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## FISCAL IMPACT REPORT

SPONSOR Ivey-Soto/Ely ORIGINAL DATE 3/16/17  
LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_  
SHORT TITLE Public Accountability Act SB 72  
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>			\$700.0	\$2,100.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Senate Bill 72 relates to HB462, 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)  
Office of the Attorney General's Office (OAG)  
Judicial Standards Commission (JSC)  
Secretary of State's Office (SOS)

### **SUMMARY**

#### Synopsis of Bill

Senate Bill 72 (SB72) proposes establishing a new Public Accountability Act which creates a 12 member Public Accountability Board (PAB) recommended and appointed by a variety of different entities including the governor, the Secretary of State (SOS), and the Chief Justice of the Supreme Court. Each member will serve for six years with no more than two consecutive terms. The bill also includes certain required qualifications of members appointed to the PAB.

The PAB is charged with enforcing applicable civil compliance provisions of the:

- Campaign Reporting Act (CRA);
- Financial Disclosure Act (FDA);
- Gift Act;
- Governmental Conduct Act (GCA);

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- Inspection of Public Records Act (IPRA);
- Lobbyist Regulation Act (LRA);
- Open Meetings Act;
- Procurement Code;
- Public Accountability Act (PAA);
- School District Campaign Reporting Act;
- Voter Action Act (VAA); and
- Article 9, Section 14 of the Constitution of New Mexico.

The duties and responsibilities of the Public Accountability Board (PAB) include receiving and investigating complaints, holding complaint hearings, promulgating rules and advisory opinions, drafting a code of public accountability, and preparing an annual report of activities and recommendations. The PAB would investigate complaints and oversee hearings regarding allegations of violations of the Acts under its jurisdiction filed against state officials, state employees, government contractors, candidates and lobbyists.

The PAB is required to assess complaints within 10 days and shall dismiss complaints that are deemed frivolous or for the purpose of publicity and shall forward complaints deemed outside of its jurisdiction to the appropriate entity. Complaints deemed to be legitimate and within PAB jurisdiction shall be investigated by the PAB. The PAB may request subpoenas in order to investigate the complaint and testimony related to the complaint shall be conducted under oath. Respondents related to the complaint are entitled to representation. The bill requires notification to the respondent and move toward action on legitimate complaints within 60 days of filing.

The PAB is required to hold its first meeting no sooner than December 1, 2018.

Significant amendments to current statutes include:

Amendments to the various acts under the jurisdiction of the PAB provide the PAB authority to submit issues directly to district court for civil enforcement rather than going first to the Attorney General or district attorneys.

An amendment to Section 1-19-35 of the CRA requires the PAB to publish a list of persons who fail to file a required report or fail to pay a required penalty.

An amendment to Section 2-6-1 prohibits a bill from being pre-filed until after the beginning of the prohibited period of soliciting campaign contributions pursuant to 1-19-34.1.

An amendment to the definition of lobbyist in the LRA to explicitly not include an executive director of a nonprofit or a 501(c) organization.

An amendment to Section 2-15-7 establishing a full time Legislative Ethics Committee to handle all matters pertaining to legislative ethics. The committee would include two nonvoting public members, one appointed by the speaker of the House of Representatives with the agreement of the Majority and Minority Leaders of the House and one appointed by the President Pro Tempore of the Senate with the agreement of the Majority and Minority Leaders of the Senate. The Legislative Ethics Committee is required to issue an annual report listing complaints received including disposition and advisory opinions issued. The Legislative Ethics Committee

is required to maintain a web page on the Legislature's website.

An amendment requires the PAB to develop and provide training to all legislators biennially.

An amendment moves the ability to suspend or debar a contractor from the state purchasing agent to the PAB.

An amendment increases the duties of the Judicial Standards Commission to have authority to oversee complaints against the PAB.

