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## FISCAL IMPACT REPORT

**SPONSOR** Lopez/Roybal **ORIGINAL DATE** 3/13/17  
Caballero **LAST UPDATED** \_\_\_\_\_ **HB** \_\_\_\_\_

**SHORT TITLE** State Ethics Commission Act **SB** 218

**ANALYST** Esquibel

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		
	\$200.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		\$560.4			Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SB218 relates to HB10, Public Accountability Act; SB72, Public Accountability Act; SB96, Campaign Finance Fixes; SB97, Public Financing of Campaign Fixes; HJR7, Independent Legislative Conduct Entity, CA; and HJR8, State Ethics Commission, CA.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

- Administrative Hearings Office (AHO)
- Administrative Office of the Courts (AOC)
- Administrative Office of the District Attorneys (AODA)
- Attorney General's Office (AGO)
- Mortgage Finance Authority (MFA)
- Public Education Department (PED)
- Secretary of State's Office (SOS)

## SUMMARY

### Synopsis of Bill

Senate Bill 218 would create a State Ethics Commission (Commission) to review allegations of violations of ethical misconduct by elected officials and public employees. The Commission would consist of 7 members appointed by the governor, the majority floor leaders of state house of representatives and the senate, and the minority floor leaders of the state house of representatives and the senate. The chief justice of the supreme court would appoint the chair of the Commission, who is required to be a retired judge. Representation would be bipartisan. The board would hire an executive director who is required to be an attorney, and who is authorized to hire a general counsel.

In addition to receiving and investigating complaints against public officials, public employees, government contractors and lobbyists, the Commission would hold hearings to determine whether violations have merit, develop, adopt and promulgate rules necessary to implement and administer the Act, provide public access to advisory opinions and reports, draft a code of ethics for public officials and employees, employ an executive director, and submit an annual report to the governor. Upon substantiating a complaint, the Commission could make recommendations for public reprimand, censure or disciplinary action. If the Commission's findings are of a criminal nature, the commission is required to forward their findings to the Attorney General or a local district attorney.

Specifically, the bill requires the Commission to:

- Receive and investigate complaints alleging ethics violations against public officers, public employees, government contractors and lobbyists regarding the acts administered by the Commission and regarding the procurement code, as well as codes of ethics adopted pursuant to those acts or pursuant to the State Ethics Commission Act;
- Conduct hearings on complaints;
- Administer the Campaign Reporting Act, the Voter Action Act, the Lobbyist Regulation Act, the Governmental Conduct Act, the Financial Disclosure Act, and the Gift Act;
- Develop rules to administer the State Ethics Commission Act;
- Compile, adopt, index, maintain and provide public access to all advisory opinions and reports required to be made public;
- Draft a proposed code of ethics for state officials and public employees and submit the code to elected state officials and state agencies for adoption; and
- Submit an annual report to the Legislature and the Governor.

The bill provides the Commission may:

- Initiate complaints alleging ethical violations;
- Petition a district court to issue subpoenas;
- Compile, adopt, publish and make available an ethics guide;
- Issue advisory opinions when a request is made in writing by a state official, state employee, government contractor or lobbyist; and
- Offer annual training to public officers, state officers, candidates for public office, government contractors, lobbyists and others.

The proposed legislation would make disclosure of confidential information (as defined within the legislation) a misdemeanor with a possible maximum fine of up to \$10,000 or punishable up to a year in prison and would also allow the imposition of civil penalties not to exceed \$25,000 for each violation.

### **FISCAL IMPLICATIONS**

SB218 would appropriate \$200 thousand from the general fund in FY18 to the State Ethics Commission to carry out provisions of the State Ethics Commission Act. Any unexpended or unencumbered balance remaining at the end of FY18 would revert to the general fund.

PED notes Section 19 of the Act appropriates \$200 thousand from the general fund to the State Ethics Commission to carry out the provisions of the Act. Given this appropriation, the Commission is authorized to hire/appoint an executive director (an attorney versed in ethics law), pay per diem and mileage to Commission members for activities associated with their duties, pay per diem and mileage to a hearing officer if the services of a retired judge are obtained for such purpose, pay for staff and general counsel, pay for the development and publishing of an ethics code, pay for trainings conducted by the Commission, and potentially pay for the attorney fees for respondents. This appropriation seems inadequate to cover the expenses contemplated by the provisions of the Act.

