

LFC Requester:	Torres
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**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

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SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original **Amendment**
Correction **Substitute**

Date Jan. 17, 2024
Bill No: HB 8

Sponsor: Cates, Jaramillo, Gurrola
Short Title: ELECTED OFFICIALS & GOV'T CONDUCT ACT CHANGES

Agency Name and Code State Ethics Commission (410)
Number: _____
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

Section 1 defines “political activity” to mean “activity directed toward the success or failure of a political party, candidate for partisan political office or partisan political group.”

Section 2 repeals and replaces Section 10-16-3 to create a clear declaration-of-public-policy section for the Governmental Conduct Act (“GCA”).

Section 3 amends Section 10-16-3.1(C), clarifying that a public officer or employee may not engage in political activity while on duty, in any room reserved for the exclusive use of the State, while wearing a uniform or official insignia identifying the individual’s office, or using any state vehicle. These amendments follow analogous provisions in the federal Hatch Act regulating the conduct of federal employees. Section 3 also provides that subsection 10-16-3.1(C) does not apply to the governor, the attorney general or any other elected state official for whom state law enforcement officers provide security.

Section 4 creates a new Section 10-16-3.2 of the GCA, reorganizing, consolidating and clarifying the GCA’s main conduct-regulating provisions, including prohibitions against the abuse of office, quid pro quo corruption, acquiring financial interests directly affected by an official act, and the misuse of public property.

Section 5 deletes subsections in Section 10-16-4 that either are located in the new Section 10-16-3.2 or substantively overlap with the new Section 10-16-3.2.

Section 6 amends Section 10-16-8 to add a new subsection 10-16-8(E), clarifying that a subsequent private employer of a former public officer or employee may be liable for knowingly causing the former public officer or employee to violate the GCA’s revolving-door provisions.

Section 7 amends the civil penalty provisions of the GCA to allow for a civil penalty range with a maximum of \$10,000, updating the current civil penalty which is \$250 per violation regardless of the circumstances or the egregiousness of the violation.

FISCAL IMPLICATIONS

State Ethics Commission staff do not believe that HB 8’s amendments to the GCA will result in

an increase to the Commission's operational costs by increasing in the number of administrative matters and civil enforcement actions related to the Act. Rather, if anything, HB 8's clarification of the GCA might precipitate fewer administrative cases and civil enforcement actions. By removing ambiguities and gaps in the GCA, HB 8 might obviate the need for an adjudicatory process to do the same through the course of litigated and administrative cases.

SIGNIFICANT ISSUES

The New Mexico Supreme Court recently issued an opinion in *State v. Gutierrez, et al.*, 2023-NMSC-002, that stops criminal enforcement of subsections 10-16-3(A) through (C) of the GCA. The amendments contained in HB 8 address the issues raised by the New Mexico Supreme Court and make the GCA clearer, fairer, and better attuned to the Act's purpose to ensure that individuals working in government in New Mexico use the powers and property of their government office only to benefit the public, and not to benefit themselves.

I. A new purpose section for the GCA

HB 8's Section 2 repeals and replaces Section 3 of the GCA. As it currently stands, Section 3 of the GCA contains both aspirational language that announces the GCA's purposes (*e.g.*, 10-16-3(B)), and language that straightforwardly regulates conduct (*e.g.*, 10-16-3(D)). These dual functions are confusing and ultimately led the *Gutierrez* Court to hold that subsections 10-16-3(A) through 10-16-3(C) do *not* create crimes, even if some language in those statutes might be read to instruct government officials employees what they should and should not do. Several statutes have clear purpose sections, which declare the public policy of New Mexico but which do not purport to regulate conduct. The Open Meetings Act, the Procurement Code, and the Inspection of Public Records Act contain good examples. *See* NMSA 1978, §§ 10-15-1 (2013); 13-1-29 (1984); 14-2-5 (1993). Following the example of those statutes, HB 8, Section 2 creates a clear purpose section that declares the public policy of New Mexico and which might be used as an interpretative guide for the remainder of the statute. Unlike the current GCA, HB 8, Section 2 does not attempt to regulate conduct. The delineation of a clear purpose section is a straightforward response to the *Gutierrez* holding.

