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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/17/17  
 LAST UPDATED 3/17/17 HJR 8/CC

SPONSOR CC

SHORT TITLE State Ethics Commission, CA SB \_\_\_\_\_

ANALYST Esquibel/Armstrong

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

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
			\$360.4- \$575.4*	\$1,081.2- \$1,726.2	Recurring	General Fund
<b>Total</b>			\$50.0- \$100.0*	\$50.0- \$100.0	Nonrecurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)  
 \* See Fiscal Implications

HJR8/HJCS relates to HB10, Public Accountability Act; SB72, Public Accountability Act; SB96, Campaign Finance Fixes; and SB97, Public Financing of Campaign Fixes; HJR7, Independent Legislative Conduct Entity, CA; and Senate Bill 218, State Ethics Commission Act.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Office of the Attorney General (OAG)  
 Secretary of State's Office (SOS)  
 State Personnel Office (SPO)

### SUMMARY

#### Synopsis of Conference Committee Report

The bill, as amended by the conference committee report provides that the governor, speaker and minority leader of the New Mexico House of Representatives, and the president pro tempore and minority leader of the New Mexico Senate will each appoint one member. These five members will select the sixth and seventh members. The bill does not require the commission to weigh evidence and rule on complaints in public hearings, or make public all ethics complaints and responses from the accused.

Synopsis of SRC Amendments

The Senate Rules Committee (SRC) amendments to the House Judiciary Committee substitute for House Joint Resolution 8 as twice amended reverse the House Floor amendments that created a new Article 25, State Ethics Commission, to the New Mexico Constitution. The SRC amendments propose to amend Article 5 of the Constitution, and add a new Section 1 that would do the following:

- A. The "state ethics commission" is established as an independent state agency under the direction of seven commissioners, no more than three of whom may be members of the same political party, whose appointment, terms, qualifications and membership shall be as provided by law.
- B. The state ethics commission may initiate, receive, investigate and adjudicate complaints alleging violations of, and issue advisory opinions concerning, standards of ethical conduct and other standards of conduct and reporting requirements, as may be provided by law, for state officers and employees of the executive and legislative branches of government, candidates or other participants in elections, lobbyists or government contractors or seekers of government contracts and have such other jurisdiction as provided by law.
- C. The state ethics commission may require the attendance of witnesses or the production of records and other evidence relevant to an investigation by subpoena as provided by law and shall have such other powers and duties and administer or enforce such other acts as further provided by law.

Synopsis of HFL Amendment #2

The House Floor amendment #2 to the House Judiciary Committee substitute for House Joint Resolution 8 (HJR8/HJCS/aHFL#1/aHFL#2) as amended corrects an error in the bill that said the bill was amending Article 25 of the Constitution of New Mexico which does not exist as the Constitution currently contains 24 Articles. This amendment indicates the bill is creating Article 25.

Synopsis of HFL Amendment #1

The House Floor amendment #1 to the House Judiciary Committee substitute for House Joint Resolution 8 (HJR8/HJCS/aHFL#1) changes may to shall to specify the State Ethics Commission shall dismiss complaints regarded as frivolous or outside of the jurisdiction of the commission.

Synopsis of Bill

The House Judiciary Committee substitute for House Joint Resolution 8 (HJR8/HJCS) would put a ballot resolution forward at the next general election to create a State Ethics Commission as an independent state agency under the direction of seven commissioners. HJR8/HJCS provides that the commission could take no action unless at least five members concur.

### **House Joint Resolution 8/CC – Page 3**

The bill specifies the commissioners be qualified electors and have other qualifications as provided by law. Commissioner appointments would be made by various elected officials. The bill states the terms, powers and duties of the proposed State Ethics Commission. The HJC substitute reduces the number of commissioners appointed by the governor from three to one and removes many of the previously specified qualifications required of the commissioners.

HJR8/HJCS proposes the State Ethics Commission may initiate, shall receive and investigate, and may adjudicate complaints alleging violations of standards of ethical conduct and other standards of conduct and reporting requirements as provided by law for state officers or employees of the executive or legislative branches of government, candidates or other participants in elections, lobbyists or government contractors or seekers of government contracts and other such jurisdiction as provided by law. All language previously requiring that an executive director be hired has been removed.

The bill permits the State Ethics Commission to dismiss complaints regarded as frivolous or outside of its jurisdiction, but the commission would be required to make public complaints that have been dismissed without a hearing and the reason for the dismissal. The bill requires the State Ethics Commission only accept verified complaints and requires the commission to keep the complaint and response confidential until the response is filed, or the date the response is due to be filed, whichever is earlier.

