- tampering with public records;
- 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.

HB 480 also creates a new public corruption offense, a fourth degree felony for “failure to report” when a public officer or employee knowingly and willfully fails to report to law enforcement or a supervisor direct knowledge of bribery, demanding or receiving a bribe, solicitation or receipt of an illegal kickback, and offering or paying an illegal kickback. A supervisor receiving such a report is required to report the information to law enforcement.

Finally, Section 22 of the bill requires when public corruption charges are filed against a member or retired member of a state retirement plan, a civil proceeding be commenced seeking forfeiture of a state pension, subject to 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**

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. Efforts to quantify specific fiscal impact by case are underway, but specific information is not available at this time.

The AGO anticipates the number of criminal cases under this bill would be small and could be handled with current staff. The AODA (and the Public Defender Department in SB 378, which contains identical provisions regarding forfeiture proceedings) report that handling civil forfeiture actions is outside the experience of their staffs, and could impact training and staffing requirements.

NMCD reports that by mandating some prison time (and thus limiting the period of probation) for a number of public corruption offenses and by treating these felonies as serious violent offenses (earning only four days of good time per month as opposed to up to 30 days a month, resulting in public corruption offenders serving up to 85% of their sentences), HB 480 will have a significant fiscal impact on NMCD. As reflected in the table above, NMCD estimates that this bill will 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 and will have to serve approximately 85% of their sentences. This increase 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**

HB 480 combines SB 432, which expands the Governmental Conduct Act to include officers and employees of political subdivisions of the state as well as state officers and employees, and SB 378, which provides increased penalties for persons convicted of public corruption offenses, including forfeiture of state retirements.

The AGO advises that the amendments to the Governmental Conduct Act erase the patchwork of ethics laws that currently apply to government, and in its place, creates a uniform body of ethics laws that apply to all public bodies, officials, and employees. The AGO prepared a chart to portray the current conflicting and overlapping ethics statutes that apply to state and local government:

	<b>CITY GOVERNMENT (§3-10-4 THRU - 60)</b>	<b>County GOVERNMENT (§4-44-21 THRU - 25)</b>	<b>STATE GOVERNMENT (§10-16-1 THRU - 18)</b>
<b>Prohibition on acquiring financial interest in business affected by decisions</b>	<b>§3-10-4A</b>	<b>§4-44-22B</b>	N/A
<b>Prohibition on use of Confidential Information</b>	<b>§3-10-4B</b>	<b>§4-44-23</b>	<b>§10-16-6</b>
<b>Disclosure of financial interest</b>	<b>§3-10-5 (applies only to elected officials)</b>	<b>§4-44-25</b>	<b>§10-16-3C A “guiding principle”</b>
<b>Disqualification from decisions affecting financial interest</b>	<b>§3-10-5B (Only if Governing body votes to disqualify city councilor)</b>	<b>§4-44-22A</b>	<b>§10-16-4 (a 4<sup>th</sup> degree felony)</b>
<b>Elected official cannot contract with government without public notice and competitive bidding and full disclosure</b>	N/A	<b>§4-44-22C</b>	<b>§10-16-7</b>
<b>Governmental body cannot contract with business represented by employee where contract is direct result of that employee’s decisions</b>	N/A	<b>§4-44-24</b>	<b>§10-16-8</b>

The Municipal League commented that local government elected and appointed officials and local government employees will now be subject to the Governmental Conduct Act as well as various criminal offenses involving public corruption. Criminal sanctions will be increased and prison time doubled, with a minimum period of 18 months, required to be served in prison.

Additionally, the League expressed concern that the threshold amount for contracts under the Governmental Conduct Act is quite low, and might impair the ability of local governments in rural or remote areas from obtaining needed goods and services due to the limited resources and sources of goods and services available.

In response to the provisions creating a new felony for failure to report and increasing penalties for public corruption offenses, NMCD warns:

If numerous new crimes or serious violent offense bills such as this one are passed, NMCD will eventually reach its rated capacity for its prison population. At that point, 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 comments focus on provisions of the bill related to forfeiture of state retirement pensions of 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." Of those states with policies regarding forfeiture of pension and retirement benefits, five apply only to elected officials; four specifically refer to both employees and elected officials; and the remainder of the policies pertain to receiving pension and other benefits of the public retirement system.