SB72 repeals the following statutory sections: 2-15-1 (Governmental ethics oversight committee created; termination); 2-15-6 (staff); 2-15-10 (Criminal sanctions); and 10-16-14 (Enforcement procedures) NMSA 1978.

SB72 limits applicability of the PAA to conduct occurring on or after January 1, 2019, and provides that the effective date of the provisions of Section 23 of the act is July 1, 2017; the effective date of the provisions of Sections 13 and 45 of this Act is July 1, 2018; and the effective date of the provisions of Sections 1 through 12, 14 through 22, 24 through 44, 47 and 48 of the Act is July 1, 2019.

## **FISCAL IMPLICATIONS**

The Secretary of State's Office (SOS) notes due to the effective dates in the bill, most costs associated with the proposed legislation would begin in FY19 to FY20. The bill provides the Board is authorized to hire/appoint an executive director (an attorney or retired state judge), pay per diem and mileage to Board 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 Board, 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 12 member Board to meet bi-monthly is estimated to be approximately \$86,400 per year (12 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 Board 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 Board 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 also proposes to amend the Campaign Reporting Act (CRA), Lobbyist Reporting Act (LRA), and Financial Disclosure Act (FDA) such that disputes are handled by an independent hearing officer instead of an arbitrator. This could provide for potential money savings as the arbitration cases are currently \$900-\$1200 per case to pay an independent arbitrator whereas a hearing officer could be provided by the General Services Department (GSD) without this cost. In 2016 there were 19 arbitration cases paid for by the SOS at a cost of \$22,800 related to violations of the CRA.

The legislation also amends Section 1-19-35 of the CRA such that any penalties collected by the Public Accountability Board for failure to timely file required campaign reports or for violations of the Financial Disclosure Act be deposited in the public election fund rather than the state general fund. The SOS collected \$8,050 in 2016 for late filing of reports under the CRA.

The Judicial Standards Commission (JSC) reports to take on the additional demand and work as proposed by SB72, the Judicial Standards Commission would need the funding for its vacant FTE to be fully restored in order to take on the new caseload and handle work in a timely manner. The cost of the full time FTE with employee benefits would be approximately \$80,000.

The JSC would need an increase in funding for contract medical evaluations of the additional 39 court-appointed commissioners, judicial hearing officers, administrative law judges or special masters for the failure or inability to perform official duties. The increase in this category to cover 1 additional medical evaluation a fiscal year would be \$5,000.

The JSC will also need additional funding for operating expenses. The Commission would be responsible for investigation of complaints of willful misconduct in office as well as failure or inability to perform official duties of the additional court-appointed commissioner, judicial hearing officers, administrative law judges or special masters. The operating expenses will include travel of staff for investigations, trial or hearing on the merits, witness expenses as well overhead charges such as copying and supplies. The Commission estimates a 10 percent increase would total \$11,370.

The Administrative Office of the Courts (AOC) notes 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 civil actions and the involvement of the courts in issuing subpoenas, appeals from the imposition of penalties, and challenges to actions taken subsequent to the Public Accountability Board report disclosure. 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.

## **SIGNIFICANT ISSUES**

The Attorney General's Office notes under the provisions of the bill, some if not all Public Accountability Board action must be taken by a majority of the Board, or more than a majority for most of the actions taking place in this Act. There are also strict time frames in which the Board must act on complaints, issue advisory opinions, and hold hearings. This could be an administrative challenge for timely action by the Board.

Section 4(C) describes the prohibitions of Board members. There are substantial restrictions to

who may be Board 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 Board. Also, the research and request for an advisory opinion are exempt from the Inspection of Public Records Act (IPRA). Any exception to IPRA should be carefully considered.

In Section 10(H), the complaint review committee or the Board may dismiss a complaint upon a finding that the complaint was filed for the primary purpose of publicity. This is a subjective standard that is ripe for interpretation. Publicity is further not defined in the SB72. It is not clear what standard should be used or whether any appeal or reconsideration could be pursued.

