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F I S C A L I M P A C T R E P O R T

SPONSOR Varela **ORIGINAL DATE** 02/09/09 **LAST UPDATED** 02/16/09 **HB** 381

SHORT TITLE Instrumentality in State Agency Definition **SB**

ANALYST Kehoe

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
NFI	NFI	N/A	(See Fiscal Impact Narrative)

(Parenthesis ( ) Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
	NFI	$0.1	$0.1	$0.1	Recurring	NMFA General Operating Fund
	NFI	$0.1	$0.1	$0.1	Recurring	NMLA General Operating Fund
	NFI	$0.1	$0.1	$0.1	Recurring	MFA General Operating Fund
	NFI	$0.1	$0.1	$0.1	Recurring	RETA General Operating Fund
	NFI	$0.1	$0.1	$0.1	Recurring	Hospital Equipment Loan Council General Operating Fund
	NFI	$0.1	$0.1	$0.1	Recurring	Exposition Authority General Operating Fund

SOURCES OF INFORMATION
LFC Files

Responses Received From
New Mexico Finance Authority (NMFA)
New Mexico Lottery Authority (NMLA)
New Mexico Mortgage Finance Authority (MFA)
New Mexico Hospital Equipment Loan Council
New Mexico Renewable Energy Transmission Authority (RETA)

SUMMARY

Synopsis of Bill

House Bill 381 proposes to make the following state instrumentalities subject to the State Budget Act (Chapter 6, Article 3 NMSA): New Mexico Finance Authority, New Mexico Lottery Authority, New Mexico Exposition Center Authority, New Mexico Mortgage Finance Authority, New Mexico Hospital Equipment Loan Council, and New Mexico Renewable Energy Transmission Authority. The bill repeals a duplicative section of Chapter 6, Article 3.

FISCAL IMPLICATIONS

House Bill 381 does not contain an appropriation.

According to the instrumentalities listed above, the major fiscal implication of House Bill 381 relates to integration of financial systems into the state's SHARE system. The cost of integration of financial data from each individual data system over to SHARE is unknown.

House Bill 381 does not contemplate any amendment to the Financial Control Act (Chapter 6, Article 5 NMSA, 1978), hence there is not a requirement for the instrumentalities listed in this bill to integrate their financial systems into the statewide Human Resource, Accounting, and Management Reporting System (SHARE). This concern could be clarified by specifically exempting these instrumentalities from processing vouchers and issuing warrants through the financial control division of the department of finance and administration.

Furthermore, House Bill 381 deletes the phrase "separate and apart from the state" and other related references which might in effect give a rise to issues of supervision or control by the state which may create unexpected consequence of converting them into "state agencies" resulting in bond issuance difficulties and consequently making bond issues an obligation of the state.

SIGNIFICANT ISSUES

According to the Office of Attorney General, "this bill will effectively convert the public entities contained in this bill into "state agencies", subjecting them to state budget laws and possibly other general state law provisions governing and restricting the operation of state agencies.

Its impact on the operations of those entities, and its interpretation with regard to other state laws governing those entities is unclear. For example, the New Mexico Finance Authority is currently granted the authority to issue bonds, make loans to nonprofit foundations, and must keep its

money in separate accounts. See NMSA Sections 6-21-3(F); 6-21-6.5; and 6-21-21. This bill could have the effect of applying the anti-donation clause of the New Mexico Constitution (Article IX Section 14) and laws concerning the deposit and control of state funds to its operations. The New Mexico Exposition Center Authority and the Mortgage Finance Authority have authority to issue bonds which are currently not obligations of the state. See NMSA Sections 6-25A-7B; 58-18-15. The current law - which is not amended by the bill – reads the obligations "shall not be a debt of the state." This bill might have the effect of converting those bonds, or subsequent bond issues, into state obligations. NMSA Section 58-18-19 prohibits the state from paying money to the Mortgage Finance Authority. Because that entity will become a state agency under this bill, that prohibition will be inconsistent with the state funding process. "
The impact of this bill on those entities by converting them into "state agencies" should be considered in light of these and other state law provisions.

Chapter 6, Article 3 provides for the provisions that govern state budgets. The significant provisions of Chapter 6, Article 3 that the instrumentalities would be subject to are the following:

Section 6-3-7 NMSA 1978 requires each state agency to submit on or before May 1 an operating budget for the ensuing fiscal year in a form prescribed by the State Budget Division.

