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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/05/13  
 LAST UPDATED 03/05/13      HB 190/aHAFC

SPONSOR Egolf

SHORT TITLE State Ethics Commission Act      SB \_\_\_\_\_

ANALYST Soderquist/Cerny

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY13	FY14		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		NFI	NFI			

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Secretary of State (SOS)

Administrative Office of the District Attorneys (AODA)

Attorney General's Office (AGO)

### SUMMARY

#### Synopsis of HAFC Amendment

The House Appropriations and Finance Committee amendment to House Bill 190: 1) strikes language related to appropriations; 2) changes the date when commissioners will be appointed to July 1, 2014; 3) changes the date when the proposed commission will begin administering provisions of defined statutes to January 1, 2015; 4) changes the date when the proposed ethics commission will submit a report to the Legislature and the governor regarding the extension of committee jurisdiction to elected and appointed officials and employees of political subdivisions of the state to January 1, 2016; 5) changes the date when all functions, appropriations, money,

records, property, equipment and supplies of the office of the Secretary of State (SOS) used in the administration of defined statutes are transferred to the proposed state ethics commission to January 1, 2015; 6) strikes in its entirety Section 62 related to a \$200.0 thousand in general fund appropriations in fiscal year 2014; 7) changes the date when the provisions of the proposed legislation become effective to fiscal years 2014 or 2015 as appropriate to the intent of the amendment.

### Synopsis of Original Bill

House Bill 190 (HB 190) is designed to establish a State Ethics Commission Act and create a State Ethics Commission (SEC) as an adjunct agency of the executive branch. The proposed SEC would oversee the filing of complaints against state officials, state employees, government contractors and lobbyists, develop an ethics code, provide annual ethics training and issue advisory opinions.

The commission would have an executive director who would be an attorney. The legislation transfers responsibility of the administration of the Election Code and government ethics from the SOS to the proposed SEC. The transfer would include “all functions, appropriations, money, records, property, equipment and supplies of the office of the secretary of state used in the administration of the Campaign Reporting Act, the Voter Action Act, the Lobbyist regulation Act, the Governmental Conduct Act, the Financial Disclosure Act”. Further, all contracts, grants, agreements, and other obligations related to the aforementioned acts would be transferred to the proposed SEC. The effective date of the provisions of Sections 1-7, 12-16, 48, and 60-65 is July 1, 2013, while the effective date of Sections 8-11, 17-47, and 49-59 is January 1, 2014.

The proposed SEC would consist of eleven members, five appointed by the governor, no more than three of whom are of the same political party, with at least one appointed from each congressional district; one appointed by the Senate’s President Pro Tempore; one appointed by the Senate Minority Leader; one appointed by the Speaker of the House; one appointed by the House Minority Leader; and two appointed by the Chief Justice of the New Mexico Supreme Court, who shall be district court judges, not of the same political party, and not from the same congressional district. No more than five of the appointees may be of the same political party. Members of the SEC shall be appointed for staggered terms of four years and cannot serve more than two consecutive terms.

The legislation appropriates two hundred thousand dollars (\$200,000) from the General Fund in fiscal year 2014 to “carry out the provisions of the State Ethics Commission Act.”

A section-by-section summary of HB 190 can be found in attachment 1.

## **FISCAL IMPLICATIONS**

### Fiscal Implications of the HAFC Amendment

The HAFC amendment eliminates the fiscal implications included in the analysis of the original legislation. However, the tasks assigned to the proposed state ethics commission are substantial, and it is likely that appropriations will be required in the future.

Fiscal Implications of the Original Bill

The appropriation of two hundred thousand dollars (\$200,000) contained in this bill should be considered a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end fiscal year 2014 shall revert to the general fund. It is unclear whether this funding is intended to cover the cost of activities of the new agency in the first year of its existence or to cover transition costs only. As contemplated in Section 6 B, the director of the SEC is empowered to prepare a budget for the commission and to hire a general counsel and additional personnel as needed.

Nevertheless, it is unclear from HB 190 what future anticipated costs of staff and operations may be.