SOS notes costs for a seven member Commission to meet bi-monthly is estimated to be approximately \$50,400 per year (7 members \* \$600 per diem and mileage \* 12 months). The proposed legislation also calls for the appointment of a full time executive director who is a licensed attorney. Salary and benefits of a full time executive director with the qualifications outlined in the legislation is estimated at \$150,000 per year. The legislation also allows the director to hire a general counsel at an additional estimated \$150,000 per year and the director may also enter into additional contracts and agreements as necessary. The legislation requires the Commission to investigate complaints filed with its office which will likely require additional staff support in addition to the Executive Director and General Counsel. An estimated three additional FTE to support the Executive Director for tracking and investigating complaints and answering questions related to compliance and enforcement of the various acts is estimated at an additional \$210,000 per year in salary and benefits. The SOS estimates it receives approximately 30 complaints per year, and the Commission could receive more complaints since it has a larger jurisdiction and more statutory authority than that granted to the SOS. Additional agency administrative startup and recurring costs are also anticipated including establishing office space, desk, computer and phone equipment, postage and supplies, and a website. These costs can vary but could be estimated at \$10,000 - \$25,000.

The bill proposes long-term costs associated with the State Ethics Act and the State Ethics Commission would be provided in a report issued by January 1, 2020 detailing a plan for employees, resources and an estimated annual budget for the Commission.

The legislation provides that an elected official or public employee is entitled to representation by the state Risk Management Division (RMD), local risk management or other insurance carrier, for representation in claims made against them. There could be a fiscal impact on agencies in the form of higher RMD rates based on the defense of such claims.

The AODA notes because SB218 creates a new crime, a misdemeanor associated with the release of confidential information, the district attorneys will have additional costs associated with prosecuting cases brought under that provision.

## **SIGNIFICANT ISSUES**

The Secretary of State's Office (SOS) indicates the bill does not include candidates for public office in the definition of "public official". This presumably will leave the SOS with the continued responsibility of oversight of ethical violations of candidates for public office, which causes a conflict when sitting public officials are also candidates for office.

The Attorney General's Office (AGO) notes SB218 transfers authority currently entrusted to the Secretary of State and Attorney General's Office in reviewing complaints, issuing advisory opinions, and holding hearings on ethics and campaign violations. SB218 provides an exception of the Open Meetings Act requirements providing that meetings of the Commission that relate to complaints or investigations shall not be open to the public. Section 12 exempts disclosure of information and reports collected or generated by the Commission from the Inspection of Public Records Act (IPRA).

There are already mechanisms in place to investigate claims against public officials and employees. It is unclear if the process by which complaints would be investigated by the Commission are meant to replace the ability of an agency to initiate their own investigations of wrongdoing, which could create conflict with regard to the ability of agencies and public officials to take disciplinary action up to and including termination of an employee when a violation needs to be addressed immediately.

The Administrative Office of the District Attorneys (AODA) indicates The State Ethics Commission has few sanctions available when it finds an ethical violation. If the conduct appears to be criminal, it shall refer the matter to the Attorney General or the district attorney. But if the matter is not criminal, the only sanctions available are reprimands, censure and referrals for disciplinary proceedings. (The acts under which the violation occurs may provide for civil sanctions, but those sanctions are not available to the Commission. The agency administering the Act – in this case the Office of the Secretary of State -- would have to seek those sanctions under the provisions of the particular Act.)

SB218 prohibits retaliatory action against a person who acts in good faith in filing a complaint, or in participating in an investigation or hearing. It is unclear how this provision will be enforced.

SB218 provides for closed hearings, and contains provisions to keep information related to those hearings confidential. Information is released to the public if an ethical violation is found. If no violation is found, the information is kept confidential unless the subject of the investigation requests its release. These provisions protect individuals who are found not guilty of an ethical violation. However, keeping the proceedings of the Commission closed may lead to distrust of the Commission and its "secret" process. For example, the press may report on conduct by a public official that appears unethical. But the public will not be kept informed of an investigation or learn why an investigation was not pursued (unless the target requests release of the information).