The bill authorizes the State Ethics Commission to adjudicate complaints alleging violations for which civil penalties or sanctions may be imposed and refer complaints alleging criminal violation of the law to the appropriate prosecutorial authority. The Ethics Commission would also have authority to issue advisory opinions, promulgate rules, issue subpoenas, and recommend a matter to the Legislature for consideration for impeachment proceedings.

HJR8/HJCS requires the State Ethics Commission impose penalties and sanctions as provided by law upon the presentation of clear and convincing evidence to the State Ethics Commission in a public hearing, and to refer to complaints alleging conduct that may be criminal violations to the appropriate prosecutorial authority.

The bill grants the State Ethics Commission jurisdiction over civil violations of law within its jurisdiction.

HJR8/HJCS is to be submitted for approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose.

### **FISCAL IMPLICATIONS**

HJR8/HJCS, Section 1(F) states the State Ethics Commission shall receive an annual appropriation sufficient to enable it to perform its duties. A specific recurring appropriation amount is not identified in the bill, but significant funding would be needed beginning in FY19.

The Secretary of State's Office (SOS) reports the State Ethics Commission would presumably require an executive director, general counsel, and other staff to perform the required duties including investigating complaints. An estimated staffing cost is \$300,000 to \$500,000 in recurring general fund revenue.

Presumably the commissioners would be entitled to mileage and per diem under the Mileage and

Per Diem Act. If the seven-member Ethics Commission met bi-monthly, per diem and mileage costs are estimated at approximately \$50,400 in recurring general fund revenue (7 members X \$600 per diem and mileage X 12 months).

Agency startup and recurring operating costs are also anticipated including establishing office space, desk, computer and phone equipment, postage and supplies, and a website estimated at approximately \$10,000 - \$25,000 in recurring general fund revenue.

Section 1-16-13 NMSA 1978 requires the Secretary of State (SOS) to print the full text of each proposed constitutional amendment, in both Spanish and English, in an amount equal to 10 percent of the registered voters in the state. The SOS is also constitutionally required to publish the full text of each proposed constitutional amendment once a week for four weeks preceding the election in newspapers in every county in the state. LFC staff estimate each constitutional amendment may cost from fifty thousand dollars to one hundred thousand dollars (\$50,000-\$100,000) in printing and advertising costs based on 2016 actual expenditures.

## **SIGNIFICANT ISSUES**

The Attorney General's Office (OAG) notes under HJR8/HJCS, complaints and responses are confidential exempting these records from the Inspection of Public Records Act until either the response is filed or the date the response is due.

The OAG notes the bill is unclear if the State Ethics Commission would take over enforcement of current state law regarding ethics and campaign related violations, but there is no provision regarding the transfer of information between these two entities. If the State Ethics Commission is to take over the oversight and enforcement of the state's election and ethics law, this would be a large administrative burden on the commission requiring numerous staff positions for oversight, education, fines, and arbitration.

The Secretary of State's Office (SOS) indicates should the constitutional amendment pass, enabling legislation would be required in a subsequent legislative session to clarify the functions of the new State Ethics Commission. Specifically, HJR8/HJCS states the State Ethics Commission shall only accept verified complaints, however 'verified complaint' is not defined. HJR8 does not explicitly indicate the statutes over which the State Ethics Commission would have jurisdiction. Currently, the SOS is charged with investigating complaints related to elections and ethics under New Mexico law. SOS statutory authority to investigate complaints is limited to the following portions of state and federal law:

- Election Code and Campaign Practices (Chapter 1 NMSA);
- Lobbyist Regulation Act (Chapter 2, Article 11 NMSA);
- Municipal Election Code (Chapter 3, Articles 8 and 9 NMSA);
- School District Elections (Chapter 22, Article 6 and 7, NMSA);
- Governmental Conduct Act (Chapter 10, Article 16 NMSA);
- Financial Disclosure Act (Chapter 10, Article 16A NMSA); and
- Public Law 107-252, The Help America Vote Act of 2002 ("HAVA").

Clarification would be needed regarding authority of the Ethics Commission and the SOS regarding enforcement of these acts. Also, the legislation may authorize the Ethics Commission to process complaints regarding the Procurement Code and the Gift Act, two areas not currently under the authority of the SOS.

The Administrative Office of the Courts (AOC) notes the bill’s design of having an independent state agency initiate, receive, investigate and adjudicate complaints against members of the judiciary for violations of standards of ethical conduct, other standards of conduct, and reporting requirements is a violation of the New Mexico Constitution’s separation of powers clause. The Supreme Court-appointed Advisory Committee on the Code of Judicial Conduct and the Judicial Standards Commission are the designated entities to handle complaints against members of the judiciary.

