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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/2/08

SPONSOR Campos LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE State Ethics Commission Act SB 376

ANALYST Wilson

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY08	FY09		
	\$500.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	FY08	FY09	FY10	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to other ethics bills (see pages 5-6)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General's Office (AGO)  
 Administrative Office of the Courts (AOC)  
 Corrections Department (CD)  
 Department of Finance & Administration (DFA)  
 Public Education Department (PED)  
 Secretary of State (SOS)

### SUMMARY

#### Synopsis of Bill

Senate Bill 376 appropriates \$500,000 from the general fund to the State Ethics Commission (SEC) for expenditure in fiscal year 2009 to carry out the provisions of the State Ethics Commission Act.

SB 376 enacts the State Ethics Commission Act, creating the SEC as an adjunct agency required to:

- receive and investigate complaints alleging ethics violations against state officials, state employees, government contractors and lobbyists;
- report findings of probable cause that a respondent's conduct constituted an ethics violation to the respondent's appointing authority, employer or appropriate state agency;
- compile, maintain and provide public access to an index of all advisory opinions, complaints and reports required to be made public pursuant to the State Ethics Commission Act;
- compile, adopt, publish and provide to all state officials, state employees, government contractors and lobbyists an ethics guide that clearly and plainly explains the ethics requirements set forth in state law;
- compile, adopt, publish and provide to all state officials, state employees, government contractors and lobbyists a business ethics guide that clearly and plainly explains the ethics requirements set forth in state law as they relate to conducting business with the state;
- provide annual ethics training to all state officials, state employees, government contractors and lobbyists;
- develop, adopt and promulgate all rules necessary to implement and administer the provisions of the State Ethics Commission Act, including rules of procedure for investigations conducted by the SEC;
- employ an executive director;
- submit an annual report of its activities, including any recommendations regarding state ethics laws or the scope of its powers and duties, in December of each year to the governor, the legislature and the chief justice of the supreme court; and
- promulgate rules for the recusal of members to avoid the appearance of impropriety and conflicts of interest.

Pursuant to the Act, the SEC may:

- recommend disciplinary actions for ethics violations in accordance with the provisions of the State Ethics Commission Act;
- subpoena and require the attendance of witnesses and the production of accounts, books, papers, records and other documents relevant to an investigation conducted by the SEC;
- issue advisory opinions to state officials, state employees, government contractors and lobbyists in accordance with the provisions of the State Ethics Commission Act; and
- contract for the provisions of goods and services.

SB 376 creates the SEC as an adjunct agency. The bill specifies the makeup of the SEC and provides a proceeding for removal of a commissioner. The bill provides that a SEC member may only be removed for incompetence, neglect of duty or malfeasance in office. SB 376 prohibits a member, during his or her term, from holding or seeking an elective public office, an appointed public position or an office in a political party, and from being a state employee, a government contractor or a lobbyist. The bill also prohibits a member from holding or seeking an elective public office, an appointed public position or public employment, from representing a person or entity who appears before the SEC, provided that a member may appear on the

member's own behalf, or from accepting employment or otherwise providing services to a person or entity who appears before the SEC, for a period of one calendar year immediately preceding a member's term and immediately following the expiration of a member's term.

The executive director of the SEC is required to:

- be employed by, report directly to and serve at the pleasure of the SEC;
- hire a general counsel for the SEC and all other personnel as may be necessary to carry out the responsibilities of the SEC;
- perform all investigations on behalf of the SEC;
- bring complaints and investigation results before the SEC;
- prepare an annual budget for the SEC and submit it to the SEC for approval; and
- make recommendations to the SEC of proposed rules or legislative changes needed. to provide better administration of the State Ethics Commission Act.

The Act provides that the executive director may administer oaths and take depositions to the same extent and subject to the same limitations as will apply if the deposition were held pursuant to the discovery rules in a civil action in the district court. The Act prohibits the executive director, for one calendar year immediately preceding his or her term and immediately following the expiration of his or her term, from holding or seeking an elective public office, an appointed public position or public employment, represent a person or entity who appears before the SEC, unless appearing on the director's own behalf, accepting employment or otherwise providing services to a person or entity who appears before the SEC during the year, holding for seeking an office in a political party, or being a state employee, a government contractor or lobbyist.

