

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 and previously issued FIRs are available on the NM Legislative Website ([www.nmlegis.gov](http://www.nmlegis.gov)) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

**ORIGINAL DATE** 3/15/17

**SPONSOR** Montoya/Brown      **LAST UPDATED** \_\_\_\_\_      **HB** 462

**SHORT TITLE** Public Accountability Act      **SB** \_\_\_\_\_

**ANALYST** Esquibel

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

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>			\$585.4- \$1,000.0	\$585.4- \$1,000.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

House Bill 462 relates to HB10 and SB72, Public Accountability Act; SB96, Campaign Finance Fixes; SB97, Public Financing of Campaign Fixes; HJR8, State Ethics Commission, CA; SB218, State Ethics Commission Act.

### 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)  
 New Mexico Finance Authority (NMFA)  
 New Mexico Lottery Authority (NMLA)  
 Regulation and Licensing Department (RLD)  
 Secretary of State’s Office (SOS)  
 State Fair Commission (ExpoNM)

### SUMMARY

#### Synopsis of Bill

House Bill 462 (HB462) would create a new section of the Election Code, the Public Accountability Act (PAA). The PAA will create a seven member state Ethics Commission (EC) who are appointed by various elected officials in the state and establishes the qualifications for the commission as well as its basic powers. The Ethics Commission will be created as an adjunct agency under the direction of seven commissioners. The bill provides that commissioners must recuse themselves if they are unable to render a fair and impartial decision and provides for the appointment of temporary commissioners in this case.

The Ethics Commission would initiate, receive, and investigate complaints alleging violations of laws imposing standards of ethical conduct on state officers and employees; of laws imposing campaign finance restrictions or reporting requirements for candidates and other participants in campaigns for state or county elected offices; of registration requirements or standards of conduct for lobbyists; and of disclosure requirements or standards of conduct for state contractors or seekers of state contracts. The Ethics Commission would only accept complaints that are received within two years of the alleged violation.

The Ethics Commission would have authority to adjudicate complaints alleging violations for which civil penalties or sanctions may be imposed for the following statutes:

- Campaign Reporting Act;
- Financial Disclosure Act;
- Gift Act;
- Lobbyist Regulation Act;
- Voter Action Act;
- Governmental Conduct Act;
- Public Accountability Act.

The Ethics Commission would also have authority to issue advisory opinions, promulgate rules, draft a code of public accountability, and prepare an annual report.

The bill proposes the appointment of an executive director that has authority to investigate complaints, request subpoenas and make determinations as to the validity of the allegations within a complaint. The director will then make recommendations to the Commission on whether to hold a public hearing or dismiss a complaint. The Commission is unable to make determinations on complaints without the recommendation of the director. At any time before or during a hearing, the Commission may, at a public hearing, approve a disposition of a complaint agreed to by the director and the respondent. Except for certain exceptions, all records and communications collected and generated by the director are confidential. If a hearing is held, the Ethics Commission shall issue a public written report of the findings of fact and conclusions of law. The report may include a public reprimand or censure, or other recommendations for disciplinary action if at least five commissioners agree that the respondent's conduct constituted a willful breach, and any fines provided for in law. The director is also responsible for compiling a list of individuals who have failed to file a report of expenditures and contributions or who fail to pay a penalty imposed by the Commission.

The bill would amend the Campaign Reporting Act (CRA) requiring the Ethics Commission instead of the Secretary of State (SOS) to conduct an examination of 10 percent of the reports filed and handle the administrative process related to compliance and/or protest a determination. Under current law, protests of final determinations are resolved by way of an arbitration according to the Uniform Arbitration Act, the Public Accountability Act would resolve protests by hearings according to Administrative Hearing Office Act. The SOS is still required to advise and educate all individuals subject to the Campaign Reporting Act. The Ethics Commission will maintain a website in which they will publish a list of persons who are out of compliance with Campaign Reporting Act reporting requirements. Other amendments to the Campaign Reporting Act move authority for compliance enforcement and issuance of advisory opinions from the SOS to the Commission and moves civil penalty enforcement from the Attorney General or district attorney to the Ethics Commission. All penalties collected due to the late filing of reports due in

accordance with the Campaign Reporting Act shall be deposited in the “current school fund.”

