

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

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: House Joint Resolution 11 repeals and replaces Article IX, Section 14 of the New Mexico Constitution, commonly known as the “Anti-Donation Clause.” The proposed amendment would maintain the core of the Clause, that is, that the state, counties, school districts, and municipalities shall not directly or indirectly lend or pledge their credit or make a donation of public funds to a private person or private entity. The amendment provides one exception, that a donation may be made to a private person or entity if the donation is “used to accomplish a public purpose” which is defined as “for the benefit of the public health, safety or welfare.” The amendment further provides that these provisions are not self-executing and before the donation of public funds to a private person or private entity, the legislature must enact implementing legislation by a majority vote of the members elected to each house of the legislature.

As such, House Joint Resolution 11 retains the *credit clause* of Article IX, Section 14, which prohibits the lending or pledging of credit in favor of a private person, eliminating all of the extant exceptions to the credit clause. With respect to the *gift clause*, House Joint Resolution 11 retains the prohibition on donations, subject to “public purpose” exception allowing any gift of state funds or property (or the funds of property of counties, municipalities and school districts) so long as the gift “is used to accomplish a public purpose” and follows a legislative authorization.

FISCAL IMPLICATIONS

Under the State Ethics Commission Act, the Commission is tasked to advise, adjudicate, and enforce Article IX, Section 14. For the State Ethics Commission, the fiscal implications of this joint resolution are indeterminate; any estimation would depend on the implementing legislation required by Subsection 1(B). House Joint Resolution 11 will lead to questions of interpretation, regarding the application of the credit clause (without any exceptions thereto), and whether a donation is within the meaning of a “public purpose” under the constitutional text.

Looking to fiscal implications statewide, House Joint Resolution 11 could lead to large transfers of public funds—by both state agencies and local public bodies—to private business, organizations and individuals, outside of a contract between a public body and a private person, and outside of statutory law providing for accountability and oversight.

SIGNIFICANT ISSUES

The Anti-Donation Clause is part of New Mexico’s original 1912 Constitution. It was enacted to protect the public from public officials making imprudent credit pledges and other subsidies of private enterprises that exposed the public to loss or liability. Over the last 113 years, the people of New Mexico have reviewed and approved eight specific exceptions to the general prohibition against donations to private individuals where the voters have determined those exceptions constitute acceptable donations of public funds. New Mexico courts and federal courts sitting in

New Mexico have interpreted the existing Anti-Donation Clause and its exceptions, identifying several categories of common law exceptions to both the credit and gift clauses of Article IX, Section 14, including for transfers of public money (i) under contract, (ii) between public bodies, (iii) to pay just compensation, and (iv), as it applies to the credit clause, to provide for revenue-bond lease financing of capital projects that benefit private entities.

While the Anti-Donation Clause currently provides eight specific exceptions, House Joint Resolution 11 would provide one overarching exception—*and only as to the gift clause*. The exception would essentially swallow the prohibition on gifts, because so long as a donation could be tied to “public health, safety or welfare” the legislature could, through enabling legislation, permit the donation of funds to a broad range of private persons and entities. While the Anti-Donation Clause already permits donations of public funds for individuals who are sick and indigent, or in danger of becoming so, House Joint Resolution 11 does not narrow what might constitute a broader term of “public health” or the additional categories of “safety or welfare.” The upshot is that under House Joint Resolution 11, the gift clause of Article IX, Section 14 would operate less as a constitutional constraint on subsidies of public funds to private organizations, and more as a general authorization for the Legislature to allow *or require* state agencies, counties, municipalities, and school districts *to donate* public funds or property to businesses, private organizations, and individuals. House Joint Resolution 11 contains no guidelines or safeguards on what must be included in enabling legislation that would protect public funds or otherwise establish any criteria for such legislation. For example, the Anti-Donation Clause currently provides an exception for affordable housing so long as the legislature enacts enabling legislation, and then outlines specifically what must be included in such enabling legislation. House Joint Resolution 11, by contrast contains no such language. Further, by authorizing exceptions to be made by enabling legislation, rather than through constitutional amendment, House Resolution 11 removes the opportunity for direct input from New Mexico’s voters on each permissible category of donation of public funds to private businesses, organizations, and individuals.

House Joint Resolution 11 would also task the legislature with the enormous undertaking of enacting legislation for not just the state, but for all counties, school districts, or municipalities for the authorization of any donation of public funds to private businesses, organizations, and individuals. Again, the voters, the courts, the New Mexico Department of Justice (née the Attorney General’s Office) and, more recently, the State Ethics Commission have been engaged in the project of identifying permissible transfers of public funds over the 113 years of amendments to and interpretation of Article IX, Section 14. To authorize the donation of public funds to private entities for any of the purposes outlined in the exceptions to the current Anti-Donation Clause—both by amendment and by common law adjudications—the implementing legislation would have to account for each exception. Such a statutory undertaking would have to be informed by the caselaw.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

The State Ethics Commission has jurisdiction to investigate and adjudicate complaints alleging violations of Article IX, Section 14, to enforce Article IX, Section 14 through civil actions, and to educate and issue advisory opinions regarding Article IX, Section 14. A new Article IX, Section 14 is likely to generate many issues regarding the application of the new constitutional language will affect the Commission’s workload relating to enforcement and education concerning the Article IX, Section 14.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

While Section 1(A) specifically addresses the state and “any county, school district or municipality,” Section 1(B) makes a general reference to “Before public funds are donated to a private person or a private entity...” There are several political subdivisions to which the language in Section 1(A) would not apply, including community colleges, land grants, and water and wastewater associations. While Subsection B arguably relates back to the first section, the term “before public funds” without any limiting language leaves open a question as to whether the requirement for enabling legislation applies only to those funds spent by entities referenced in Subsection A, or if it refers to all “public funds” spent by any public entity in the state.

There is also a potential issue with funding currently authorized under the Anti-Donation Clause. Prior to the enactment of any enabling legislation, there will be no exceptions to the general prohibition against providing funds to private persons or entities. For example, the current Clause allows the payment of public funds for the care and maintenance of sick or indigent persons, scholarship programs for veterans, loan payments for medical students, and affordable housing projects properly enacted under the Clause; any outstanding funds for these purposes would not fall under an exception until after the legislature subsequently enacted legislation defining “public purpose” for the donation of public funds at all levels of government leaving those individuals and organizations relying on those funds in limbo.

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The State will continue to maintain the guardrails New Mexico’s voters and courts have established in 113 years of constitutional amendments and legal jurisprudence surrounding the payment of public funds to private businesses, organizations, and individuals.

AMENDMENTS