SB 376 provides that the SEC may issue an advisory opinion to a state official, state employee, government contractor or lobbyist on matters relating to a specific set of circumstances involving ethics violations. Unless amended or revoked, an opinion shall be binding on the SEC in any subsequent SEC proceedings concerning the person who requested the opinion, provided the person acted in good faith and in reliance upon the opinion. SB 376 requires the SEC to promulgate rules for issuing advisory opinions, and sets down some rules for the SEC.

SB 376 prohibits a person from taking or threatening to take retaliatory, disciplinary or other adverse action against another person who in good faith files a complaint with the SEC alleging an ethics violation or provides testimony of information to the SEC during an investigation. Nothing in the Act precludes civil actions or criminal sanctions for libel, slander or other civil or criminal claims against a person who files a false claim under the Act.

### **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 2009 shall revert to the general fund.

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary will be proportional to the enforcement of this law, applications for orders, and prosecutions commenced by the AG and DA. New laws, amendments to existing laws and new hearings have the potential to increase

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 SEC. 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 SEC 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. In the 2007 legislative session this will was introduced, but failed to pass.

This bill 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 SEC's political, administrative and legal independence will be of critical importance to the effective functioning and administration of the SEC.

CD provided the following:

While the SEC cannot order state agencies to take disciplinary action against state employees it finds to have committed ethics violations, CD and other state agencies can and should use the SEC's records to pursue disciplinary action against its employees when appropriate.

It is unclear if this new law will conflict with the collective bargaining agreement (CBA) between the State and AFSCME, or the Public Employee Bargaining Act. For example, Article 24, Section 4 of the CBA normally requires employers to serve all disciplinary actions within 45 days of when the employer acquired knowledge of the employee's misconduct. If the commission investigates a CD employee under this new law, it would not be acting as the employer, but it would be in essence acting as the state. So whether or not the SEC would have to conclude its investigation and recommend any discipline within 45 days (or whether or not CD would have to act on the SEC's recommendation and impose disciplinary action on its employee within 45 days of the beginning of the SEC's investigation) might be litigated or challenged by AFSCME, for example. It must be assumed that AFSCME will challenge the new law.

This bill could increase agency performance due to increased accountability.

PED noted the following:

Page 9, Lines 15 – 17 is a mammoth undertaking; it requires the SEC to provide annual

ethics training to all those within its jurisdiction. That would 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 14, Lines 13 - 18, 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 could 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.

Section 9 (Page 18) of the act prohibits retaliation against someone who files a complaint or provides testimony or documents pursuant to the Act. Although the section notes that “nothing in the State Ethics Commission Act precludes civil actions or criminal sanctions for libel, slander or other civil or criminal claims against a person who files a false claim under that act,” the prohibitory language does not provide any consequences under the act if retaliation occurs. That could make this provision “directory” as opposed to “mandatory”.

The AGO notes that 40 other states have established independent ethics commissions to review ethics issues. It can be strongly argued that the most important function of such a SEC will be education and training to help change the culture of government and awareness of ethical issues.

## **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 SEC 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 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.

PED notes the bill only permits the hiring of an executive director and general counsel. There is no provision for the employment of persons to carry out the many administrative duties that are implicit in the bill. Instead, the bill merely permits the SEC to contract for goods and services.

## **RELATIONSHIP**

SB 376 relates to the following:

HB 160, Amend Gift Act Allowable Amounts

HB 309, State Ethics Commission Act  
HB 344, State Ethics Commission Act  
HJM 24, Study Bipartisan State Elections Commission  
SB 132, Whistleblower Protection Act  
SB 320, Ethical Conduct of Political Subdivisions  
SB 437, State Ethics Commission Act  
SJR 6, Create State Ethics Commission, CA

The AGO provided the following:

Both HB 344 and HB 309 create a State Ethics SEC. The significant differences are that this bill does not grant the SEC the power to issue public reprimands and to draft a code of ethics. Plus, the SEC cannot initiate a complaint.

In addition, the complaint must be dismissed within six months if the investigation has not been completed, whereas the House bills allow for dismissal after 12 months, plus, the House bills allow the SEC to extend the time for dismissal.

Finally, this bill differs in its membership of the SEC: the minority leadership is not permitted to appoint members but instead is given the power of “advice and consent”.

DW/nt