The bill would amend the Voter Action Act (VAA) such that any appeals as to the certification of a candidate under the VAA will be handled by the EC instead of the SOS. The bill also moves authority from the SOS to the EC to make determinations as to a violation under the VAA and enforce any penalties.

The bill would amend the Lobbyist Regulation Act (LRA) moving agency designation filings for lobbying from the SOS to the EC. Further amendments authorize the EC to conduct examinations of the reports under the LRA and enforce any penalties as well as administer any protests of a violation determination by the EC using an independent hearing officer as provided by the Administrative Hearing Office Act. It removes the authority of the SOS to refer matters under the LRA to the Attorney General for civil enforcement.

The bill would amend the Legislative Ethics Committee duties. It requires an annual report to be issued annually regarding activities of the Committee in the past 12 months, including information on complaints received and advisory opinions issued. It also requires that the Legislative Ethics Committee maintain a webpage on the Legislature’s website. Language is also included that requires any recommendations of sanctions against a legislator to be a public record.

The bill would amend the Governmental Conduct Act (GCA) moving all enforcement authority from the SOS and the Attorney General to the Ethics Commission. The SOS maintains responsibility for educational efforts under the Act.

The bill would amend the Financial Disclosure Act (FDA) moving all enforcement authority to the EC. It also removes the arbitration process and replaces it with a hearing through an independent hearing officer pursuant to the Administrative Hearing Office Act.

### **FISCAL IMPLICATIONS**

The Attorney General’s Office (AGO) notes Section 18(D) changes the fund in which the fines collected for a violation of the Campaign Reporting Act go. Before, fines went to the “state general” fund. As HB462 currently reads, all sums would go to the “current school” fund. This change is not further explained in the proposed legislation. However, it is in accordance with Article XII, Section 4 of the New Mexico Constitution.

The Secretary of State’s Office (SOS) notes due to the effective dates in SB505/SJCS, most costs associated with the proposed legislation would begin in FY20. The bill provides the Commission is authorized to hire/appoint an executive director (an attorney or retired state judge), pay per diem and mileage to Commission members for activities associated with their duties, pay per diem and mileage to a hearing officer if the services of a retired judge are obtained for such purpose, pay for staff and general counsel, pay for the development and publishing of an ethics code, pay for trainings conducted by the Commission, and potentially pay for the attorney fees for respondents. The bill does not include an appropriation to cover the expenses contemplated by the provisions of the Act.

The SOS notes costs for a 7 member Commission to meet bi-monthly is estimated to be approximately \$50,400 per year (7 members \* \$600 per diem and mileage \* 12 months). The

proposed legislation also calls for the appointment of a full time executive director who is a licensed attorney or retired judge. Salary and benefits of a full time executive director with the qualifications outlined in the legislation is estimated at \$150,000 per year. The legislation also allows the director to hire a general counsel at an additional estimated \$150,000 per year and the director may also enter into additional contracts and agreements as necessary. The legislation requires the Commission to investigate complaints filed with its office which will likely require additional staff support in addition to the Executive Director and General Counsel. An estimated three additional FTE to support the Executive Director for tracking and investigating complaints and answering questions related to compliance and enforcement of the various acts is estimated at an additional \$210,000 per year in salary and benefits. The SOS estimates it receives approximately 30 complaints per year, and the Commission could receive more complaints since it has a larger jurisdiction and more statutory authority than that granted to the SOS. Additional agency administrative startup and recurring costs are also anticipated including establishing office space, desk, computer and phone equipment, postage and supplies, and a website. These costs can vary but could be estimated at \$10,000 - \$25,000.

The bill requires the Legislative Ethics Committee maintain a webpage on the Legislature's website and post information regarding any breaches of the Act by legislators. Funding would be needed for the Committee to carry out these duties.