Section 6-3-19 NMSA 1978 requires all agencies to complete budget request forms in the manner prescribed by the State Budget Division. The forms include information such as: revenue or anticipated revenue from all sources for the fiscal year last completed, the current fiscal year and for the succeeding fiscal year. In addition, agencies must submit expenditures or anticipated expenditures for the current fiscal year and for the two succeeding fiscal years for capital and operational purposes. This section requires the governor to prepare and submit a budget to the Legislature for consideration and inclusion in the General Appropriation Act. Thus, the budgets of the instrumentalities would be subject to appropriation by the Legislature.

Section 6-3-21 NMSA 1978 requires the governor to submit the budget recommendations for the ensuing fiscal year to the Legislature for consideration no later than September 1st of each year.

Section 6-3-25 NMSA 1978 sets forth the procedures for agency budget adjustment requests (BARs).

Section 6-3A-1 NMSA 1978 would require compliance with the Accountability in Government Act (AGA). The purpose of the Accountability in Government Act [6-3A-1 NMSA 1978] is to provide for more cost-effective and responsive government services by using the state budget process and defined outputs, outcomes and performance measures to annually evaluate the performance of state government programs.

AGA requires that agencies be held accountable for the services and products they deliver in accordance with clearly defined missions, goals and objectives; develop performance measures for evaluating performance and assessing progress in achieving goals and objectives, and those measures should be integrated into the planning and budgeting process and maintained on an ongoing basis; have their performance in achieving desired outputs and outcomes and in efficiently operating programs measured and evaluated in an effort to improve program coordination, eliminate duplicate programs or activities and provide better information to the governor, the legislature and the public; and strive to keep the citizens of this state informed of the public benefits derived from the delivery of agency services and products and of the progress agencies are making with regard to improving performance.

Similar statues that parallel the Budget Act but not currently addressed in this bill include the following:

Section 2-5-4 NMSA 1978 requires state agencies, departments, and institutions to furnish a copy of its appropriation request made to the Department of Finance and Administration to the Legislative Finance Committee (LFC).

Section 2-5-7 NMSA 1978 requires each agency or institution of the state and its political subdivisions shall, upon request, furnish and make available to the Legislative Finance Committee such documents, material or information as may be requested by the members of the committee or its director or staff which are not made confidential by law.

Not addressed by the bill is whether or not the instrumentalities would be subject to the State Procurement Code.

PERFORMANCE IMPLICATIONS

According to MFA, Section 6-3-6 NMSA 1978 provides that the state budget division may allot funds that may be expended by any state agency. This power is inconsistent with the fact that MFA's general funds are not state funds "allotted" by the state budget division or DFA. It further provides that the expenditures of any state agency in the first six months of each odd-numbered fiscal year shall be limited to one-half of the "appropriation" or approved budget for that fiscal year. Again, this is inconsistent with the MFA Act in that MFA cannot receive "appropriations" (Section 58-18-5.5: MFA "shall not receive direct appropriations of state funds from the legislature").

In addition to the section cited above, Section 6-3-24 and 6-3-25 NMSA 1978 prescribe a budget adjustment procedure that is inconsistent with the demand nature of many of MFA's affordable housing finance programs. According to MFA the BAR procedure may impair MFA's ability to respond expeditiously to market demands. Any limitation on MFA to respond in a timely manner to these demands may have an adverse impact on MFA's ability to utilize the federal subsidies with the result that those subsidies could be re-allocated to other states, causing fewer affordable housing units to be funded for some of New Mexico's most vulnerable families.

According to NMLA, House Bill 381 conflicts and is inconsistent with many provisions of the New Mexico Lottery Act. The Lottery has set requirements to return minimum percentages to the beneficiaries, players and others, leaving very little discretionary operating dollars. Further, the Lottery Board is required to approve, disapprove, amend or modify the annual budget of the Lottery each year. Oversight by the Legislative Finance Committee is mandated by statute. Additionally, the Lottery Act (6-24-25), states, "The authority shall be self-sustaining and self-funded. No appropriations, loans or other transfer of state funds shall be made to the authority or used or obligated to pay the expenses of the authority or lottery prizes."

ADMINISTRATIVE IMPLICATIONS

NMFA indicates the enactment of HB 381 would require considerable due diligence for NMFA to accurately assess the financial and administrative impact to the Authority. Because NMFA is required to report its financials in official offering documents, NMFA has several questions about the process requirements of this bill. Particularly, NMFA raises capital in the public municipal bond market frequently throughout the year, primarily, at a time that cannot be predicted a year in advance, when budgets are developed. Rather, NMFA issues debt when the market is most opportune.