The SOS analysis states that their office “currently administers the Campaign Reporting Act, Lobbyist Regulation Act, Governmental Conduct Act and the Financial Disclosure Act. Three FTEs work primarily on matters arising under these acts. Those FTEs also work on election matters during the election cycle. If the SOS did not oversee these acts, these FTE’s would still be needed on at least a temporary basis during elections.”

This suggests that three FTEs would be necessary to carry out the work of the new SEC. Since the primary functions of the 3 FTEs at the SOS outside of an election cycle is for administration of the acts outlined, it is possible that these positions could be used to staff the new SEC, assuming the SOS would be funded sufficiently for temporary positions during the election cycle. However, these FTE’s are not cited in the legislation.

Besides staffing the new agency, other fiscal implications that are not yet determined are moving costs, IT considerations, a telephone system, and a lease for the offices of the SEC and costs of per diem and mileage for the commission.

The appropriation may be inadequate for start-up costs depending on the timeline of implementation. The Attorney General’s Office (AGO) states: “HB 190 would also transfer funding and equipment from the Secretary of State to the Commission. We note that HB 190 contains an apparent one-time appropriation of \$200,000. Whether such an appropriation is adequate is uncertain, since the structure and purpose of the Commission are potentially quite expansive.”

The effect on future year operating costs could be significant depending upon management’s assessment of operational requirements to run a new, independent state agency.

**SIGNIFICANT ISSUES**

HB 190 anticipates moving most ethics-related functions out of the SOS. The SOS who is currently in charge of these functions is an elected official. HB 190 would replace oversight of ethics-related functions to an 11-member appointed board, effectively removing voter involvement in the selection of either an individual (as currently is the case) or in the membership of a commission (as HB 190 would create).

HB 190 states in section 3a that the SEC “is created as an adjunct agency of the executive branch under direction of the eleven commissioners.” In section 2a it defines “adjunct agency as “an

agency, board, commission, office or other instrumentality, not assigned to an elected constitutional officer, that is excluded from any direct or administrative attachment to a department and that retains policymaking and administrative autonomy separate from any other agency of state government.” It is unclear in HB 190 what relationship the SEC will hold to the executive branch under this scenario. The AGO and the State Auditor’s office have autonomy from other agencies of state government, but each is headed by an elected official.

HB 190 also states the SEC would oversee the filing of complaints, specifically ethics violations alleged against (among others) state employees and states that the SEC shall, if warranted, “investigate the complaint.” Since the State Personnel Board currently handles complaints against state employees, and collective bargaining agreements in place also address the rights of state employees, it is as yet unknown how the SEC’s investigations and process would intersect with existing regulations and practices with regard to this group of individuals. Section 11C does state that if the respondent is a state official or state employee, the written report of the SEC findings of fact and conclusions of law “may include a public reprimand or censure regarding the respondent’s behavior or recommendations for disciplinary action against the respondent.” Does this conflict with personnel confidentiality restrictions?

The AGO states: “At the present time, there is not a central public body charged with the responsibility to investigate ethics violations as contemplated by HB 190. Instead, enforcement is piecemeal: for example, the Secretary of State shares responsibility with the Attorney General for enforcing the Financial Disclosures Act; in addition, the Secretary of State shares responsibility with the District Attorneys and the Attorney General for enforcing the Procurement Code and the Governmental Conduct Act; finally, no agency is charged with enforcing the Gift Act.”

The AGO finds no legal impediments to this bill, noting: “HB 190 is a complex bill with many facets. The main thrust of the bill does not present any obvious legal impediments. Indeed, HB 190 appears to have accounted for some of the past concerns that the AGO has expressed about similar bills.”

The Administrative Office of the District Attorneys (AODA) states that the provisions of HB 190 of particular relevance to the district attorneys are Sections 13 and 16. Specifically:

“Section 13 provides that if the commission finds at any time that the respondent’s conduct may amount to a criminal violation, the commission shall immediately refer the matter to the attorney general or an appropriate district attorney, and provide the attorney general or district attorney with all the evidence collected that may be used in a criminal proceeding. The commission may hold the matter in abeyance pending resolution of any criminal charge. Many of the acts being amended by HB 190 to recognize administrative power in the commission rather than the Secretary of State contain their own provisions for referring potentially criminal matters to the attorney general or the district attorney. Under HB 190’s amendments of those acts, the commission will be the entity referring criminal cases.