The legislation provides that an elected official or public employee is entitled to representation by the state Risk Management Division (RMD), local risk management or other insurance carrier, for representation in claims made against them. There could be a fiscal impact on agencies in the form of higher RMD rates based on the defense of such claims.

The Attorney General's Office (AGO) notes it is likely the Commission would require some assistance from the AGO, which could necessitate significant additional staff resources.

## **SIGNIFICANT ISSUES**

The Attorney General's Office (AGO) notes HB462 grants substantial discretionary power to the executive director and exempts the director's work product or any public records created by the director from inspection under the Inspection of Public Records Act (IPRA). In Section 9, Advisory Opinions can be requested by any person. This may lead to numerous requests that could present quite a strain on any office. The Commission can be sued, (Section 5(B)), and would create liability for themselves if opinions are not properly vetted. Also, the research and request for an advisory opinion are confidential and exempted from IPRA. Any exception to IPRA should be carefully considered.

Section 10 allows the director to recommend the Commission dismiss a complaint that is frivolous, unfounded or outside the Commission's civil enforcement jurisdiction. As such, the executive director would have great influence regarding the prosecution and investigation of complaints. As a comparison, HB10 would designate a "review committee" to make such determinations to the Commission.

Section 11 has issues regarding hearings in front of the Commission. First, HB462 does not state who would prosecute such violations. Second, the Act provides that if the Commission finds a willful breach it will impose fines as provided for by law, while also stating that "the procedures provided in . . . Section 11 of the Public Accountability Act shall be used if those procedures

conflict with the procedures provided by any of the laws listed in Section 6” of that Act. Many of the laws under the jurisdiction of the Commission have fines which can only be awarded by a district court. Also, the willful violation standard is not the same a district court would apply to determine an appropriate fine.

HB462 does not provide a right of appeal. As soon as the final decision comes from the Commission, the decision is published and given to the Legislature, or employer of whom the complaint was filed.

Section 12 exempts any public record generated by the executive director as exempt from IPRA. This exemption should be analyzed carefully. There is no other IPRA exemption that is a blanket exemption of all public records created by an individual. Even the law enforcement exception of IPRA, 12-2-1(A)(4), is time sensitive, allowing for information to be released based on the phase of the investigation.

The Secretary of State’s Office (SOS) notes in the bill the SOS is still charged with education of the Acts enforced by the Ethics Commission. There would need to be a direct relationship and communication between the Commission and the SOS to ensure consistency in the application and interpretation of the Public Accountability Act (PAA), but the confidentiality of the PAA may limit this process.

Under the bill, the SOS would still manage complaints related to other sections of the Election Code, and these complaints often include allegations of multiple statues. Further clarification may be needed regarding the division of labor between the Commission and the SOS should complaint enforcement of any of the Acts be comingled within one complaint.

Under the bill, the SOS would still be required to oversee compliance and enforcement of the School District Reporting Act, which is very similar to the Campaign Reporting Act. For consistency, the sponsor may consider adding this Act to the Public Accountability Act.

The New Mexico Finance Authority (NMFA) indicates HB462 empowers the Commission to issue advisory opinions, thus shifting the responsibility of issuing an opinion to an appointed membership consisting of non-attorneys. The advisory opinions would not have the force of law and their weight, and any potential decision of the Commission based on such opinion could easily be challenged.

HB462 does not clearly define roles and responsibilities or transfer of civil enforcement powers from the Secretary of State, or the Attorney General. The bill empowers the Commission to issue a public reprimand, censure or make recommendations for disciplinary action yet these powers may conflict with that of the State Personnel Board or provisions contained in a union agreement.

HB462 may lead to a conflict in roles, responsibilities and outcomes of various agencies already tasked with responsibility to investigate ethics violations.

Pursuant to Section 10 of the bill, the director is empowered to make recommendations as to whether a particular complaint warrants investigation, yet the bill does not outline any factors that the director should utilize in order weigh the validity of the complaint, nor its priority.

Section 10 empowers the complaint review committee to dismiss a complaint that is frivolous, unfounded, or outside the commission's jurisdiction.

