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FISCAL IMPACT REPORT

SPONSOR M.H. Garcia ORIGINAL DATE 2/05/07
LAST UPDATED 3/07/07 HB 822/aHJC/aHAFC
SHORT TITLE State Ethics Commission Act SB _____
ANALYST Baca/Wilson

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY07	FY08	FY09	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$500.0	\$500.0	\$1000.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to relates to HB818, HB819, HB820, HB821 & HB822

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Finance and Administration (DFA)

Public Defender Department (PDD)

Public Education Department (PED)

SUMMARY

Synopsis of HAFC Amendment

The House Appropriations and Finance Committee amendment removes the \$500,000 appropriation.

Synopsis of HJC Amendment

The House Judiciary Committee amendment requires that the two members appointed to the state ethics commission by the president pro tempore of the senate shall not be of the same party. The same applies to the two members appointed by the speaker of the house.

In addition the amendment changes the powers and duties of the commission by requiring that it submit recommendations in its annual report of the scope of its powers and duties. Furthermore the amendment removes from the powers and duties section the responsibility of resolving complaints filed with the commission by agreed settlement, stipulation or consent order at any state of the commission proceedings.

Synopsis of Original Bill

House Bill 822 appropriates \$500,000 from the general fund to the state ethics commission for expenditure in fiscal year 2008 to carry out the provisions of the state ethics commission act.

HB 822 establishes the state ethics commission act and creates a ten member state ethics commission (SEC) as an adjunct agency. The bill defines the membership, terms, powers and duties of the commission. The SEC is required to receive and investigate complaints against state offices, state employees, government contractors and lobbyists alleging ethics violations, report its findings and maintain public records as required pursuant to the act.

The SEC will also be required to publish an ethics guide to clearly and plainly explain ethics requirements in state laws and a business ethics guide relating to conducting business with the State. The SEC must provide annual ethics training to all state officials, state employees, government contractors and lobbyists. In addition, the SEC will be required to promulgate rules necessary to implement and administer the act. The SEC is also given the authority to subpoena information and witnesses needed to conduct investigations, recommend disciplinary action for ethics violations, issue advisory opinions and resolve complaints through settlement, stipulation or consent order.

HB 822 allows the SEC to appoint an executive director, and provides for the duties of the director. The director is tasked with hiring a general counsel for the SEC and all other personnel required to enable the commission to carry out its responsibilities.

FISCAL IMPLICATIONS

The appropriation of \$500,000 contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of fiscal year 2008 shall revert to the general fund.

The bill provides that members of the SEC are entitled to receive per diem and mileage reimbursement but will not receive any other form of compensation. The legislation does not specify an approved level of staff for the agency, but allows for an executive director, a general counsel and all other personnel as may be necessary to carry out the responsibilities of the commission. Until the staffing requirements of the agency are determined and the agency will begin operation, it is difficult to assess whether this appropriation level will be sufficient to adequately fund the agency and commission operations.

SIGNIFICANT ISSUES

The establishment of a SEC is a Governor's initiative. The legislation is a result of recommendations of a task force on ethic reform set up by the governor in its report submitted on October 4, 2006. The task force was established to study the issues of governmental ethics and campaign finance reform in an attempt to improve ethical behavior in state government. The task force recommended establishing an independent SEC to promote increased accountability for ethical behavior among State officials and employees, lobbyists and those that conduct business with the state.

HB 822 establishes the SEC as an adjunct agency, which is defined in Section 9-1-6 NMSA 1978 as an agency that is excluded from direct or administrative attachment to a department, and

which retains policy making and administrative autonomy separate from any other instrumentality of state government. The task force found that the commission's political, administrative and legal independence will be of critical importance to the effective functioning and administration of the SEC.

PED provided the following:

Page 5, Lines 7 – 8, which excludes judges from the definition of “state employee”, will immunize judges from the scope of the state ethics commission act. In *State v. Maestas*, the supreme court reversed five convictions for official acts prohibited under the governmental conduct act and five counts of criminal sexual penetration during the commission of official acts against a municipal judge because the governmental conduct act, just as this act will, excludes judges from the “public office or employee” definition.

Page 9, Lines 4 – 6, is a mammoth undertaking; it requires the SEC to provide annual ethics training to all those within its jurisdiction. That will include all state employees, all legislators, all government contractors and all lobbyists. Unless individuals must pay for this training, this will be a significant cost as well as a logistical challenge. Whatever the nature of the training given by the SEC, this will create a legal standard of care for those who are trained.

Page 13, Lines 11 – 20, addresses the interview of witnesses and the right of respondents to be represented by attorneys. Because the SEC will most likely be confronted with respondents who claim the right against compelled testimony and self incrimination, this will invoke consideration of what the SEC will do when a person, who could face criminal proceedings, refuses to cooperate or to testify.

Page 14, Lines 20 – 25, requires the Commission to report the existence of probable cause about a respondent “to the respondent’s appointing authority, employer or appropriate state agency.” There is no similar provision for reporting if the respondent is a state official (e.g., a legislator).

Page 16, Section 9 of the act prohibits retaliation against someone who files a complaint or provides testimony or documents pursuant to the act. However, the prohibitory language does not provide any consequences if retaliation occurs. That could make this provision “directory” as opposed to “mandatory”.

ADMINISTRATIVE IMPLICATIONS

The DFA claims that the creation of the SEC as an adjunct agency to maintain the independence of the agency from any direct or administrative attachment to a department may have negative administrative ramifications for the agency. Although the agency is given the authority to hire staff as necessary to carry out its responsibilities, with an appropriation of \$500,000 that must cover operating costs, publications of ethics manuals, training for all State officials, State employees, government contractors and lobbyists, as well as mileage and per diem for commission members, the agency will be limited in its staff size. This level of appropriation will probably only support an estimated 3 to 4 staff positions, of which one will be an executive director and the other a general counsel. As has been the experience with other small agencies, administrative staff will probably be minimal and may serve multiple functions. This may present a problem for

the agency to have an adequate level of expertise over both policy and programmatic issues as well as administrative functions. In order for the agency to remain independent, these functions could not be supplemented by support from any existing agency.

RELATIONSHIP

HB 822 relates to HB 818, HB 819, HB 820, HB 821, and HB 822

POSSIBLE QUESTIONS

1. Why are judges excluded?
2. Should an executive agency have the right to oversee other branches of government?
3. Will the SEC serve as an “inspector general”?
4. Are local government officials and employees affected by this act?

DW/mt:csd