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FISCAL IMPACT REPORT

ORIGINAL DATE 02/06/12

SPONSOR Griego, E. LAST UPDATED _____ HB _____

SHORT TITLE State Ethics Commission Act SB 371

ANALYST Wilson

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY12	FY13		
	\$350.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the District Attorneys (AODA)

Administrative Office of the Courts (AOC)

Attorney General' Office (AOC)

Public Regulation Commission (PRC)

Public Education Commission (PED)

SUMMARY

Synopsis of Bill

Senate Bill 371 appropriates \$350,000 from the general fund to the State Ethics Commission (SEC) for expenditure in fiscal year 2013 to carry out the provisions of the State Ethics Commission Act (Act).

SB 371 creates a five member SEC appointed by the Governor from a list of names forwarded by legislative leadership and the chief justice of the Supreme Court.

The SEC is mandated to:

- (1) receive and investigate complaints alleging ethics violations against state officials, candidates, government contractors and lobbyists;
- (2) hold hearings in appropriate cases to determine whether there has been an ethics violation;
- (3) develop, adopt and promulgate the rules necessary to implement and administer the

provisions of the Act;

(4) compile, index, maintain and provide public access to all advisory opinions and reports made public pursuant to the Act;

(5) conduct a review of the laws listed in the Act and submit to the legislature and the governor, on or before July 1, 2013, any recommendations the SEC may have for amendment or revision of those laws;

(6) draft a proposed code of ethics for state officials and state employees and submit the proposed code to each elected state official and state agency for adoption;

(7) submit to the legislature and the governor, in December of each year, an annual report of the SEC's activities, including any recommendations it may have regarding the Act

(8) compile, adopt, publish and make available to all state officials, candidates, government contractors and lobbyists an ethics guide that clearly and plainly explains the requirements of the laws listed in Subsection G of Section 2 of the Act; and

(9) offer annual ethics training to state officials, candidates, government contractors, lobbyists and other interested persons.

The SEC is also given discretionary authority to issue subpoenas requiring the attendance of witnesses and the production of books, records, documents or other evidence relevant or material to an investigation and advisory opinions to state officials, candidates, government contractors and lobbyists in accordance with the provisions of the Act.

If the SEC finds that there has been an ethics violation, the SEC shall issue a written report that shall include findings of fact and conclusions of law. The written report may include a public reprimand or censure or recommendations for disciplinary action against the respondent.

In addition, the SEC shall publicly disclose the written report and provide it, along with the evidence, to the respondent, the attorney general and the appropriate body or person as listed in this bill.

By January 1, 2014, the SEC shall submit a report to the legislature and the governor regarding the extension of commission jurisdiction to elected and appointed officials and employees of political subdivisions of the state. The report shall include and make recommendations on:

A detailed plan formulated by the SEC for implementation of an extension of its jurisdiction, including a proposed time line;

The estimated number of additional employees and the amount and type of resources needed by the commission to carry out its powers and duties if its jurisdiction is extended;

Estimated budget increases and the estimated annual budget for the commission if its jurisdiction were extended; and

Any changes needed to existing law.

See attachment for section by section analysis from PED.

FISCAL IMPLICATIONS

The appropriation of \$350,000 contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of Any unexpended or unencumbered balance remaining at the end of FY2013 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 would 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. Efforts to quantify specific fiscal impact by case are underway, but specific information is not available at this time.

SIGNIFICANT ISSUES

The AGO supports New Mexico creating an independent ethics commission to oversee ethics issues affecting the executive and legislative branches of government. Forty other states have created various forms of independent ethics commissions.

There is currently no central public body with the responsibility to investigate all ethics violations. Instead, enforcement is piecemeal: for example, the Secretary of State (SOS) shares responsibility with the attorney general for enforcing the Financial Disclosures Act; in addition, the SOS shares responsibility with the district attorneys and the attorney general for enforcing the Procurement Code and the Governmental Conduct Act; finally, no agency is charged with enforcing the Gift Act.

PED provided the following:

The provisions of this act expand the size of government by creating a new agency. It is unclear if the responsibilities outlined in this bill can be undertaken within existing government resources.

The bill does not impose any restrictions on the ability of the governor to appoint commissioners in a given political party. This could result in one political party being more represented on the commission than the other.

Section 10 allows a case to be investigated indefinitely unless the SEC dismisses the complaint. It is not clear if the director, who appears to be the investigator, can vote along with the other commissioners on whether a complaint should be dismissed.

As to Section 4 which restricts certain post-SEC activities engaged in by the SEC, the bill does not establish any consequences for violating these restrictions.