Section 11 presents issues regarding hearings in front of the Board. First, SB72 does not state who would prosecute such violations. Second, hearings would have to be presided over by a member appointed by the chief judge and that member must write a findings of facts and conclusion of law. This is a substantial amount of work that would be undertaken by these members. Third, the Board states that if it finds a willful breach it will impose fines provides for by law. Many of the laws under the jurisdiction of the Board have fines which can only be awarded by a district court. Also, the willful violation standard is not the same as district court would follow in determining a fine. Fourth, there does not seem to be a review or appeal process. As soon as the final decision is issued by the Board, the decision is published and given to the Legislature, or employer of whom the complaint was filed. This may not uphold a respondent's minimum due processes rights.

Section 12 exempts certain information and reports from the Inspection of Public Records Act (IPRA). This exemption should be analyzed carefully. 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. Currently SB72 does not allow for these records to ever be released. While IPRA allows for additional exceptions "otherwise provided by law", careful consideration should applied when adding exemptions to public records.

Section 14 (B) may be in conflict with New Mexico's state retention schedule for certain documents as New Mexico is now a functional retention state. Additional analysis is necessary to further consider this issue.

Amendments to oversight of our current state law would be a substantial change to oversight and enforcement. Section 15-39, and all sections in which the Secretary of State's Office (SOS) is removed, takes away the SOS's ability to enforce the election code in the specified areas. Areas in which our Legislature had entrusted the SOS with its oversight. The SOS will now only oversee the administration of the election code and not enforce it. SB72 also removes oversight in enforcing violations from the Attorney General.

Section 16 is a large administrative burden on the Board. Assuming such a burden would require numerous staff positions for oversight, education, fines, and arbitration.

It is unclear how prosecutions of violations under the Act would proceed. While prosecutorial authority is granted to the Board, the AGO is responsible to "prosecute and defend all actions and proceedings brought by or against any state officer or hear of a state department, *board or commission*, or any employee of the state in his official capacity." [NMSA 1978, § 8-5-2(C) (emphasis added).] At minimum, it is likely that the Board would require a special commission

for another attorney to prosecute as a commissioned special assistant attorney general.

Senate Bill 72 will give the Judicial Standards Commission (JSC) additional jurisdiction over the 12 members of the proposed Public Accountability Board, as well as all future court-appointed commissioners, judicial hearing officers, administrative law judges or special masters while acting in a judicial capacity. The impact on the JSC would be an increase in demand for services and caseload and an expansion of jurisdiction to specified persons working within the executive branch.

The JSC estimates its jurisdiction would grow by the 12 Public Accountability Board members, 25 judicial hearing officers, 2 administrative law judges at the State Personnel Office as well as any other administrative law judges or special masters that are acting in a judicial capacity at other agencies throughout state government. The JSC currently has a total of 308 judges that it has jurisdiction over. The additional 39 known persons would increase the Judicial Standards Commission's jurisdiction by 13 percent.

### **PERFORMANCE IMPLICATIONS**

The Judicial Standards Commission indicates without restored funding for its FTE the complaint process provided for in the bill will take longer to investigate and adjudicate. This would mean that not only would the additional cases suffer that are reviewed by the 12 members of the accountability board, court-appointed commissioners, judicial hearing officers, administrative law judges or special masters while acting in a judicial capacity, but so would the investigations and adjudications reviewed by the 308 judicial judges the JSC currently has jurisdiction over. Cases will take longer and judges that may need discipline or removal will be on the bench longer. Deadlines specified in the Act may not be met without additional staffing and funding at the time the Act is implemented.

The Office of the Attorney General' Open Government Division provides legal counsel to the Regulation and Licensing Department's (RLD) boards and commissions and the Public Accountability Board would require significant legal assistance from the AGO, especially during its formative years when it would be responsible for implementing the Act and promulgating new regulations. HB72 does not provide any appropriation or additional resources to the AGO, which may impact the agency's other performance based budget targets.

