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FISCAL IMPACT REPORT

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| SPONSOR <u>Cates/Jaramillo/Little/Chavez/Szczepanski</u> | LAST UPDATED <u>2/17/23</u> | ORIGINAL DATE <u>2/9/23</u> |
| Conduct of Current & Former Public | BILL | |
| SHORT TITLE <u>Officials</u> | NUMBER <u>House Bill 5</u> | |
| | ANALYST <u>Gaussoin</u> | |

REVENUE* (dollars in thousands)

| Estimated Revenue | | | Recurring or Nonrecurring | Fund Affected |
|-------------------|---|---|------------------------------|------------------|
| FY23 | FY24 | FY25 | | |
| | Indeterminate but minimally positive | Indeterminate but minimally positive | Recurring | General Fund |

Parentheses () indicate revenue decreases.

*Amounts reflect most recent analysis of this legislation.

Conflicts with Senate Bill 364.
Relates to Senate Bills 34 and 91.

Sources of Information

LFC Files

Responses Received From
State Ethics Commission (SEC)
New Mexico Attorney General (NMAG)

SUMMARY

Synopsis of House Bill 5

House Bill 5 (HB5) reorganizes the Governmental Conduct Act to clarify its intent, provide specific guidance to public officers and employees about prohibitions against political conduct in government offices, specify sexual acts are among the things of value that cannot be traded for official favors (*quid pro quo*), and make clear a subsequent private employer of a former public officer or employee may be liable if the employee violates existing “revolving door” restrictions against former officers or employees representing clients before the government office where they previously worked. It would eliminate the set \$250 civil penalty for each violation of the Governmental Conduct Act and increase the maximum total penalty from \$5,000 to \$10 thousand.

Among its amendment to the act, HB5 would clarify a legislator can appear for, represent, or assist another person in a matter before a state agency; make reference to their legislative capacity; and use legislative stationery, legislative email, and other indications of the legislator’s position only when the legislator has no financial interest and is working on behalf of a

constituent without compensation. In addition, it clarifies that a legislator who appears before, represents, or assists others before a state agency as a lawyer or in the conduct of another profession cannot refer to their position as a legislator or use legislative stationery or any indications of their position.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

The increased penalty in House Bill 5 would likely generate revenue for the State Ethics Commission. However, the commission did not quantify the potential impact.

SIGNIFICANT ISSUES

The State Ethics Commission contends the “most critical function” of HB5 is its reorganization and clarification of existing provisions of the Governmental Conduct Act that address government corruption, abuse of power, the acquisition of conflicting interests, misuse of government property, and *quid pro quo*, the exchange of an official act for something of value.

The office of Attorney General (NMAG) says HB5 addresses an essential weakness in the act by clarifying what acts are criminal:

HB5 addresses an important shortfall of the Governmental Conduct Act (GCA) recognized by the New Mexico Supreme Court in *State v. Gutierrez*, 2023-NMSC-002, which held that Section 10-16-3 of the GCA is not specific enough to create crimes. The court in *Gutierrez* found that the ethical principles provided in the act could not be enforced as criminal penalties as they lacked sufficient definition.

The commission echoes the NMAG comments:

The [Governmental Conduct Act] contains both aspirational language that announces the GCA’s purposes ... and language that straightforwardly regulates conduct. These dual functions are confusing and ultimately led the *Gutierrez* Court to hold that subsections [of the GCA] do *not* create crimes, even if some language in those statutes might be read to instruct government official’s 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. ... Like those statutes, the GCA should have a 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. That section, however, should not attempt to regulate conduct. Accordingly, House Bill 5’s Section 1 accomplishes these goals by redrafting Section 3 of the GCA as a purpose and declaration-of-policy section.

As with the issue with criminal enforceability, the commission says a lack of clarity in the existing law’s prohibition against using the powers of government office for political purposes is also addressed by HB5:

Like its federal analogue, the Hatch Act, the purposes of section 10-16-3.1 are to ensure that government programs are administered in a nonpartisan fashion and that government resources are not used for partisan, political ends; to protect government employees from political coercion in the workplace; and to ensure that government employees are

advanced based on merit and not political affiliation. ... Unlike the Hatch Act, however, the current version of Section 10-16-3.1 of the GCA 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. ... House Bill 5's Section 2 would provide the needed clarification by adding the prohibitions contained in 5 U.S.C. § 7324(a)(1)-(4) of the federal Hatch Act., which specifically address what a federal employee may not do with respect to engaging in political activity in connection with their federal employment.