SB218 does not dictate party affiliation of Commission members, except to require that the Governor appoint one Commission member from the largest political party in the state, and one Commission member from the second largest political party in the state. The political affiliation of the remaining five members is not specified. But SB218 requires four commissioners for a quorum, including two members of the largest party and two members of the second largest party. No business can be conducted without a quorum. If the political make-up of the Commission becomes unbalanced, a person responsible for appointing a Commission member could render the Commission powerless by tipping the balance towards one political party, preventing the Commission from obtaining a quorum.

SB218 governs ethical complaints against state employees. Note that it does not provide for appeals, and the provisions of SB218 may not be consistent with provisions in collective bargaining agreements and State Personnel Board rules.

### **PERFORMANCE IMPLICATIONS**

The district attorneys (and other entities) may seek advisory opinions from the Commission, receive a proposed code of ethics from the Commission, receive an ethics guide and ethics training from the Commission, may file complaints with the Commission and may be the subject of investigations by the Commission.

### **ADMINISTRATIVE IMPLICATIONS**

The SOS reports it is presumed that the SOS would still have administrative oversight related to many of the impacted Acts outlined in the proposed legislation. Significant and close coordination between the Commission and the SOS will be required to ensure that administration and educational efforts provided by the SOS are in line with the guidance and opinions issued by the Commission. Additionally, findings against candidates and elected officials by the Commission could impact appearance on the ballot or qualification for public financing which will require close coordination with the SOS and the county clerks.

The Office of the Attorney General Open Government Division provides legal counsel to over 100 state boards and commissions. Additional staff and resources would be required if the AGO were to provide counsel to the State Ethics Commission or represent the Commission in court proceedings. As drafted, SB218 requires the Attorney General to prosecute criminal violations referred by the Commission. This would increase the number of criminal prosecutions and result in additional staff time required for enforcement.

It is unclear if the creation of the State Ethics Commission would change the role of the State Personnel Office and agency human resource managers for investigating personnel matters. There may be some issues that arise, both procedurally and substantively, if public employees governed by the new State Ethics Commission are also union employees. There may also be issues relating to conflicts with existing provisions of the State Personnel Act/Regulations, relating to discipline of government employees.

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

The Administrative Office of the Courts (AOC) notes SB218, exempts judges and justices from coverage under the State Ethics Commission Act, unlike other legislation introduced in 2017,

including HJR8, HB10 and SB72, which are ambiguous regarding the inclusion of the judiciary in investigations and discipline by adjunct or independent agencies. Judges and justices are governed by the New Mexico Code of Judicial Conduct, 21-100 through 21-406 NMRA. The Supreme Court-appointed the Advisory Committee on the Code of Judicial Conduct which has been responding since 1986 to inquiries from judges seeking guidance on ethical dilemmas with opinion letters. Additionally, Article 6, Section 32 of 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.

(See [www.nmjsc.org/docs/SKMBT\\_C55210041915041.pdf](http://www.nmjsc.org/docs/SKMBT_C55210041915041.pdf), Rule 1.C.)

Article 3, Section 1 of the New Mexico Constitution provides that

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.

Having 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. SB218 does not present the same constitutional violation argument for members of the judiciary because it does not extend the State Ethics Commission's reach to the judiciary.

Also, currently, if the conduct of a judge or justice is criminal in nature, the matter may be referred to the Attorney General who may prosecute a criminal matter.

## **TECHNICAL ISSUES**

The Secretary of State's Office (SOS) notes the bill fails to revise all the statutes that currently outline the responsibility of ethics oversight. Each of those statutes needs to be amended to reflect that the Commission would have complaint oversight and referral powers.

The Attorney General's Office (AGO) notes in the bill the request for an advisory opinion is made exempt from disclosure under the Inspection of Public Records Act (IPRA). Any exception to IPRA should be carefully considered.

The Administrative Office of the Court (AOC) notes SB 218 does not provide any mechanism for appealing or otherwise challenging the finding of the SEC prior to the Section 11(D) required public disclosure of a report.