Section 10(H) entitles public officials to representation by the Risk Management Division. Coupled with the sweeping investigatory powers conferred by the bill and the ability of the public to submit complaints to the Commission, the Risk Management Division will likely see a significant increase in requests to defend public officials for complaints made in accord with the bill, costing the state money and resources.

Section 11 discusses the ability of a complainant to appeal a decision of the Commission to dismiss a complaint. However, the bill does not contain language outlining a clear appeal process for the dismissal of a complaint or for any other decision of the Commission.

### **PERFORMANCE IMPLICATIONS**

The Secretary of State's Office (SOS) notes it received a total of 70 complaints in 2016, of which approximately 30 were received regarding potential violations of the Campaign Reporting Act, Lobbyist Reporting Act, Governmental Conduct Act, and Financial Disclosure Act. Many complaints are resolved by reviewing each party's correspondence and ensuring voluntary compliance.

HB462 proposes to give a lot of power to the appointed executive director and much of the investigative material reviewed by the director for preparing recommendations regarding complaints is not subject to public review. The bill seems to propose that the Ethics Commission cannot act without first receiving a recommendation from the executive director.

The Administrative Office of the District Attorneys (AODA) notes the district attorneys (and other entities) may seek advisory opinions from the board, may file complaints with the board, and may be the subject of investigations by the board.

The district attorneys will no longer share with the Attorney General the responsibility for civil enforcement of the Campaign Reporting Act, the Governmental Conduct Act, and the Financial Disclosures Act.

HB462 does not address criminal enforcement, except to take away provisions requiring referral of criminal matters to the Attorney General and the district attorneys. It therefore does not address situations in which a civil investigation conducted by the board uncovers a possible crime. Such cases should be referred to the Attorney General or the district attorneys for prosecution.

### **ADMINISTRATIVE IMPLICATIONS**

The Secretary of State's Office (SOS) notes the bill requires the commissioners be appointed by July 1, 2019. Any administrative transfer of duties will require coordination with the SOS and the Commission.

The legislation proposes to remove some of the complaint and compliance functions from the

SOS, but the SOS would retain all other functions over the Acts, including the responsibility of education and administration of the Campaign Finance Reporting System.

The Regulation and Licensing Department (RLD) notes adopting the multiple roles, duties and responsibilities currently handled by other state agencies will require the newly created New Mexico Ethics Commission to have adequate staffing, infrastructure and a well-organized administration in order to operate effectively. How these functions will be specifically funded and executed is not provided in this bill.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

The State Fair Commission notes there are already mechanisms in place to investigate claims against public officials and employees. It is unclear if the process by which complaints would be investigated may impact the ability of an agency to initiate their own investigations of wrongdoing, which could create conflict with regard to the ability of agencies and public officials to take disciplinary action up to and including termination of an employee when a violation needs to be addressed immediately.

### **TECHNICAL ISSUES**

The Secretary of State's Office (SOS) notes HB462 may contain technical issues in that certain Acts are proposed for amendment by the bill such that hearings must be conducted pursuant to the Administrative Hearings Office Act; however, other hearings proposed to be conducted by the Ethics Commission are not held to this same standard.

The Regulation and Licensing Department notes on page 9, line 14 "defendant" should be replaced with "respondent" for consistent use of terms. On page 12, line 13, paragraph (2) should be redrafted to read: "present a question regarding whether the conduct described in the request would violate any of the laws listed in Section 6 of the Public Accountability Act" The change is needed to accommodate requests which may concern conduct of a person other than the requestor.

The New Mexico Finance Authority (NMFA) notes Section 7 of the bill allows for removal of the executive director only for cause, yet cause is undefined.

Also, the bill discusses the potential confidentiality of complaints and investigations in Section 12, yet the language of the bill is ambiguous as to when such documents and discussions are confidential and what information reported to the Commission will be confidential. This inconsistency in the language will introduce risk as to the confidentiality requirements and potentially allow unsubstantiated or immature complaints to be publicly reported without the opportunity for rebuttal or prior to full investigation, and may conflict with the Open Meetings Act.