However, NMAG argues HB5 falls short on clarifying what constitutes abuse of government office for political purposes and “further clarification” is needed:

There are numerous resources, advisory opinions, and court cases that provide further clarification of requirements and restrictions under the Hatch Act that may be helpful in answering interpretation and application questions of the similar provisions proposed under HB5, but these sources are persuasive only, as the laws are not identical and have different applicability. While HB5 draws from the Hatch Act, it does not include the same amount of detail and it is not supplemented with the type of federal regulations that are found in 5 C.F.R. § 733 – 734.

NMAG notes, in particular, HB5 does not provide the clear exceptions to political activity provided in the Hatch Act and leaves unanswered questions about what constitutes “on duty” and allowed uses of official insignia or a state vehicle.

The commission says the increases in penalties proposed in HB5 will improve deterrence and fairness:

First, 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 are in need of updating.

Second, not all violations of the GCA are equally corrupt. For example, it is a violation of the current section 10-16-9(B) for a non-attorney legislator to represent a constituent before a state agency 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, currently subject to a \$250 civil penalty. But they are not equal abuses of the public trust.

HB5 would make moot a December 2022 State Ethics Commission informal opinion that “the Governmental Conduct Act (GCA) prohibits a legislator from using legislative letterhead within the scope of an appearance, representation, or assistance of another person in a matter before a state agency.” In a January 2023 letter to the State Ethics Commission, Senate leadership argued the commission's opinion was inconsistent with their reading of the law and with an Interim

Legislative Ethics Committee advisory opinion from 1996. On February 6, 2023, the commission declined to rescind the opinion and emphasized the opinion was nonbinding. Instead, the commission recommended amendments to the act. In its analysis of Senate Bill 364, a bill that proposes amendments to the representation provision very similar to those in HB5, the commission said the bill “adopts many features” of the commission’s recommendation.

ADMINISTRATIVE IMPLICATIONS

By providing greater clarity, HB5 has the potential to both increase and decrease the workload at the State Ethics Commission. The commission notes it receives numerous referrals concerning campaign activity by government officials that, because of the lack of clarity in existing law, are not clearly violations. Clear guidance should both improve the understanding of proper conduct by government employees and elected leaders and ease the ability to sort through complaints.

NMAG, noting it has jurisdiction to enforce the Governmental Conduct Act on referral from the State Ethics Commission, suggests the increase in penalties could result in more referrals.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB5 conflicts with SB364, which more narrowly amends the Governmental Conduct Act to clarify when a legislator can use official indications of their position. The bill relates to Senate Bill 34, which would prohibit former state legislators from accepting compensation as a lobbyist for two years following legislative service, and Senate Bill 91, which adds sexual favors to prohibitions against quid pro quo and raises the civil penalty, among other changes.

TECHNICAL ISSUES

From NMAG:

Certain terms used in the [the act] and HB5 remain undefined and may create challenges when interpreting the law. Some of the undefined terms include:

- Political Activity – this term is used but not defined in the GCA, and the boundaries of what constitute such activity is not clear.
- On Duty – added to Section 2 of HB5 (NMSA 1978, Section 10-16-3.1) is not defined and unclear how this might affect state elected officials who do not hold normal business hours and may often engage in campaign or other political activity during typical business hours.

HB5, Section 5, amends Section 10-16-8 and adds liability for private employers that employ a former public officer or public employee who violates the prohibition on contracts after government service. This is an important addition that will help deter violations and hold employers accountable for the business contracts of their employees. However, the provision applies a strict liability and no *mens rea*, meaning that an employer may be liable even if the employer was not aware of the violation or conduct of the employee. The term employee is also not defined, and it is unclear whether non-traditional employment relationships would be subject to this provision, including part-time, term positions, contractors, or other employment arrangements.