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FISCAL IMPACT REPORT

ORIGINAL DATE 2/16/16

SPONSOR Egolf LAST UPDATED _____ HB 80

SHORT TITLE State Ethics Commission Act SB _____

ANALYST Jorgensen

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		See Narrative	See Narrative	See Narrative	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with HJR 5, SB 11, SB 12 and SB 69

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Attorney General's Office (AGO)
 General Services Department (GSD)
 Secretary of State (SOS)

SUMMARY

Synopsis of Bill

HB 80 enacts the State Ethics Commission Act (Act), which creates the state ethics commission (Commission) as an adjunct agency of the executive branch and transfers responsibility for administering the Campaign Reporting Act, the Voter Action Act, the Lobbyist Regulation Act, the Governmental Conduct Act, the Financial Disclosure Act, and the Gift Act from the Secretary of State (SOS) to the new Commission.

Some specific duties and responsibilities of the Commission include:

- Initiating or receiving and investigating complaints alleging ethics violations against local and state public officers and employees, candidates for elected office, government contractors and lobbyists regarding the acts administered by the Commission and the procurement code, as well as codes of ethics adopted pursuant to those acts or pursuant to

the Act. The Commission may issue subpoenas requiring witness attendance or production of records or other evidence relevant to an investigation. (Allegations of misconduct involving campaign advertisements, however, are not within its scope.);

- Conducting hearings on those complaints. Where an ethical violation is found by clear and convincing evidence, the commission may issue a reprimand or censure, or recommend disciplinary action;
- Issuing advisory opinions when a request is made in writing by a state official, state employee, government contractor or lobbyist;
- Administering the Campaign Reporting Act, the Voter Action Act, the Lobbyist Regulation Act, the Governmental Conduct Act, the Financial Disclosure Act, and the Gift Act;
- Developing rules to administer the Act;
- Compiling, adopting, indexing, maintaining and providing public access to all advisory opinions and reports required to be made public;
- Drafting a proposed code of ethics for state officials and state employees and then submitting it to elected state officials and state agencies for adoption;
- Compiling, publishing and making available an ethics guide;
- Conducting annual training to public officers, state officers, candidates for public office, government contractors, lobbyists and others; and
- Submitting an annual report to the legislature and the governor.

The Commission is composed of 11 members: five are appointed by the governor (with no more than three appointees of the same party, and at least one appointed from each congressional district); the president pro tempore of the senate, the minority floor leader, the speaker of the house and the minority floor leader each appoints a member, and two district court judges are appointed by the chief justice of the supreme court. The district judges shall not be of the same political party or from the same congressional district. No more than 5 commissioners may be of the same party, and the appointing authorities are directed to take into account cultural and geographic diversity in making their selections.

Commissioners serve staggered four-year terms, are limited to two terms, and may be removed only by the supreme court for incompetence, neglect of duty or malfeasance in office. Six commissioners are required for a quorum. During their tenure, commissioners may not seek or hold office in a political party, seek or hold elected public office or appointed public position, or be a state employee, state contractor or lobbyist. Similar prohibitions are in effect for one year after a commissioner leaves office, and during that year a former commissioner may not represent a respondent or accept employment or otherwise provide services to a respondent. (An exception is made for the district court judges appointed by the chief justice of the chief justice of the Supreme Court, who may continue their work as judges during and after service on the commission.) Commissioners receive only per diem and mileage.

The commission may appoint an executive director (who must be an attorney), who in turn may hire a general counsel and additional personnel. The director may bring complaints, investigate any complaints lodged with the Commission, and present the results of those investigations to it. The director also prepares the annual budget, and recommends rule changes and legislative changes to the Commission. Restrictions on employment apply when the director leaves service with the Commission.

The Act prohibits retaliatory action against a person who, in good faith, files a complaint or participates in an investigation or hearing. Further, if alleged misconduct may amount to a criminal violation, the Commission must immediately refer the matter and any evidence collected during an investigation to the attorney general or an appropriate district attorney. Certain matters are declared confidential and require closed hearings. Civil and criminal penalties for disclosure of confidential materials are provided. HB 80 also amends the Open Meetings Act to provide that Commission meetings relating to complaints or investigations of alleged ethics violations are closed to the public. The bill contains a similar exemption for disclosure under the Inspection of Public Records Act for documents and other written materials in the Commission’s possession pertaining to alleged ethics violations.

The Act contains a severability clause, and its provisions apply to conduct occurring on or after January 1, 2017. Certain provisions of the Act (Sections 1 through 7, Sections 12 through 16, Section 49, and Sections 62-64) are effective July 1, 2016; the remaining provisions are not effective until January 1, 2017.

FISCAL IMPLICATIONS

HB 80 requires a broader range of ethical compliance and investigation than is currently performed by the SOS. The SOS did provide an estimate of the total operating costs for the Commission’s operations:

Executive Director	\$130,000
General Counsel	\$100,000
10 Support FTE	\$700,000
Mileage and Per Diem	\$60,000
Operational Costs	\$100,000
IT System (CFIS)	\$50,000
Total	\$1,140,000

The SOS writes:

“SOS currently administers the Campaign Reporting Act, the Voter Action Act, the Lobbyist Regulation Act, the Governmental Conduct Act, and the Financial Disclosure Act in the Bureau of Elections (BOE). While all BOE employees conduct work on both the Acts and on various elections issues, the office has three FTEs that primarily work on issues related to the Acts and we are in the process of hiring two additional staff to accomplish the office’s mission of improving education, ethics, and compliance with regard to the Acts.”