II. Clearer regulations of political activities by public officials and employees

Section 10-16-3.1 of the GCA currently prohibits public officials and employees from using the powers of their government offices for a political purpose, including to benefit a candidate or political party or to influence certain political activity. Like its federal analogue, the Hatch Act, 5 U.S.C. §§ 7321–7326, the purposes of section 10-16-3.1 are: (i) to ensure that government programs are administered in a nonpartisan fashion and that government resources are not used for partisan, political ends; (ii) to protect government employees from political coercion in the workplace; and (iii) to ensure that government employees are advanced based on merit and not political affiliation. *See* U.S. Office of Special Counsel, "Hatch Act Overview," <https://osc.gov/Services/Pages/HatchAct.aspx>. Unlike the Hatch Act, however, section 10-16-3.1 does not provide sufficiently clear guidance to government officials, employees, and oversight agencies as to what conduct is permitted or prohibited. This lack of clarity results in the filing of administrative complaints with both the Office of the Attorney General and the State Ethics Commission to remedy conduct that, while clearly disallowed in the federal context by the Hatch Act, is arguable in the state context under current section 10-16-3.1. For example, in the short period of the Commission's existence, the Commission has seen administrative complaints alleging that candidates for office are campaigning (i) in their government uniform, (ii) while on duty as government employees, or (iii) using a government building in their campaign advertisements. These administrative complaints have not led to the clarification of section 10-16-3.1's scope, either because the administrative complaint was beyond the jurisdiction of the

Commission as a quasi-judicial body, or because the Commission reached a settlement based in part on arguable differences about the law's scope.

Sections 1 and 3 of HB 8 bring needed clarification to this area of law. Section 1 provides a definition of "political activity," and Section 3 adopts some clear and specific provisions from the federal Hatch Act that address what a government employee may not do with respect to engaging in political activity in connection with their employment. 5 U.S.C. § 7324(a)(1)–(4). The bill amends section 10-16-3.1 to add the prohibitions contained in section 7324(a)(1)–(4) of the federal Hatch Act, but provides that the subsection does not apply to the governor, the attorney general or any other elected state official for whom state law enforcement officers provide security.

III. Reorganizing the GCA's main conduct-regulating provisions

HB 8 reorganizes the GCA's most important conduct-regulating provisions. Currently, these sections are scattered among subsections 10-16-3(C) (abuse of office generally, but held criminally unenforceable by *Gutierrez*); 10-16-3(D) (quid pro quo corruption); subsection 10-16-3.1(C) (unauthorized use of government property); 10-16-4(A) (misuse of office to benefit a financial interest); and 10-16-4(C) (acquiring a financial interest that will be affected by an official act). Section 4 of HB 8 enacts a new section 10-16-3.2 that combines these duties and, in so doing, clearly organizes the Act's main conduct-regulating provisions. The new section 10-16-3.2 also articulates what is a prohibited abuse of office in New Mexico. Section 10-16-3.2 would apply to all officials and employees in the legislative and executive branches of state government and all officials and employees of local government.

First, the proposed Subsection 10-16-3.2(A)(1) articulates and prohibits the abuse of a government office. This subsection would cover the same conduct as the current version of Subsection 10-16-4(A) of the GCA, which prohibits a public officer or employee from taking an official act to benefit his or her financial interest. Under the GCA, "financial interest" is a defined term, meaning an ownership interest in a business or property or a position of employment. Subsection 10-16-3.2(A)(1) would also make clear that a public officer or employee shall not use the powers of their government office to benefit their own or another's monetary interest.

Second, the proposed Subsection 10-16-3.2(B) copies language from the current version of Subsection 10-16-4(C) of the GCA, which prevents public officers and employees from acquiring interests that would be in conflict with the exercise of their public office or position.

Third, the proposed Subsection 10-16-3.2(C) includes language from the current version of Subsection 10-16-3.1(C), which prohibits a government official or employee from using government property for other than authorized purposes. Currently, that prohibition exists as part of section 10-16-3.1, which is a very truncated, state-law version of the federal Hatch Act, focusing on preventing elected public officials from co-opting the resources of the state to further their political campaigns. But the use of government property for a candidate's political campaign is only one unauthorized use among many possible unauthorized personal uses of government property. Accordingly, the prohibition on the use of government property for non-authorized uses is better placed alongside other instances of the abuse of office, as it is in HB 8's Section 4.