Section 16 is a new provision making it a misdemeanor to disclose any confidential complaint, report, file, record or communication in violation of the State Ethics Commission Act”

## ADMINISTRATIVE IMPLICATIONS

The SOS states: “The ethics commission created by this bill would be required to maintain and administer the Campaign Finance Information System, or a replacement program, which is used by candidates, political committees and lobbyists to report contributions and expenditures. Coordination would be required between the SOS and county clerks and the ethics commission to ensure that all candidates who file declarations of candidacy are entered into the system. Further, the ethics commission would be required to notify county clerks and the SOS of any candidates who have unpaid fines or unfiled reports, who are not eligible to have their names placed on the ballot or to receive a certificate of election.”

The AODA states “Criminal referrals will come from the commission, rather than from the Secretary of State”

## TECHNICAL ISSUES

The bill contains two different definitions of a "lobbyist" which are similar but not identical. Section 2 (J) and Section 43(E) should of the legislation related to definitions of a lobbyist and their activities should be amended so as to be consistent.

Section 61A (6) states that all property related to various acts, including the Gift Act in the office of the secretary of state shall be transferred to the SEC. However, the SOS states they are not responsible for violations of the Gift Act.

## OTHER SUBSTANTIVE ISSUES

According to the National Conference of State Legislatures (NCSL), New Mexico is one of just nine states without an ethics commission. Of the states with ethics commissions, they all have the authority to investigate allegations of violations of the ethics code sections they administer. In twenty states, their orders are enforceable in court. (See: <http://www.ncsl.org/legislatures-elections/ethicshome/50-state-chart-state-ethics-commissions-powers-a.aspx#nm> ).

NCSL also states: “While most committees only have jurisdiction over the legislature, a few oversee lobbyist activities. Nearly all committees are composed of legislators only, thereby making it imperative that committee members uphold the public’s trust and maintain credibility.” (<http://www.ncsl.org/legislatures-elections.aspx?tabs=1116,84,212> )

The NCSL provide the following information about jurisdictions:

“State ethics commissions are responsible for enforcing ethics laws, although their jurisdictions vary among the states. Jurisdictions can include legislators, executive branch officials, candidates, local officials, lobbyists and vendors. The commissions may have jurisdiction over officials and employees in more than one branch of government. This chart describes the various jurisdictions of ethics commissions.”

LEGISLATORS	EXECUTIVE BRANCH	CANDIDATES	LOCAL OFFICIALS (OTHER THAN CAMPAIGN ISSUES)	LOBBYISTS	VENDORS
39 COMMISSIONS IN 35 STATES	46 COMMISSIONS IN 40 STATES	29 COMMISSIONS IN 28 STATES	23 COMMISSIONS IN 23 STATES	31 COMMISSIONS IN 30 STATES	10 COMMISSIONS IN 9 STATES

(Note: some states have more than one commission overseeing ethics violations.)

## **Attachment 1: Section by section analysis of HB 190**

Section 1 establishes the title of the act.

Section 2 provides definitions under the act, including those for ethics violations, lobbying, lobbyists, and contractors, officials actions that occur under the act, and so on.

Section 3 establishes the membership of the commission, the terms that commissioners serve, and mechanisms for the transaction of business.

Section 4 establishes qualifications for the commissioners.

Section 5 establishes duties and powers of the commissioners.

Section 6 establishes the duties and powers of the executive director of the commission, including additional qualifications.

Section 7 establishes the conditions under which the commissioner should recuse or disqualify himself or herself from action taken by the proposed SEC.

Section 8 establishes that commissioners may issue advisory opinions on matters related to ethics and the conditions under which those advisory opinions may be issued.

Section 9 establishes the conditions under which ethics complaints may be filed with the proposed SEC and the conditions under which investigations may be pursued by the commission.

Section 10 establishes time limitations that must be adhered to as investigations are pursued by the proposed SEC.

Section 11 establishes the conditions under which the proposed SEC creates reports and discloses findings and conclusions of ethics violations.

Section 12 establishes that the complaints, reports, files, records, and communications collected or generated by the proposed SEC or the executive director that pertain to alleged ethics violations are confidential and not subject to the provisions of the Inspection of Public Records Act (IPRA).