Although Section 5 of the Act requires the SEC to adopt a proposed Code of Ethics, Section 10-16-11 of the Governmental Conduct Act already requires the adoption of various Codes of Ethics by the Legislature and state agencies for filing with theSOS. This is problematic because it is not clear whether these codes must be aligned and whether infractions of existing codes can be deemed an infraction of the SEC's adopted code or otherwise give rise to an ethics complaint before the SEC.

Although Section 11 states that a respondent has a right to due process, there does not appear to be any right for the respondent to issue subpoenas, compel the attendance of witnesses or engage in discovery.

In Section 11, by authorizing the SEC to delve into the criminality of the respondent and to make a finding based on violations of criminal law beyond a reasonable doubt, this provides a respondent later prosecuted based on a violation of criminal law the ability to claim double jeopardy”.

In Section 11, the Act does not require that a notice to a respondent be in writing that there is no finding of ethics violation after a hearing.

The limitations provision in Section 14 gives rise to subjective application of when a complaint is within the three-year limitation period. It essentially allows complainants to allege recent discoveries of what could be very old and stale issues that are claimed to have only recently come to light. This could result in abuse by complainants by causing the SEC to investigate very old matters.

The fact, under Section 16 of the Act, that meetings of the SEC are not open to the public is at odds with the provision in Section 11(D) of the Act that requires any notice it issues that finds no ethics violation and dismisses a complaint must be made public.

In its definition of state official, the Act does not include members or employees of the judicial branch of government.

ADMINISTRATIVE IMPLICATIONS

There will be administrative efforts involved in the implementation of the Act related to the Chief Justice’s role in vetting and recommending retired judges for possible appointment as Chair and in the Supreme Court’s jurisdiction over the removal of SEC members.

Exempt employees and all those subject to the Act’s provision and should receive training on the new Code of Ethics.

TECHNICAL ISSUES

The AODA notes section 15 makes it illegal to take retaliatory action against a complainant, but does not provide a penalty.

PED recommends the following:

- Recommend on page 11, line 25 after the word “commission” add the words “or resigns”.
- Recommend on page 12, line 21 after the word “oath” add the words “to commissioners or witnesses during hearings or depositions”.
- Recommend on page 13, line 10 after the word “recuse” add the words “himself or herself”.
- Recommend on page 18, line 10 after the word “counsel” add the words “at no expense to the commission”.

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- Recommend on page 19, line 18 after the word “provide” add the word “written”.
- Recommend on page 30, line 14 after the year “2012” add the words “regardless of when it is discovered”.

PRD notes the term sufficient cause, which is used in the Act, is not defined.

OTHER SUBSTANTIVE ISSUES

The AGO questions whether the proposed independent SEC adequately ensures bipartisan action, helps restore and enhance the public’s trust in government, possesses sufficient resources to do its job effectively and has safeguards to protect against abuses and the pursuit of unwarranted or frivolous complaints.

POSSIBLE QUESTIONS

The AODA asks why section 13 states that the SEC may refer a criminal matter instead of making such a referral mandatory.

DW/amm

The Public Education Department has provided the following analysis:

Section 1

This bill will be the State Ethics Commission Act (Act).

Section 2

The bill provides definitions for the terms: adjunct agency, candidate, commission, commissioner, complainant, ethics violation, government contractor, legislative body, lobbying, lobbyist, official action, political party, respondent, state agency and state official.

The definition for “lobbyist” is nearly identical to “lobbyist” that is contained in Section 2-11-2 of the Lobbyist Regulation Act [Chapter 2, Article 11 NMSA 1978].

Section 3

Creates the State Ethics Commission (SEC) consisting of 5 Commissioners appointed by the Governor:

- 1 appointed by the Speaker of the House of Representatives from a list of 3 nominees;
- 1 appointed by the minority floor leader of the Senate from a list of 3 nominees;
- 1 appointed by the majority floor leader of the Senate from a list of 3 nominees;
- 1 appointed by the minority floor leader of the Senate from a list of 3 nominees; and
- The chair will be appointed from a list of 3 retired judges submitted by the Chief Justice of the Supreme Court.

Initial appointments are staggered; thereafter, all appointments are for four years with no commissioner serving for more than two consecutive terms. A quorum consists of 3 members. A commissioner can only be removed for incompetence, neglect of duty or malfeasance in office after giving notice and an opportunity to be heard. Only the Supreme Court can remove members; their decision is final.

Members receive no compensation or allowance but are entitled to receive per diem and mileage pursuant to state law.

Section 4

This section establishes the qualifications of the commissioners and imposes some restriction on their activities that will deem them to have resigned from the SEC such as employment with a state agency and seeking or holding an elective office or appointed position. There are also some post-SEC activities that are prohibited.