Section 1(G)(6) provides the State Ethics Commission “may have such other powers and duties and administer or enforce such other acts as provided by law.” The bill provides no specificity with regard to the scope of enforcement authority for the proposed commission.

The State Personnel Office (SPO) notes the State Personnel Act currently provides the avenue by which public employees may be disciplined for violations of the State Personnel Act as well as the Governor’s Code of Conduct. The Administrative Procedures Act and the State Personnel Act provide for the appeal process in instances where a classified employee wishes to challenge discipline imposed in accordance with the State Personnel Act and the State Personnel Board rules.

Public employees maintain licenses (e.g. law, medical) that have standards of conduct related to their license. HJR8/HJCS does not make a distinction in its jurisdiction over these employees and their licenses, with the bill providing for “sanctions”, a term currently used for violations associated with employees’ professional licensure.

## **PERFORMANCE IMPLICATIONS**

The Secretary of State’s Office (SOS) notes it received a total of 70 complaints in 2016, of which approximately 30 were received regarding potential violations of the Campaign Reporting Act, Lobbyist Reporting Act, Governmental Conduct Act, and Financial Disclosure Act. Many complaints are resolved by reviewing each party’s correspondence and ensuring voluntary compliance.

Depending on the enabling legislation and subsequent division of labor, the proposed State Ethics Commission and SOS would need to have a strong and ongoing relationship to assure that the outcome of complaints is communicated to the SOS as violations or noncompliance of the Campaign Reporting Act could result in someone’s ability to file a declaration of candidacy or have their name appear on the ballot.

## **ADMINISTRATIVE IMPLICATIONS**

The Secretary of State’s Office (SOS) indicates presumably the constitutional amendment would remove some or all of the complaint handling responsibilities of the SOS, but the SOS would retain all other functions over the Acts under its jurisdiction including the responsibility of education, seeking voluntary compliance, and administering the campaign finance reporting system including seeking voluntary compliance for late or unfiled campaign finance reports. The SOS would continue to educate candidates, elected officials, lobbyists, their employers, and the general public on all the same bodies of law; however, the State Ethics Commission would become the body that adjudicates complaints. The administrative transfer of authority would occur after

the commissioners are appointed on July 1, 2019.

The Attorney General's Office (OAG) indicates the bill is not clear if the OAG would provide general counsel and administrative prosecutor services for the State Ethics Commission as the OAG does for many other boards and commissions.

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

SPO notes HJR8/HJCS does not provide information on how its proposed jurisdiction will not conflict with the State Personnel Act, the Governmental Conduct Act, the Administrative Procedures Act, the Human Rights Act or the Civil Rights Act. Currently, each of these acts defines unacceptable conduct in the workplace and provides employees and employers remedies and processes for violations of these standards.

### **TECHNICAL ISSUES**

HJR8/HJCS proposes an amendment to Article 25 of the New Mexico Constitution; however, the state Constitution only contains 24 Articles. House Floor Amendment #2 addressed this problem by indicating the bill would create an Article 25 of the Constitution of New Mexico.

The Attorney General's Office (AGO) notes the bill should specify which state laws over which the State Ethics Commission would have jurisdiction.

The bill does not describe the State Ethics Commission as either an adjunct agency or an administrative agency as provided for in law, but rather terms the Commission an "independent state agency" which is not defined.

The Administrative Office of the Courts (AOC) suggests removing state employees from the bill to avoid conflicts and a duplication of efforts with State Personnel Board rules and procedures contained in the Personnel Act, Section 10-9-1 NMSA 1978 et. seq.

The AOC indicates if HJR8/HJCS is not intended to include members of the judiciary for violation of campaign-related laws, the judiciary can be specifically excluded.

The State Personnel Office (SPO) notes that unlike the current acts in place that involve employee and employer conduct, HJR8/HJCS does not provide for a process by which any of the commissions' acts or rulings may be appealed. Counter to the 14<sup>th</sup> Amendment requirement for due process, the bill does not provide for appeal or judicial review of any final decisions reached by the commission.

### **OTHER SUBSTANTIVE ISSUES**

The State Personnel Office (SPO) reports the proposed State Ethics Commission is provided power to "adjudicate complaints alleging violations for which civil penalties or sanctions may be imposed..." The ability to adjudicate violations that provide for civil penalties necessarily involves subject matter jurisdiction that currently and appropriately lies with the state and federal courts of New Mexico. Specifically, the Human Rights Act of New Mexico, Section 28-1-7 et. seq and the Civil Rights Act of 1964, Public Law 88-352, both prohibit discrimination in the work place and provide for civil penalties for public and private employees and employers for

violations of the respective laws.

RAE/al/jle