Based on this report, the AOC concludes that the pension forfeiture language in HB 480 is consistent with similar policies in other states.

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 480—by conducting the forfeiture proceeding before the same jury that hears and decides the underlying felony—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. But the AODA expresses concern that, 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 difference between these two standards of proof may confuse the jury in its deliberations.

ERB raises this concern:

The application of the section on pension forfeiture in HB 480 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 480 could be forfeited. This issue might be resolved by an amendment to the pension forfeiture section providing that HB 480 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.

ERB also points out:

HB 480 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 the 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 480 as well. In a related vein, the AGO points out that HB 480 raises potential problems related to overlapping jurisdiction over community property or child support issues.

## **PERFORMANCE IMPLICATIONS**

The NMCD reports this bill would negatively impact the Department's ability to perform prison-related and probation/parole supervision services (with current levels of staffing) by eventually increasing the NMCD prison population.

## **ADMINISTRATIVE IMPLICATIONS**

Similarly, the NMCD suggests that since the bill is likely to result in substantial increases in the NMCD prison population, it will increase the workloads of current prison staff.

NMDOT notes that HB 480 requires public officers and employees who have knowledge of acts of bribery or kickbacks to report them to the supervisor or a law enforcement officer. Failure to do so would be a fourth degree felony. Because failure to report instances of bribery or kickbacks would have criminal implications, it is highly likely that such reporting by public officers and employees would increase.

## **CONFLICT, RELATIONSHIP**

HB 480 conflicts with HB 378 by reclassifying those public corruption offenses that are currently fourth degree felonies to third degree felonies and directing that eighteen (18) months of a public corruption sentence (rather than nine months), not be suspended, deferred or taken under advisement. In addition, HB 480 conflicts with HB 378 because it does not contain the prohibition against public corruption offenders contracting with the state or lobbying. Further, HB 480 conflicts with HB 378 by imposing treble damages and reasonable attorney fees in all public corruption offenses except tampering with public records and bribery of a public officer or employee. Lastly, HB 480 conflicts with HB 378 because it does not require posting by agencies of a list of all crimes constituting public corruption offenses and other corrupt practices and the penalties associated with such crimes.

HB 480 conflicts with SB 432 as well because it does not amend the Governmental Conduct Act to prohibit state and local government officers and employees who participate directly in the contracting process from becoming employees of the contractor contracting with the agency.

HB 480 duplicates the definition of public corruption offenses contained in HB 383.

The pension forfeiture section of HB 480 is identical to the pension forfeiture section in HB 378 and similar in nature and identical in several sections to SB 247, Forfeiture of Retirement for Certain Crimes and SB 259, Forfeiture of Public Officials Benefits.

HB 480 also relates to these ethics and election bills:

HB 67, Prohibit Public Official Lobbying for 1 Year  
HB 154, No Election Expenditures from Corporations  
HB 155, Disclosure of Funds for Election Advocacy  
HB 195, State Ethics Commission Act  
HB 376, Public Officer Lobbying, Ethics & Disclosure  
HB 434, Lobbyist Registration act Penalties  
SB 164, State Ethics Commission Act  
SB 172, State Ethics Commission Act  
SB 181, Contributions from State Contractors  
SB 182, Limit Contributions in Certain Elections  
SB 293, State Ethics Commission Act

## **OTHER SUBSTANTIVE ISSUES**

Section 22 would require the forfeiture of a member's or a retired member's state retirement if that person was convicted of a public corruption offense even if that offense was not directly related to the member's or retired member's public employment.

The AGO notes that HB 480 resolves an existing conflict in the penalties for bribery: both the Governmental Conduct Act (fourth degree felony) and the Criminal Code (third degree felony) currently prohibit bribery. Since the elements of both crimes are identical, only the Governmental Conduct Act would be enforceable since it provides the lesser penalty. This bill makes the Governmental Conduct Act bribery a third degree felony.

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

The AGO advises:

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.

The penalties for public corruption will continue to be the same as other crimes.

MD/svb