### **ADMINISTRATIVE IMPLICATIONS**

The Secretary of State's Office (SOS) notes the proposed legislation removes some statutory responsibilities from the Secretary of State and replaces them with actions on behalf of the newly created Public Accountability Board (PAB). The newly created PAB would be primarily responsible for complaints related to the Campaign Reporting Act (CRA), Lobbyist Reporting Act (LRA), Financial Disclosure Act (FDA), Voter Action Act (VAA), Governmental Conduct Act (GCA), and School District Reporting Act; Acts currently overseen by the SOS. However, the SOS would still be charged with administration, filing, and educational efforts included in the Acts. This bill essentially removes the investigative, compliance and referral authority from the SOS and grants the authority to the PAB with more enforcement authority than currently granted to the SOS. The SOS would still be responsible for receiving complaints related to violations of the Help America Vote Act and other violations of the election code other than those Acts specifically being assigned to the PAB.

The proposed legislation grants the PAB with the authority to institute a civil action in district court for any violations of the Acts within its jurisdiction, whereas, current statute only allows this action if authorized by the Attorney General or the district attorneys.

The bill requires the SOS to provide information regarding appointments to the board and notices of board meetings until the PAB establishes its own website which must be completed no later than October 1, 2019. These efforts are anticipated to be minimal with little administrative impact to the SOS.

The bill moves the requirement to examine campaign reports as required pursuant to Section 1-19-32.1 of the CRA from the SOS to the PAB. The bill also moves all other enforcement for non-compliance with the CRA and authority to issue advisory opinions on the CRA from the SOS to the PAB; however, the SOS is still charged with educational efforts and providing for the filing of all required reports. The SOS and PAB would need to work closely in order to develop a referral process in the event that a reporting entity does not file timely with the SOS and the PAB needs to take enforcement action.

The bill amends sections of the Voter Action Act (VAA) changing the authority for appeals and penalty determination from the SOS to the PAB. With the proposed division of labor, SOS would administer the act and would need to work closely with the PAB in order to refer or provide information for penalty enforcement.

The bill amends the Lobbyist Registration Act (LRA) changing authority to examine lobbyist reports for compliance from the SOS to the PAB and changes the authority to write advisory opinions from the SOS to the PAB. The SOS is still charged with the administration of the LRA, including educational efforts and providing for the filing of required reports, and would need to work closely with the PAB to assist with or refer actions to the PAB for enforcement.

The Office of the Attorney General could be expected to provide legal resources to the Public Accountability Board, which would result in additional staff and attorney resources.

It is unclear how prosecutions of violations under the Act would proceed. While prosecutorial authority is granted to the Board, the AGO is responsible to “prosecute and defend all actions and proceedings brought by or against any state officer or hear of a state department, *board or commission*, or any employee of the state in his official capacity.” [NMSA 1978, § 8-5-2(C) (emphasis added).] At minimum, it is likely that the Board would require a special commission for another attorney to prosecute as a commissioned special assistant attorney general.

The Judicial Standards Commission (JSC) notes substantial facility changes would be needed if this legislation passes, because the JSC does not hold public hearings. All hearings are confidential under the Article 6, Section 32 of the New Mexico Constitution and the JSC’s rules. The JSC would need to be afforded new hearing space to conduct public hearings, create alternate filing and case management systems, draft new rules, and establish new processes and procedures to handle cases of misconduct by persons who are not judicial branch judges.

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

The Judicial Standards Commission notes the language in the bill gives jurisdiction to the

Commission over administrative law judges or special masters acting in a judicial capacity. As this wording is not specific to a branch of government this could lead to overlap in the executive branch. For example, the State Personnel Office has two administrative law judges that adjudicate and promulgate rules for the State Personnel Act. There are many agencies that use special masters or hearing officers like the Public Regulation Commission, State Engineers, Environment Department, and Tax and Revenue Department just to name a few. There could be an overlap of branches in the wording of the bill as well as administrative rights. Some of these hearing officers or administrative law judges are classified employees with grievance rights, unlike the current jurisdiction the Commission would have over appointed or elected officials.