The Administrative Office of the District Attorneys (AODA) notes the qualifications for commissioners are discussed in two separate sections, Section 3 and Section 4, and some of the provisions are duplicative. Combining all qualification requirements in one section would be clearer.

The Administrative Office of the Courts (AOC) suggests excluding judges from the Section 2(J)

definition of “public employee.”

## OTHER SUBSTANTIVE ISSUES

The Attorney General’s Office (AGO) notes the bill raises issues of timeliness as Commission action must be taken by a majority of the Commission, or more than a majority in some cases. There are strict timeframes in which the Commission must act on complaints, issue advisory opinions, and hold hearings. These timelines could present an administrative challenge for timely action.

Section 4(C) describes the prohibitions for Commission members. There are substantial restrictions as to who may be Commission members and restrictions on their political speech. Additionally, precluding public employees could be problematic, for they would have the most institutional knowledge regarding the laws enforced by the Commission.

Section 13 (B) may be in conflict with New Mexico’s state retention schedule for certain documents, as New Mexico is now a functional retention state.

Amendments to oversight of our current state laws would be a substantial change to oversight and enforcement. Sections 14-37 removes the SOS’s ability to enforce the Election Code in the specified areas. Under the bill’s provisions, the SOS will now only oversee the administration of the Election Code and not enforce it. Therefore, the Commission would need to work very closely with the SOS for the SOS’s statutory duty to seek voluntary compliance with the Acts in question is still mandated to the SOS. And it is only after the SOS seeks compliance of a violation, that the fines associated with a violation of Act can be levied.

The Administrative Office of the Courts (AOC) indicates the bill’s definition of “public officer” specifically excludes judges, but the Section 2(J) definition of “public employee” does not. Absent specific exclusion of judges within the definition of “public employee,” there is no certainty as to their exclusion.

HB462, Section 5 requires the Ethics Commission to investigate complaints, hold hearings to determine whether there has been a breach, a violation of the relevant laws, and to administer the applicable compliance provisions of the relevant laws.

Judges and justices are governed by the New Mexico Code of Judicial Conduct, 21-100 through 21-406 NMRA. The Supreme Court-appointed Advisory Committee on the Code of Judicial Conduct has been responding since 1986 through advisory opinion letters to inquiries from judges seeking guidance on ethical dilemmas. Additionally, Article 6, Section 32 of the New Mexico Constitution creates the Judicial Standards Commission. Article 6, Section 32 of the constitution provides in part

... any justice, judge or magistrate of any court may be disciplined or removed for willful misconduct in office, persistent failure or inability to perform a judge's duties, or habitual intemperance, or he may be retired for disability seriously interfering with the performance of his duties that is, or is likely to become, of a permanent character.

It can be argued that judges and justices are already appropriately guided and disciplined



regarding ethical/unethical behavior and that to include them within the purview of the Act is unnecessary.

Additionally, Article 3, Section 1 of the New Mexico Constitution provides that

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

It can be argued that the HB462 scheme of having an adjunct agency of the executive department investigate complaints against public employees, which may include judges and justices, and administer applicable compliance provisions of relevant laws is a violation of the Constitution's separation of powers clause and thus impermissible, as not expressly directed or permitted within the Constitution.

Also, currently, if the conduct of a judge or justice is criminal in nature, the matter may be referred to the Attorney General who may prosecute a criminal matter.

HB462 and the Public Accountability Act do not provide any mechanism for appealing or otherwise challenging the finding of the Ethics Commission prior to the Section 11(E) required public disclosure of a report.

HB462 Section 3(A) provides that the Ethics Commission is created as an adjunct agency of the executive branch under direction of the seven commissioners. Section 2(A) defines "adjunct agency" to mean an agency, 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. The existing Section 9-1-6 NMSA 1978 definition of "adjunct agency" is almost identical, except for providing that an adjunct agency retains policymaking and administrative autonomy separate from any other "*instrumentality*", rather than "*agency*" of state government.

RAE/jle