Proposed Subsection 10-16-3.2(C)(2) also makes clear that the use of the power of government office to knowingly violate a New Mexico law is a straightforward abuse of office. A

government office is a public trust, and the public does not entrust the powers of government office to public officials so that they might use their government power to knowingly violate the law. This understanding of the abuse of office is similar to other states' definitions of abuse of office. *See, e.g.*, Colo. Rev. Stat. Ann. § 18-8-404, 405; Ken. § 522.020; Tex. Tit. 8, § 39.01.

Fourth, a final and significant way that a government official or employee might abuse their office is by engaging in *quid pro quo* corruption—that is, where the government official exchanges an official act for something of value. Subsection 10-16-3(D) of the GCA currently prohibits *quid pro quo* corruption and proposed Subsection 10-16-3.2(D) maintains the language from the current Subsection 10-16-3(D).

Last, HB 8's Section 5 is a necessary amendment in tandem with HB 8's Section 4. Section 4 moves language from Section 10-16-4(A) and (C) of the GCA, leaving subsection 10-16-4(B) as the whole of what remains in the current Section 10-16-4. Section 5 of HB 8 therefore leaves what is currently Subsection 10-16-4(B) as the remainder of Section 10-16-4. This amendment makes sense because the provision regulates when public officers or employees should be disqualified from engaging in official acts.

IV. Clarifying that employers can be liable for their employees' revolving-door violations

Section 6 of HB 8 amends Section 10-16-8 of the GCA, which regulates the revolving-door between government employment and private companies that represent clients before government offices. Subsection 10-16-8(D) of the GCA prohibits a former government officer or employee from representing a person for pay before their former government agency within one year of separating from that government agency. Subsection 10-16-8(B) prohibits in perpetuity a former government officer or employee from representing a person before any government agency on a matter on which they worked “personally and substantially” while in government service.

These are important laws. Critically, however, it is often the subsequent private business employer of the former government employee that causes the former government employee to violate the GCA's revolving-door provisions, and it is also the subsequent business employer of the former government employee that often stands to profit from the former government employee's unlawful representations. Accordingly, the proposed amendment in HB 8's Section 6 allows for the imposition of liability against the employer for knowingly causing its employee's revolving-door violations. While it is the Commission's position that the statute currently allows for the imposition of vicarious liability against a corporate employer for its employees' GCA violations, Section 6 improves the GCA by making explicit what is now only implicit: that an employer may be liable for knowingly causing its employee's revolving-door violations.

V. Making the GCA's civil penalties fairer and more of a deterrent

Section 7 of HB 8 amends Section 10-16-18 of the GCA which provides for civil penalties under the Act.

The current civil penalties under the GCA—\$250 per violation for a maximum of \$5,000—are too low to meaningfully deter violations of the GCA. For example, for a business that causes an employee to violate the GCA's revolving-door provisions, a \$250 fine is merely a transaction cost that is easily absorbed. When compared to other jurisdictions, New Mexico imposes very low fines (both per transaction and maximum) for basic, governmental ethics violations. Moreover, the fines have remained the same since 1995 and need updating.

Furthermore, not all violations of the GCA are equally corrupt. For example, it is a violation of the current section 10-16-9(C)(1) for a legislator to represent a constituent before a state agency in a professional capacity and refer to themselves as a Member during that representation—*e.g.*, when representing a client before a state agency, signing an email to a cabinet secretary as “Sen.” or “Rep.” It is also a violation of section 10-16-4(A) of the GCA for an employee in a state or local agency to offer to sell public property in exchange for a bribe. These are both violations of the GCA and, therefore, each is currently subject to a \$250 civil penalty. But these two violations are not equal abuses of the public trust.

Section 7 addresses these issues by creating a penalty range and increasing the maximum available civil penalty to \$10,000. For context, this maximum penalty is only one-half of the maximum penalty currently available under the Campaign Reporting Act, also within the Commission’s remit. The penalty range also enables a district court judge or the State Ethics Commission (and its hearing officers) to impose civil penalties that are proportionate to the violation, as opposed to fixed at \$250.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Subsections 10-16-3(A) through (C) will remain criminally unenforceable under *State v. Gutierrez*. The GCA will continue not to clearly articulate what is a prohibited abuse of office in New Mexico, effectively locating that job with the Commission and the courts through the course of administrative and litigated cases. The GCA’s civil penalty provisions of \$250 per violation will continue not to deter violations of the public trust.

AMENDMENTS