Also, SB 218, Section 3(A) provides that the State Ethics Commission is created as an adjunct agency of the executive branch under direction of the eleven commissioners. Section 2(A)

defines "adjunct agency" to mean an agency, board, commission, office or other instrumentality, not assigned to an elected constitutional officer, that is excluded from any direct or administrative attachment to a department and that retains policymaking and administrative autonomy separate from any other agency of state government. The existing Section 9-1-6 NMSA 1978 definition of "adjunct agency" is almost identical, except for providing that an adjunct agency retains policymaking and administrative autonomy separate from any other "instrumentality", rather than "agency" of state government.

SB218, Section 11 permits rather than requires the State Ethics Commission to appoint a retired judge to preside at and conduct a hearing. The bill does not, however, provide for who will preside at and conduct a hearing if the Commission does not appoint a retired judge to do so.

## OTHER SUBSTANTIVE ISSUES

The Public Education Department (PED) notes there is concern this Act may violate Article III, Section 1 of the New Mexico Constitution if it is an unconstitutional delegation of judicial power. While the Legislature may create quasi-judicial agencies, there are some issues raised by various provisions of the proposed Act that may exceed such delegation authority.

New Mexico courts have found that legislative empowerment of an administrative agency to adjudicate cases passes constitutional muster. See, *Wylie Corp.*, 104 N.M. at 753, 726. However, while the separation of powers doctrine does not prohibit every exercise of judicial functions by groups outside the judiciary, the "real thrust of the separation of powers philosophy is that each department of government must be kept free from the control or coercive influence of the other departments." *Board of Education of Carlsbad Municipal Schools v. Harrell*, 118 N.M. 470, 484 (1994).

If this delegation is deemed to constitute the delegation of judicial power, generally defined as the final authority to render and enforce a judgment, thought should be given to inclusion of an explicit provision for judicial review of any Commission decision, based on determining whether a Commission decision was arbitrary and capricious, unlawful, unreasonable, or not based on substantial evidence. Inclusion of such a provision would help to insulate this Act from a non-delegation challenge.

Section 2(F) of the Act defines "ethics violation" by reference to specific existing codes of conduct. However, it also includes a violation of any "code of ethics adopted pursuant to the" Act itself. This would allow for the Commission to exercise unfettered discretion in defining, and thereby possibly creating new, ethical violations, which would be subject to change in conjunction with changes in the make-up of the Commission over time. Also, this may lead to a body of much broader violations, thus, raising concerns about conflicts with pre-existing ethical obligations of those subject to the Act, including those subject to separate ethical obligations of their professions, such as school administrators and lawyers. Additionally, related to this provision, Section 5(A)(5) of the Act states, the Commission will draft a proposed code of ethics for public officials and public employees and submit the proposed code to each elected public official and public agency for adoption. This provision does not specify whether the proposed code will be mandatory or voluntary and does not address whether an agency must adopt the code by rule or by policy. Depending on the answers to such questions, this could be an encroachment on the authority delegated to an agency.

Section 2(M) includes a public school district and a charter school, within the definition of “public agency”. The inclusion of these entities, may lead to conflict with existing ethical obligations and oversight over compliance with such obligations by the Public Education Department, to the extent that “public employee” includes any employee subject to licensing requirements containing ethical components. The Act does state that employees of a school district or charter school only includes an employee who works in an administrative capacity, but this limitation does not entirely remove the potential for conflict.

Section 3(A)(5) uses the phrases “largest membership in the state” and “second largest membership in the state” to define the perimeters of two of the commissioners. It isn’t clear how such a determination is made. If by reference to rolls of registered voters, it would add clarity to say so.

Section 3(B) requires the appointing authorities for the Commission to “give due regard” to geographic representation and to the cultural diversity of the state. In order to ensure such diversity, especially with regard to the issue of geographic representation, consideration should be given to actually including some specific requirements for the composition of the Commission.

With regard to the qualifications of the commissioners, although there are limitations on conduct of the commissioners while they are in office and afterwards, there appear to be no specific background checks or sworn disclosures required prior to appointment. Consideration could be given to the addition of such requirements to Section 4 relating to the Qualifications of Commissioners.

