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FISCAL IMPACT REPORT

ORIGINAL DATE 02/01/12
 LAST UPDATED 02/03/12

SPONSOR Ryan HB _____

SHORT TITLE Fraud Against Taxpayers Act Public Liability SB 234

ANALYST Soderquist

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	N/A	N/A	N/A	N/A	Recurring	All Funds

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General’s Office (AGO)
 Administrative Office of the Courts (AOC)
 Educational Retirement Board (ERB)
 State Investment Council (SIC)
 General Services Department (GSD)

Responses Not Received From

Public Employees Retirement Association (PERA)

SUMMARY

Synopsis of Bill

If enacted, Senate Bill 234 would protect the state and its agencies and public officials from liability from claims pursuant to the Fraud Against Taxpayers Act, (“FATA”) Section 44-9-1 *et seq.* NMSA 1978, if the state and public officials were acting within their scope of their duty (“sovereign immunity”). The legislation also provides that if an action is brought against a public employee under the FATA, government agencies would not be liable for fees, costs, expenses, or any judgment or settlement that a public official might incur in defense of such an action.

FISCAL IMPLICATIONS

SB 234 has the potential to reduce state costs related to the legal defense of state employees, officers or boards accused of misdeeds or malfeasance by shifting the responsibility of that defense from the state to the individual. The actual amount of that cost saving is unavailable, but responses from agencies suggest current fees total several hundred thousand dollars per year, with the potential of more lawsuits increasing costs to the state in the future. The response from the General Services Department (GSD) states that legal expenses for FATA cases are currently close to one million dollars, with “dozens” of defendants involved.

However, the response from the State Investment Council (SIC) states that lacking protections against qui tam actions that frequently name dozens of individuals with no specific crimes identified, the SIC would likely be forced to seek additional liability insurance coverage for its members, officers and staff if it were to continue to function effectively. It is unclear exactly what such coverage would cost, although the SIC states that for that agency alone the costs could be hundreds of thousands of dollars annually. Extrapolating those costs to affected agencies across state government, there is the potential for significant hidden costs under SB 234.

SIGNIFICANT ISSUES

The proposed legislation is designed to address ongoing issues related to individuals that have been accused of illegal activities pursued while employed by the state. A number of high-profile cases have been pursued – and, in some instances, continue to be pursued – over the last decade, leading to substantial legal defense costs assumed by the state. Less prominent legal actions are pursued on a regular basis and settled by the Risk Management Division (RMD) at the General Services Department (GSD). The primary intent of the proposed legislation is to mitigate the costs that accrue to the state as a result of FATA actions, both prosecution and defense.

Responses from state agencies recognize the irony of charges being brought by the state against individuals for crimes or other forms of malfeasance, yet the necessity that by law the state must defend those same individuals. Furthermore, an additional irony is that any recovery obtained by the state as a result of legal action would in turn have to be paid by the state by virtue of the state’s responsibility to indemnify its employees. Nevertheless, responses from state agencies also raised concerns related to the legislation on several key points:

- According to the response from the Attorney General’s Office (AGO), the proposed provision of sovereign immunity for public officials and entities under FATA is inconsistent with the structure and purpose with FATA as the existing statute has indicates clear legislative intent to subject state officials to liability for crimes or other forms of malfeasance. By providing blanket immunity to state officials, SB 234 conflicts with the goals of FATA and, furthermore, potentially forecloses any possibility of holding public officials accused of crimes or malfeasance accountable through civil proceedings.
- Responses from the AGO and the SIC emphasize that some FATA suits pursued against state employees, officers, and board members – including Legislators – are “baseless, vexatious, and harassing” in nature. Suits may at first glance appear to be legitimate, but after extensive litigation may be proven to be groundless. The enactment of SB234 would potentially force individuals to pay significant amounts to defend themselves against

meritless suits. According to the AGO, this will be the case even if blanket immunity is enacted, stating “unscrupulous lawyers and litigants may try to argue their way around the immunity. Worse yet, they may simply ignore it, necessitating at least some litigation in order to resolve the case”.

- As stated above, eliminating the state’s duty to defend or indemnify any public official who faces legal action does not necessarily eliminate the need for the agency to indemnify its employees, particularly when an agency’s enabling legislation expressly provides indemnification to state employees, officers, and board members. The SIC response states, “in the investment world, where investment losses are not uncommon due to the risk/reward nature of the business, the environment is ripe for FATA suits, whether there is a factual basis behind them or not. Such suits can be filed freely with the intent of achieving settlements, without the requirement to prove any wrongdoing”.
- It is not inappropriate to ask whether public officials responsible for road maintenance, childcare services, environmental protection, or any other activity involving public safety would face similar charges to those mentioned above.

PERFORMANCE IMPLICATIONS

None.

ADMINISTRATIVE IMPLICATIONS

Unclear, as the proposed legislation could reduce administrative burdens placed on state agencies – the Risk Management Division at the General Services Department in particular – designed to defend state employees, officers, and board members from legal action brought under FATA. On the other hand, as the response from the SIC indicates, the proposed legislation could also impose an additional administrative burden on agencies in terms of the acquisition of liability policies for their employees.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None.

ALTERNATIVES

Responses from state agencies to the FIR request raised questions as to whether state employees, officers, and board members should be made individually responsible for the costs of legal action as a result of pursuing activities that are a component of their job description. A potential alternative proposed by the AGO in its response is that a statutory provision be enacted that requires the repayment of legal costs by any state employee, officer, or board member if convicted of a crime or other form of malfeasance. Another suggestion is legislation seeking punitive damages and reimbursement through the loss of retirement benefits and pensions. The SIC, as an example, emphasizes budget “clawback” provisions for the agency for funds expended in defense of anyone later convicted or removed for violating their fiduciary responsibilities.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The state will continue to be responsible for the defense of state employees, officers and board members in legal action pursued under the provisions of FATA and the judicial review of those decisions.

ANA/lj