MFA's understanding of Chapter 6, Article 3 leads them to believe MFA will be required to budget for all the bond programs and trusts MFA administers, as well as federal funds passed through to sub-grantees, which currently totals 92 separate funds. MFA's external auditor, KPMG, has advised that each fund would require separate materiality thresholds which will require additional extensive audit work, causing MFA's audit expenses to increase by two to three times the current cost. This year MFA's external audit cost $242,000; if MFA must report on the 92 separate funds, the cost of the external audit would increase to $500,000 - $725,000. Given that these additional funds are already audited separately by federal, state, and local entities, paying an additional $250,000 - $500,000 in order to comply with the state budgeting process appears to be duplicative and demands significant additional resources that would otherwise be utilized to fund affordable housing activities.

Compounding matters further, the Executive creates the state budget using a budget classification and software system MFA does not use. As a result, MFA anticipates that parallel systems and/or dual entry will be required, which will in turn require additional staff support. Additionally, the timing of the state budget process implies that MFA would be proposing a budget thirteen to seventeen months in advance of its fiscal year (Oct 1 – Sept 30). This would make it very difficult to create an accurate budget. In the final analysis, MFA respectfully submits that its treatment as a state agency for purposes of the state budgeting process will result in significant operational and administrative inefficiencies, the diversion of funding that would otherwise be utilized for affordable housing activities in the midst of an extremely challenging economic environment, and increased risk for MFA and the state. MFA further submits that the state already has significant oversight and control over MFA's budgeting processes and may audit and review its books, accounts, and programs at any time.

TECHNICAL ISSUES

Section 2-5-4 NMSA 1978 requires state agencies, departments, and institutions to furnish a copy of its appropriation request made to the Department of Finance and Administration to the Legislative Finance Committee (LFC). This section should be amended to require the instrumentalities to also submit a copy of the appropriation request to LFC.

Section 2-5-7 NMSA 1978 requires each agency or institution of the state and its political subdivisions shall, upon request, furnish and make available to the Legislative Finance Committee such documents, material or information as may be requested by the members of the committee or its director or staff which are not made confidential by law. This section should be amended to require cooperation with LFC.

It is unclear if the instrumentalities named in this bill would also be subject to the Procurement Code.

On page 15, line 13, the word "nadminister" should be "administer".

OTHER SUBSTANTIVE ISSUES

New Mexico Finance Authority (NMFA). NMFA FY09 Operating Budget totals $8.2 million with 39 FTE. The budget reflects a 1.8 percent increase and an overall 23.3 percent increase over FY08 ($6.6 million) due to expansion for new programs, including three new FTE for the New Market Tax Credits Program, increases in technology improvements and second tier drinking water bond development.

NMFA was created in 1992 as a governmental instrumentality to coordinate the planning and financing of state and local public projects, to provide for long-term planning and assessment of state and local capital needs and to improve cooperation among the executive and legislative branches of state government and local governments in financing public projects. The principle mission of NMFA is to assist qualified entities in financing capital equipment and infrastructure programs. The financial programs and activities of NMFA are governed by a 12-member board and are monitored by the New Mexico Finance Authority Legislative Oversight Committee. NMFA develops its own budget approved by its board of directors and does not require legislative approval. However, all rules adopted or promulgated by NMFA are subject to approval by the NMFA Oversight Committee.

Laws 2003, Chapter 273, makes NMFA an instrumentality of the state subject to the State Audit Act. The NMFA has public available audits with unqualified opinions and with no significant findings during the last four (4) years. In addition, NMFA has implemented comprehensive procurement policies and personnel policies. The NMFA is subject to the Open Meetings Act and the Inspection of Public Records Act.

New Mexico Lottery Authority (NMLA). The New Mexico Lottery was modeled after the highly successful Georgia Lottery, which was established as a business enterprise. Recently created U.S. lotteries are based on the Georgia model. According to the New Mexico Lottery Act (6-24-2), "the most desirable, efficient and effective mechanism for operation of a state lottery is an independent lottery authority organized as a business enterprise separate from state government, without need for state revenues or resources and subject to oversight, audit and accountability by public officials and agencies." The New Mexico Lottery Act grants the Lottery the authority to engage in entrepreneurial pursuits to advance the Lottery's mission to maximize revenues for higher education and charters the board of directors to provide a private sector perspective of a large marketing enterprise and to exercise sound and prudent business judgment in managing and promoting the Lottery.

New Mexico Lottery Authority (NMLA). The New Mexico Lottery Act currently requires the New Mexico Lottery Authority to present their budget to DFA and LFC by December 1. The lottery is not a state agency, but the LFC reviews the budget for policy issues and general oversight purposes. According to NMLA, the Lottery must follow the State Procurement Code as well as the State Auditor Act.