Section 13 establishes the conditions under which potential criminal violations may be referred to the Attorney General or appropriate District Attorneys by the proposed SEC.

Section 14 establishes limitations on jurisdiction, in particular the time frame in which investigations may be pursued by the proposed SEC.

Section 15 establishes actions that individuals cannot pursue against other individuals that have filed complaints with the proposed SEC.

Section 16 establishes penalties for individuals that violate the proposed provisions concerning confidentiality (section 12) required by the proposed SEC.

Section 17 establishes definitions as used in the Campaign Reporting Act, in particular that prescribed forms and electronic format are provided by the proposed SEC and proper filing officer is the proposed SEC, not the Secretary of State.

Section 18 amends Section 1-19-26.1 NMSA 1978 related to political committees, in particular that political committees will now file with the proposed SEC and not the Secretary of State.

Section 19 amends Section 1-19-26.2 NMSA 1978 related to the adoption and promulgation of rules to implement the provisions of the Campaign Reporting Act, in particular that this will be the responsibility of the proposed SEC and not the Secretary of State.

Section 20 amends Section 1-19-27 NMSA 1978 related to the filing of reports on campaign contributions and expenditures, in particular that individuals will file reports with the proposed SEC and not the Secretary of State.

Section 21 amends Section 1-19-28 NMSA 1978 related to the provision of campaign contribution and expenditure forms and other similar forms, in particular that individuals will file reports with the proposed SEC and not the Secretary of State.

Section 22 amends Section 1-19-29 NMSA 1978 related to the time and place that reports on campaign contributions and expenditures are filed, in particular that individuals will apply for hardship exemptions with proposed SEC and not the Secretary of State.

Section 23 amends Section 1-19-31 NMSA 1978 related to the format of the required reports on campaign contributions and expenditures, in particular that the proposed SEC will determine that format and not the Secretary of State.

Section 24 amends Section 1-19-32 NMSA 1978, in particular which documents are considered records open to public inspection. The section also substitutes the title of the proposed SEC in those citations where the Secretary of State currently exists.

Section 25 amends Section 1-19-32.1 NMSA 1978 related to the examination of campaign contributions and expenditures, in particular that this would be the responsibility of the SEC and not the Secretary of State.

Section 26 amends Section 1-19-34.4 NMSA 1978 related to the education of the public as to what duties must be adhered to under the Campaign Reporting Act, the conditions under which investigations will be initiated, the conditions under which violations will be determined, the conditions under which penalties will be assessed, and so on, in particular that this would be the responsibility of the SEC and not the Secretary of State.

Section 27 amends Section 1-19-34.6 NMSA 1978 related to the referral of potential violations of the Campaign Reporting Act to the Attorney General or District Attorney for civil action, in particular that this would be the responsibility of the SEC and not the Secretary of State.

Section 28 amends Section 1-19-34.7 NMSA 1978 related to contribution limitations, in particular that it would be the responsibility of the SEC and not the Secretary of State to determine appropriate amounts of contributions.

Section 29 amends Section 1-19-35 NMSA 1978 related to the penalties required for the failure to file or late filing of campaign contribution and expenditure reports, in particular that this would be the responsibility of the SEC and not the Secretary of State.

Section 30 amends Section 1-19A-2 NMSA to provide a definition for the proposed SEC in Voter Action Act.

Section 31 amends Section 1-19A-3 NMSA 1978 that individuals declaring an intent to participate in activities that fall under the Voter Action Act, including obtaining campaign financing pursuant to that act, would file declarations of intent with the proposed SEC and not the Secretary of State.

Section 32 amends Section 1-19A-6 NMSA 1978 provides that the certification of all submitted campaign finance materials is the responsibility of the proposed SEC and not the Secretary of State.

Section 33 amends Section 1-19A-7 NMSA 1978 to state that certified candidates must return unspent or unencumbered funds remaining after an election to the proposed SEC and not the Secretary of State.

Section 34 amends Section 1-19A-9 NMSA 1978 related to the publishing and filing of candidate reporting requirements, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 35 amends Section 1-19A-10 NMSA 1978 related to qualifying contributions deposited into the Public Election Fund, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 36 amends Section 1-19A-11 NMSA 1978 related to the report that documents, evaluates and makes recommendations concerning the Voter Action Act and determines the revenues in the Election Fund and the projected costs for the next election cycle, in particular that this report would be the responsibility of the proposed SEC and not the Secretary of State.

