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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/06/09

SPONSOR Garcia LAST UPDATED \_\_\_\_\_ HB 614

SHORT TITLE State Ethics Commission Act SB \_\_\_\_\_

ANALYST Wilson

### APPROPRIATION (dollars in thousands)

| Appropriation |      | Recurring<br>or Non-Rec | Fund<br>Affected |
|---------------|------|-------------------------|------------------|
| FY09          | FY10 |                         |                  |
| \$500.0       |      | Recurring               | General Fund     |

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with HB 151 and SB 139, 140 and SB 269  
 Relates to HB 99, HB 244, HB 252, HB 253, HB 272, HB 495, HB 535, HB 553, SB 49, SB 94, SB 116, SB 128, SB 163, SB 258, SB 262, SB 263, SB 296 & SB 346

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Corrections Department (CD)  
 Department of Finance & Administration (DFA)  
 Secretary of State (SOS)

### SUMMARY

#### Synopsis of Bill

House Bill 614 appropriates \$500,000 from the general fund to the State Ethics Commission (SEC) for expenditure in fiscal year 2009 and fiscal 2010 to carry out the provisions of the State Ethics Commission Act (SECA).

HB 614 enacts the SECA and creates a nine-member SEC as an adjunct agency. The bill defines the membership, terms, powers and duties of the SEC. The SEC is required to receive and investigate complaints against state officials, state employees and lobbyists alleging ethics violations, report its findings and maintain public records as required pursuant to the act.

Under HB 614, the SEC is also required to publish an ethics guide and a business ethics guide for all state officials, state employees and lobbyists. The SEC must employ an executive director. The SEC may initiate complaints alleging ethics violations, recommend disciplinary actions in accordance with the SECA, subpoena documents and witnesses, and issue advisory opinions.

HB 614 requires dismissal of a complaint if the SEC has not scheduled a meeting concerning the disposition of a complaint within 90 days after the complaint is received by the SEC or has not disposed of the complaint within 6 months after the complaint was received.

The SECA prohibits a person from taking or threatening to take any adverse action against another person who files a complaint alleging an ethics violation or provides testimony, documents or information during an investigation.

The bill has an emergency clause.

### **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 the fiscal year 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 and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

### **SIGNIFICANT ISSUES**

The establishment of a SEC has been an executive initiative. The legislation is a result of recommendations by Governor Richardson's Task Force on Ethic Reform in its report submitted on October 4, 2006. The Task Force was established by Executive Order on May 3, 2006 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.

HB614 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 would be of critical importance to the effective functioning and administration of the SEC.

DFA noted that based on the continuing allegations and instances of government corruption, there is a need for an entity to investigate reports of unethical behavior in government operations. The establishment of such an agency could also result in anonymous charges and false complaints filed against state employees and officials.

The AOC provided the following:

This bill appears to exclude judges and justices, whether elected or appointed, from the definition of “state employee.” The definition of state official does *not* include a person elected or appointed to an office of the judicial branch. Thus, it appears that the Act does not apply to judges or justices.

Arguments may be made in favor of not applying the SECA to judges and justices. Not only are judges and justices governed by the New Mexico Code of Judicial Conduct and not only has the Supreme Court-appointed Advisory Committee on the Code of Judicial Conduct been responding since 1986 through advisory opinion letters to inquiries from judges seeking guidance on ethical dilemmas the New Mexico Constitution creates the Judicial Standards Commission, which is governed by Judicial Standard Commission Rules, the stated purpose of which is to protect the public from any improper conduct and behavior of judges; to preserve the integrity of the judicial process; to maintain public confidence in the judiciary; to create a greater awareness of proper judicial behavior on the part of the judiciary and the public; and to provide for the expeditious and fair disposition of complaints of judicial misconduct.

The New Mexico constitution provides that any justice, judge or magistrate of any court may be disciplined or removed for willful misconduct in office, persistent failure or inability to perform a judge's duties, or habitual intemperance, or he may be retired for disability seriously interfering with the performance of his duties

Although the bill requires the SEC to transmit a report and collected evidence to a respondent, the Attorney General and the Judicial Standards Commission if the respondent is a judge or justice, it can be argued that judges and justices are already appropriately guided and disciplined regarding ethical and unethical behavior and that to include them within the purview of the Act is unnecessary.

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

It can be argued that to have an adjunct agency of the executive department providing discipline to and training for judges and justices is a violation of the constitution's separation of powers clause and thus impermissible, as not expressly directed or permitted within the constitution. The same argument may be made regarding the legislature and an adjunct agency of the executive department.

## **ADMINISTRATIVE IMPLICATIONS**

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.

The SOS notes that a portion of the Campaign Reporting Act, Lobbyist Reporting Act, and Voter Action Act enforcement responsibility will be removed from the office of the SOS.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB 614 conflicts with HB 151 and SB 139, SB 140 and SB 269 as follows:

- The definition of “state employee” includes a person who has a contract with a state agency pursuant to the Procurement Code. In SB 140, for example, “government contractor” is defined as a person who has a contract with a state agency pursuant to the Procurement Code and includes a person who has submitted a competitive sealed proposal or competitive sealed bid for a contract with a state agency.
- Section 7.F. provides that except as otherwise provided, all complaints, communications, records or other information related to a preliminary investigation shall be confidential. SB 140 and SB 269 provide a specific misdemeanor penalty for disclosure of confidential information, and allow the court to impose a civil penalty for violation of confidentiality requirements. HB 614 provides neither.
- Unlike HB 614, SB 140 requires the SEC to submit a report by January 1, 2011 regarding the extension of SEC jurisdiction to elected and appointed officials and employees of counties, municipalities and school districts.
- This bill defines “campaign contribution” to include the value of services provided without compensation or unreimbursed travel or other personal expenses of persons who volunteer a portion or all of their time on behalf of a candidate or political committee. This inclusion is a specific *exclusion* from the definition of campaign contribution in SB 139.
- Rather than stagger the effective date of portions of the SECA, like the bills with which it conflicts, HB 614 contains an emergency clause requiring the Act to take effect immediately.

The bill also relates to other ethics bills as follows:

HB 99, Prohibit Former Legislators as Lobbyists  
HB 244, Prohibit Contractor Contribution Solicitation  
HB 252, Political Contributions to Candidates  
HB 253, Quarterly Filing of Certain Campaign Reports  
HB 272, Quarterly Campaign Report Filing  
HB 495, Political Candidate & Committee Donations  
HB 535, Lobbyist Identification Badges  
HB 553, Disclosure of Lobbyist Expenses  
SB 49, Governmental Conduct Act For Public Officers  
SB 94, Prohibit Former Legislators as Lobbyists  
SB 116, Limit Contributions to Candidates & PACs

**House Bill 614 – Page 5**

SB 128, Require Biannual Campaign Reports  
SB 163, Prohibit Former Legislators as Lobbyists  
SB 258, Contribution from State Contractors  
SB 262, Political Contributions to Candidates  
SB 263, Contractor Disclosure of Contributions  
SB 296, State Contractor Contribution Disclosure  
SB 346, Political Contributions to Candidates

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