In 2007, the Legislature mandated that the Lottery return 27% of revenues to the Legislative Lottery Scholarship Fund starting July 2007 and then 30% starting January 2009. The Lottery adjusted its budgets responsibly to meet this commitment and has been in compliance ever since. According to the New Mexico Lottery Authority, the mandate to return 50% of ticket sales back to players as prizes, to pay commissions to retailers, and to return 30% of revenue to the Legislative Lottery Scholarship program ensures that the Lottery makes spending decisions based on good financial stewardship. The proposed bill would impose a degree of complexity that would stifle innovation and responsiveness, which are essential to growing sales responsibly and returning maximum revenues to the Legislative Lottery Scholarship program.

New Mexico Renewable Energy Transmission Authority (RETA). RETA was created as a public body, politic and corporate, separate and apart from the state, constituting a governmental instrumentality for the performance of essential public functions. RETA employs 3 staff, an Executive Director, In house Counsel and an administrative assistant. Employees are not state employees, do not participate in PERA and are not eligible for state employee benefits. RETA is subject to the Audit Act, and the audit of the first year of operations is underway.

RETA reports "the agency currently receives all funding from, and makes all budget requests to, the Legislature through the Energy, Minerals and Natural Resources Department (EMNRD). As a result, HB 381 would not have an immediate impact on RETA because RETA is, for all practical purposes, already complying with the State Budget Act through EMNRD. However, as envisioned by the Legislature, RETA is expected to generate its own funding sources to eventually become self-sufficient, as currently is the case with some of other instrumentalities named in HB 381. In that case, monies that have not heretofore been subject to the legislative request and appropriation process would become so, not only for RETA, but other entities as well, which might compromise RETA's ability to carry out its statutory mandate to promote, develop and finance renewable energy transmission and storage projects. The RETA operational appropriation request is submitted by the Energy, Minerals and Natural Resources Department and the FY10 request consists of $250.0 in recurring appropriations and a $600.0 special appropriation request.

It may be difficult for RETA to be able to anticipate fluctuating financial and energy market demands approximately a year in advance of operating budgets, when agency budget requests are due, to budget its revenues most effectively. If markets change rapidly, as RETA has witnessed in the last seven months, RETA could be locked into making revenue expenditures from categories that may no longer be appropriate, or for projects identified in a budget that may no longer be feasible." RETA is not part of the state's SHARE accounting system. To enter data and perform other necessary functions required by the SHARE accounting system (HR, fiscal transactions, etc.), RETA indicates it would either need an additional FTE or have those functions performed under contract on a routine basis.

New Mexico Mortgage Finance Authority (MFA). MFA was created in 1975 to assist with financing the acquisition, construction, rehabilitation and improvement of residential housing for New Mexico low- and moderate-income families. MFA is governed by a seven-member board including the lieutenant governor, state treasurer and state attorney general. The MFA Legislative Oversight Committee approves rules and regulations formulated by the Authority. Oversight committee members meet on a monthly basis during the interim, and MFA staff keeps the committee apprised of critical housing needs and issues facing the state, and propose legislation for the committee's review, approval, and potential sponsorship. According to a policy adopted by MFA Board in 2003, the Authority must also seek and consider the advice and consent of the Governor's Finance Council prior to making material changes to its investment policy or making material changes in its program for issuing long-term debt for its single and multifamily housing programs.

In addition to issuing mortgage revenue bonds to finance first-time homebuyer mortgages, down payment assistance and the development of affordable rental housing, MFA administers numerous federal funding sources on behalf of the state, allocates federal Low Income Housing Tax Credits and New Mexico Affordable Housing Tax Credits, and serves as trustee for the New Mexico Housing Trust Fund Advisory Committee and the Land Title Trust Fund Advisory Committee.

MFA indicates the bill may be inconsistent with Section 58-18-16 which provides the state "will not limit or alter the rights vested in the authority" to fulfill the terms of any agreements made with the holders of "notes, other obligations, pass-through securities or guarantees." MFA general operating revenues are comprised of bond proceeds, loan interest earnings, administrative allowances, and loan servicing fees. To the extent MFA general fund revenues are pledged or reserved for these purposes in MFA's budget, any alteration of these reserves or pledges would be inconsistent with the statute. Pursuant to Section 58-18-4, MFA "is not created or organized, and its operations shall not be conducted, for the purpose of making a profit". MFA net revenues are transferred to its general fund, which is used to support additional affordable housing programs benefiting the state. In 2008, state pass-through appropriations and New Mexico Affordable Housing Tax Credit allocating authority represented approximately two percent of the program funding sources to which MFA had access.