## **TECHNICAL ISSUES**

The Administrative Office of the Courts (AOC) notes the title to Section 11 contains the description, “Appeal of Dismissal,” yet Section 11 does not address appeals. Language regarding the appeal of a dismissal is found in Section 10(I).

Section 20(B)(1): What is still referred to as the “secretary’s decision” is now, subsequent to SB72 amendments, the Public Accountability Board’s decision.

In Section 2, specifically excluding judges and justices from definitions of public employee and public office in SB72 will dispel any confusion as to whether judges and justices fall within these definitions and are subject to the provisions of the Public Accountability Act.

The Judicial Standards Commission notes an unknown factor stemming from the bill’s language is what constitutes “any administrative law judge or special master acting in a judicial capacity.” There are many agencies across state government that have hearing officers or special masters. The language needs clarification to specify which positions exactly would be transferred to the Judicial Standards Commission’s jurisdiction. These could range from special masters/administrative law judges at the Public Regulation Commission, State Engineer, Environment Department, Workers Compensation or Tax and Revenue Department, just to name a few.

The Attorney General’s Office notes throughout SB72, executive director and director are used interchangeably and the bill should be consistent with the use of executive director in every instance.

## **OTHER SUBSTANTIVE ISSUES**

The Administrative Office of the Courts (AOC) notes Article 6, Section 32 of the New Mexico Constitution creates the Judicial Standards Commission, which is governed by Judicial Standard Commission rules. 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.

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.

To grant the Judicial Standards Commission through SB72 in Section 34-10-2.1 NMSA 1978, the same authority to regulate the conduct and character of board members of the Public Accountability Board, court-appointed commissioners, judicial hearing officers, administrative law judges or special masters while acting in a judicial capacity, some of whom will not be members of the judiciary and whom will be members of an adjunct agency of the executive department, potentially violates the separation of powers clause of the Constitution and is thus impermissible, as not expressly directed or permitted within the Constitution.

The definitions for “public employee” and “public officer” do not specifically exclude judges and justices from the scope of the Public Accountability Act. SB72 amends Section 34-10-2.1 NMSA 1978, granting the Judicial Standards Commission the authority to regulate the conduct and authority of individuals outside of the judiciary, does not clarify whether judges and justices are subject to the provisions of the Public Accountability Act. If judges and justices are meant to be investigated and disciplined by the Public Accountability Board, an adjunct agency of the executive branch, this could be a violation of the separation of powers clause and therefore impermissible. Judges and justices are already guided and disciplined regarding ethical and unethical behavior. Specifically excluding judges and justices from the Act’s definitions of public employee and public office will dispel confusion.

SB72, Section 3(A) provides that the Public Accountability Board is created as an adjunct agency of the executive branch under direction of the 12 board members. Section 2(A) defines “adjunct agency” to mean 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. 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.

SB72 and the Public Accountability Act do not provide any mechanism for appealing or otherwise challenging the finding of the Public Accountability Board prior to the Section 11(E) required public disclosure of a report, nor at any time. Section 10(I) does provide for appeal of the dismissal of a complaint by a complainant.

## **POSSIBLE QUESTIONS**

The Attorney General’s Office (AGO) notes In Section 9 of the Act, advisory opinions can be requested by any person. This would lead to numerous requests that could present quite a strain on any office. Who would draft the opinions? Board staff? Such opinions take careful consideration in applying the law. The Board can be sued, (Section 5(B)), and could create liability for themselves if opinions are not properly vetted. Also, does the Board need to vote to approve the advisory opinions? Seems like they would have an interest in ensuring that the

opinions are correct and reflect its position on potential violations of law.

RAE/sb