Based on the SOS current staffing level, it may be possible to transfer FTE and funding from the SOS to the commission to partially offset some of the costs. The Campaign Finance Information System (CFIS) is currently administered by the SOS at an annual cost of \$50 thousand. The provisions of HB 80 require the Commission to take over CFIS, it is likely that up to \$400 thousand (\$350 thousand for salary and benefits for 5 FTE and \$50 thousand for CFIS) could be transferred from SOS to the Commission thereby reducing the need for “new money” from the estimated \$1.1 million to \$740 thousand.

In addition to the operational costs of the commission, the General Services Department (GSD) notes Section 9(I) of HB 80 states that state officials and employees charged and investigated by the Ethics Committee are entitled to legal representation through the risk management division (RMD). Assuming that RMD can contract with law firms at the same rates applicable to tort claim defense, the average cost of a defense before the State Ethics Commission is estimated to be \$18,000 per respondent/charge (assumes blended legal services rate of \$150/hour, plus gross receipts tax and \$3,500 in costs for deposition transcripts, duplicating costs, and witness fees) Assuming there are 100 charges filed with the Ethics Committee annually, the estimated cost of defense to RMD would be \$1.8m. If half of the charges brought before the Commission are unsubstantiated, RMD would have no right of recovery resulting in an annual defense cost of \$900 thousand. Additionally, many individuals found to have committed ethical violations will be unable to reimburse RMD for defense costs further increasing the costs of representation.

SIGNIFICANT ISSUES

SOS reports that transitioning administration of the Campaign Reporting Act, the Voter Action Act, the Lobbyist Regulation Act, the Governmental Conduct Act, the Financial Disclosure Act, and the Gift Act by January 1, 2017, just weeks after completion of canvassing of a presidential general election is completed, will become problematic as it will divide the attention of the SOS/BOE from the general election to the transition at a critical time for the office.

SPO writes:

“Most Significantly, HB 80 contains no mechanism for appealing the Commission’s decision. While HB 80 does amend §1-19A-16, this is in regards to a commission decision on certification in relation to elections. Both the State Personnel Board Rules and the collective bargaining agreements (CBA) contain procedures by which employees, both union and non-union, may appeal a disciplinary decision. (AFSCME CBA, article 24, section 4; 1.7.11.13(C)(4)(a) and (b), 1.7.12 et seq. NMAC). Employees covered by a CBA may also elect arbitration, which is not provided for in HB 80.

“Sections 11(C) and (D) of HB 80 conflict with current CBA and the State Personnel Board Rules. Pursuant to these sections the commission may issue a written report containing a “public reprimand or censure” against a state employee; however, 1.7.11.8(B) NMAC provides that discipline of a state employee includes a reminder, oral or written reprimand, suspension, demotion, or dismissal. Public reprimands and censures are not included as a form of discipline to which state employees are subject. Moreover, Article 24 of the CBA with AFSCME, and Article 8 of the CBA with Communications Workers of America (CWA), tracks this same language. These same sections of the CBAs contain a 45 day time limit for the employer to issue a notice of contemplated action or impose disciplinary action. HB 80, Section 10 contains time-limits which may go on for an extended period of time. Specifically, section 10 provides that if the commission has not scheduled a hearing within 90 days after the complaint is received, the director shall report to the commission the status of the investigation, and every 90 days thereafter until the commission dismisses the complaint or a hearing is held.

“Furthermore, the public disclosure of the discipline contemplated by HB 80 is contrary to the provisions of State Personnel Board Rules and existing CBA’s. The issuance of a public reprimand or censure by the commission is in direct violation of Article 17 of the AFSCME CBA, Article 16 of the CWA CBA, as well as the confidentiality provisions of 1.7.1.12 NMAC,

which establish what records may be examined by the public and under what circumstances. Records relating to discipline and “matters of opinion” are considered confidential, and are not open to public inspection except with written permission of the employee or via a lawful court order or subpoena.

“Section 9 requires the Risk Management Division (RMD) to represent respondents before the commission; however, HB80 fails to provide RMD with any funding or FTE to provide this new service. Section 9 allows RMD to recover an “equitable share” of “reasonable attorney fees and costs” without defining “equitable share”.”

ADMINISTRATIVE IMPLICATIONS

Overall, HB 80 takes away significant oversight responsibilities from the secretary of state, including enforcement of the Campaign Reporting Act, Voter Action Act, Lobbyist Regulation Act, Financial Disclosure Act, Governmental Conduct Act, and Gift Act.

CONFLICT

SB 11 and SB 69, each of which amends certain provisions of the Campaign Reporting Act, and SB 12, which amends certain provisions of the Voter Action Act, conflict with HB 80 to the extent that HB 80 shifts the administration of the those two acts from the Secretary of State to the Commission.

TECHNICAL ISSUES

On page 77, line 10, the reference to “secretary of state” more appropriately may be to the “state ethics commission.”

CJ/jle