Section 3(H) allows the Commission to request removal of a commissioner by the Attorney General. Potential removal for “malfeasance in office” might appropriately include a defining phrase, “including but not limited to, violation of any ethical code of conduct.” Further, it isn’t clear whether this referral to the Attorney General for removal would constitute “action” by the Commission and thus, would require a vote subject to quorum requirements.

Section 4(D) provides that a change of political parties, while a commissioner, constitutes a resignation. This sections does not address whether such resignation would be effective immediately, or only upon the appointment of a replacement.

Section 5(A)(2) provides the Commission the authority to hold hearings to determine whether there has been an ethics violation. As discussed above, this raises potential concerns regarding the separation of powers. The fact that some ethical violations may constitute crimes makes this concern more compelling. The later provision for referral of any possible criminal violations to the Attorney General may alleviate these concerns.

Section 5(A)(6) authorizes the Commission to “employ” an executive director. This provision states that the executive director shall be an attorney, but does not require that the attorney be licensed in the State of New Mexico, or that their license be active or in good standing. Also, Section 6(A) uses the term “appoint” in reference to the executive director, rather than “employ.”

Section 5(B)(1) allows the Commission itself, not pursuant to receipt of a complaint, to “initiate complaints alleging ethics violations against public officials, public employees, government contractors and lobbyists. . .” Although later provisions do provide for the dismissal of frivolous



complaints, and investigations are required to be confidential, an investigation itself may be harmful, and this section is extremely broad. It provides for almost unfettered discretion by the Commission regarding when to self-initiate an investigation, limited only by the standard of Section 9(A) that the Commission must have “receipt of evidence deemed sufficient by the Commission.” This would seem to subject the Act to a potential challenge based on a violation of due process. Additionally, the inclusion of government contractors to the group subject to the proceedings of the Commission, may require revisions to applicable contract templates.

Section 6(A) provides that the executive director shall hold office until such time as they are removed by the Commission. However, the provision is silent as to whether or not the Commission must have grounds for removal.

Section 7(A) requires a commissioner to recuse themselves from “participation in a Commission proceeding”, in the event of a conflict of interest. The term “conflict of interest” is not defined. Also, it isn’t clear whether a “commission proceeding” includes the decision to investigate, the investigation, or only a hearing. Although the Act seems to contemplate that the executive director is primarily responsible for the investigation, it might be wise to clearly indicate that a commissioner with a conflict should not have any involvement in or access to, an investigation. Additionally, Section 7(B) appears to provide for disqualification on the basis of an allegation of a conflict. However, it isn’t clear on whether the Commission has to make such an allegation, or if any individual may, or how the “disqualification” specifically occurs. Does it require a vote by a duly constituted quorum?

Section 9(F) provides for investigation by the director. Given that there may be large numbers of investigations, this should include “the director, his designee, and/or appropriately designated staff members.”

The last sentence of Section 9(G) states, in part, that “the district court shall compel compliance” when a person refuses to comply with a Commission issued subpoena. It would be advisable for this statement to be revised to state something similar to “the district court shall compel compliance in accordance with applicable rules of civil procedure and existing and controlling case law.” This would comport with the doctrine of the separation of powers.

Section 9(H) provides for representation of a respondent by the Risk Management Division. The language relating to reimbursement of the cost of an attorney provided by Risk Management doesn’t make it clear that no reimbursement will be required by the respondent if the complaint is dismissed prior to hearing or if no violation is found after hearing.

Section 11(B) allows the Commission to appoint a retired judge to preside over and conduct hearings, but does not indicate who will preside over such hearing in the event that the Commission does not appoint a retired judge to preside. Additionally, there doesn’t seem to be a clear standard for referral to a hearing by the investigator.

Section 11(D) provides that after a hearing, the Commission shall issue a “written report” including findings of fact and conclusions of law. This may raise separation of power issues.

Section 12 provides for the confidentiality of investigation records for alleged violations. The Act does not appear to address the provision of such records to the individual investigated. This may raise due process issues.

Section 15(A) prohibits the taking of any retaliatory actions against complainants under certain circumstances. This may conflict with comparable provisions in the licensing provisions applicable to individuals licensed by the PED, as well as other comparable provisions in various existing ethics regulations.

RAE/jle