The MFA governing board reviews and approves audits (as described in more detail below), reviews and approves MFA's general fund and operating budget, and participates in an annual strategic planning process, among other activities. MFA's Board meetings are noticed and conducted under the New Mexico Open Meetings Act, and meeting proceedings are recorded, well documented, and publicly available. The State Audit Act was amended in 2003 to include MFA. MFA statutes also provide that "the state auditor and his legally authorized representatives are authorized and empowered from time to time to examine the accounts and books of the Authority, including its receipts, disbursements, contracts, leases, sinking funds, investments and any other records and papers relating to its financial standing" and that "the authority shall submit to the governor, the state auditor and the legislative finance committee, within thirty days of the receipt thereof by the authority, a copy of the report of every external examination of the books and accounts of the authority."

MFA further states it "must obtain credit ratings from one or more of the major credit rating agencies because it issues debt. MFA maintains an A+ Positive general credit rating with Standard and Poor's credit rating agency. Standard and Poor's cites MFA's current relationship with the State of New Mexico as a primary reason for this strong rating: because MFA is an instrumentality "separate and apart from the state," it has the ability to respond effectively to the demands of capital markets and New Mexico's housing environment. This creates certainty, which in turn inspires confidence on the part of investors, funding agencies, and developers—important MFA constituencies that make many affordable housing financing and development activities possible in New Mexico.

Rating agencies will likely re-evaluate the general credit rating of MFA in light of any state control or oversight of its general fund. Any downward adjustment to MFA's credit rating will adversely affect MFA's participation in and ability to provide certain loans. As a result, loans will be more expensive to affordable housing developers and MFA will not be able to provide as many loans as it does currently, which could potentially have a chilling effect on the willingness of developers to pursue affordable housing development, as this type of development is already perceived to be extremely challenging. In addition, future flexibility of the single family bond program would be severely limited if MFA's control over the use of its general fund is constrained by the state budgeting process."

New Mexico Hospital Equipment Loan Council. The Council offered no relative information to its program or the fiscal impact the proposed will would have on its operation.

The Council was created in 1983 under the New Mexico Hospital Equipment Loan Act (Chapter 58, Article 23, NMSA 1978). The purpose of the Council is to provide the healthcare industry with access to low-cost capital through the issuance of tax-exempt and taxable bonds, loans and leases. The Council is an independent instrumentality of the State of New Mexico governed by a five-member Board. The Board is composed of two health facility officers, two financial institution officers, and one at-large member.

According to the Council's website, "eligible health facilities include any entity or person that:

- is licensed by the New Mexico Department of Health to provide health-related services, assisted living support or long term care;
- provides health-related research; or
- is properly accredited or certified and eligible to receive Medicare or Medicaid reimbursement for all or part of its activities providing mental health services, developmental disabilities services, or related specialized support to, or on behalf of, a defined group of persons."

Both non-profit and for-profit healthcare facilities qualify for a property tax exemption for property acquired through an industrial revenue bond issued by the Council. This exemption is applicable for the life of the bond issue or loan, not to exceed thirty years from the date the bonds were issued, and is a significant benefit for borrowers that would not otherwise qualify for a property tax exemption under other constitutional or statutory provisions. The Council can finance any real or personal property, instrument, service, or operational necessity that is determined by the Council to be directly or indirectly needed for medical care treatment or research, or to operate the health facility.

New Mexico Exposition Center Authority. The New Mexico Exposition Center Authority Act was created in Laws 2005, Chapter 342 for the purpose of creating, constructing, developing, operating and managing exposition centers. The Act provides for the authority's membership, powers, procedures and financing, including authorizing the Authority to issue revenue bonds and collect rents and charges.

According to Section 6-25A-21, NMSA 1978, a joint interim legislative committee known as the "New Mexico Exposition Center Authority Oversight Committee" was created. The New Mexico Legislative Council was to determine the membership of the committee and appoint the members and designate the chair and the vice chair in accordance with Council policies. However, according to the Legislative Council Service, members to the interim legislative oversight committee were not appointed and the interim committee never existed.

The Act calls for the Authority to consist of 15 members including: the secretaries of finance and administration, economic development, tourism, and transportation, the chair of the state transportation commission, the executive director of the New Mexico finance authority, the mayor of Albuquerque, the chair of the Bernalillo county board of commissioners, the mayor of Santa Fe, chair of the Santa Fe county board of commissioners, executive director of the mid-region council of governments and four residents of the state to be appointed by the Governor. The governor appointed members to the Authority, but to date, there is no evidence a meeting was ever called by the chair of the Authority as required by the Act.

LMK/mc