Section 5

This section establishes the powers and duties of the SEC, which include:

- Receiving and investigating ethics complaints;
- Compiling public access to an index of all advisory opinions, complaints and reports;
- Promulgating all rules necessary to implement the Act including procedural and member recusal rules;
- Employing an executive director;
- Holding hearings to determine if there are violations;
- Drafting a proposed code of ethics for state officials and state employees to be submitted to each state official and state agency for adoption;
- Submitting an annual report of their activities to the Governor and the Legislature that includes any recommendations; and
- Compiling and publishing an ethics guide that explains ethics requirements of laws; and
- Offering annual ethics training to state officials, candidates, government contractors, lobbyists and other interested persons.

The SEC also has discretion to:

- Issue advisory opinions to those individuals under the Act ;
- Issue subpoenas to compel the attendance of witnesses and productions of records.

Section 6

This section establishes the duties of the executive director, which include hiring a general counsel, performing investigations for the SEC, preparing an annual budget, making recommendations to the SEC for improvements, administering oaths and taking depositions, and initiate ethics complaints.

Section 7

This provision establishes procedures for recusing and disqualifying Commissioners due to conflicts of interest. The SEC must promulgate rules for recusal of their members.

Section 8

This section permits the SEC to issue advisory opinions upon requested on matters related to ethics which are confidential and not subject to the Inspection of Public Records Act.

Section 9

This section establishes procedures for processing complaints. A person filing a complaint must sign a complaint under penalty of false statement and include evidence that supports the

complaint. The chair of the SEC can also sign a complaint issued by the SEC which must contain factual allegations. The Director can also initiate a complaint upon receipt of evidence sufficient to establish cause to warrant an investigation for ethics violation.

The Director must make a recommendation to the SEC whether there is jurisdiction and whether the complaint warrants investigation. The SEC must promptly dismiss any complaints that are frivolous or outside of their jurisdiction. Whether a complaint is dismissed or pursued, the respondent must be notified in writing of the determination.

The SEC is empowered to issue subpoenas to examine books and other records. Challenges to subpoenas can only be resolved by a district court.

Section 10

The bill requires that if an investigation on a complaint has not been completed within 90 days, this must be reported to the SEC which can dismiss the complaint. If it is not dismissed, the Director must report to the SEC every 90 days on the status of the investigation.

Sections 11

Once the SEC receives the Director's report, it must decide whether there is sufficient cause to proceed with a hearing on the complaint. If it does not find sufficient cause, it must promptly dismiss the complaint. At any hearing, which is public, a respondent has a right to be represented by an attorney and to due process. The SEC must base its decision on "a preponderance of the evidence" to find a civil violation and "beyond a reasonable doubt" to find a criminal violation. It must then issue a written report in which it can recommend a public reprimand or censure, or it can recommend the person for disciplinary action. If the SEC does not find that an ethics violation occurred, it must dismiss the complaint and provide notice to the respondent which shall be made public.

Section 12

This provision provides for confidentiality of records filed with the SEC and contains some exceptions and restrictions on what documents can be released to the public.

Sections 13

This section permits the SEC to notify a district attorney or the Attorney General if they find that respondent's conduct amounts to a criminal violation. If that is done then all supporting evidence may be provided to the prosecutor. The SEC can hold a case in abeyance pending the completion of a criminal prosecution.

Section 14

This provision limits the jurisdiction of the SEC to matters that occurred within three years of the date on which the complainant discovered or reasonably should have discovered the facts constituting the alleged ethics violation. Also, the SEC cannot hear cases based on the content of campaign advertisements.

Sections 15

This section prohibits anyone from taking or threatening to take retaliatory action against a person who files an ethics complaint or provides testimony or evidence to the SEC. The Act does not prohibit the civil actions or criminal sanctions for defamation or false claim.

Sections 16

This section amends the Inspection of Public Records Act by providing that meetings of the SEC are not open to the public except for hearings to determine violations.

Sections 17

This contains a temporary provision that requires the SEC to submit a report to the Legislature and to the Governor regarding the extension of the SEC's jurisdiction to elected and appointed officials and employees of any political subdivision of the state. The report must include a recommendation and detailed plan for implementation of an extension of its jurisdiction, a timeline and estimated budget increases.

Sections 18

This section provides a \$350,000 appropriation to the SEC for FY2013; any unused balance reverts to the general fund.

Sections 19

This section contains a severability clause that provides that any unaffected provision shall not be affected if a provision is held invalid.

Sections 20

This section makes the Act applicable only to conduct that occurs on or after July 1, 2012.

Sections 21

This section makes Sections 1 through 7 and 12 through 20 effective July 1, 2012 while Sections 8 through 11 are effective January 1, 2013.