Section 37 amends Section 1-19A-12 NMSA 1978 related to the distribution of election funds to qualified candidates, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 38 amends Section 1-19A-13 NMSA 1978 related to the amount of election funds distribution, in particular that the determination of appropriate amounts would be the responsibility of the proposed SEC and not the Secretary of State.

Section 39 amends Section 1-19A-14 NMSA 1978 related to the issuance of matching funds for qualified candidates, in particular that the issuance of matching funds would be the responsibility of the proposed SEC and not the Secretary of State.

Section 40 amends Section 1-19A-15 NMSA related to the administration of the Voter Action Act, in particular that the administration would be the responsibility of the proposed SEC and not the Secretary of State.

Section 41 amends Section 1-19A-16 NMSA 1978 related to appeals for a challenge of a certification decision, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 42 amends Section 1-19A-17 NMSA 1978 related to penalties applied to individuals who violate provisions of the Voter Action Act, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 43 amends Section 2-11-2 NMSA 1978 related to definitions used in Lobbyist Regulation Act, and the entity where lobbying-related documents are filed, in particular that this would be the responsibility of the SEC and not the Secretary of State.

Section 44 amends Section 2-11-3 NMSA 1978 related to registration statements required for lobbyists or the employer of lobbyists, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 45 amends Section 2-11-6 NMSA 1978 related to expenditure reports and reporting periods for lobbyists or the employer of lobbyists, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 46 amends Section 2-11-7 NMSA 1978 related to the registration and expenditure statement and the preservation of the statement as a public record, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 47 amends Section 2-11-8.2 NMSA 1978 related to compliance, enforcement, and arbitration under the Lobbyist Regulation Act, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 48 amends Section 10-15-1 NMSA 1978 related to procedures and exceptions for open public meetings, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 49 amends Section 10-16-4.2 NMSA 1978 related outside employment obtained by public officers or employees, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 50 amends Section 10-16-11 NMSA 1978 related to codes of conduct for legislative and executive branch employees, in particular that the prescribed codes are the responsibility of and would be filed with the proposed SEC and not the Secretary of State.

Section 51 amends Section 10-16-13.1 NMSA 1978 related to education and compliance of codes established under the Governmental Conduct Act, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 52 amends Section 10-16-14 NMSA 1978 related to enforcement procedures pursued under the Governmental Conduct Act, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 53 amends Section 10-16-18 NMSA 1978 related to civil penalties applied as a result of violations of the Governmental Conduct Act, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 54 amends Section 10-16A-3 NMSA 1978 related to declarations of candidacy and financial disclosure statements filed by candidates for legislative and statewide offices, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 55 amends Section 10-16A-4 NMSA 1978 related to disclosures required by public officers or employees of state agencies concerning potential conflicts of interest, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 56 amends Section 10-16A-5 NMSA 1978 related to education and compliance required under the Financial Disclosure Act, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 57 amends Section 10-16A-6 NMSA 1978 related to enforcement, investigation, fines, and arbitration under the Financial Disclosure Act, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 58 amends Section 10-16A-8 NMSA 1978 related to enforcement and civil penalties applied under the Financial Disclosure Act, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 59 amends Section 10-16B-3 NMSA 1978 related to the limitation of gifts offered by lobbyists or employers of lobbyists and state officers and employees, in particular that this would be the responsibility of the proposed SEC and not the Secretary of State.

Section 60 requires a report on the possible extension of the responsibilities of the proposed SEC to local governments, including timeline and additional budget required by the proposed SEC.

Section 61 requires the transfer of all appropriations, money, records, functions, property, equipment and supplies related to the Campaign Reporting Act, the Voter Action Act, the Lobbyist Regulation Act, the Governmental Conduct Act, the Financial Disclosure Act and the Gift Act from the Secretary of State to the proposed SEC.

Section 62 appropriates two hundred thousand dollars (\$200,000) from the general fund to carry out provisions established under the legislation.

Sections 63, 64 and 65 establish provisions of severability, applicability, and effective dates.