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## FISCAL IMPACT REPORT

ORIGINAL DATE 3/15/17

SPONSOR SJC LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Public Accountability Act SB 505/SJCS

ANALYST Esquibel

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

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>			\$607.0	\$1,821.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SB505/SJCS relates to SB72, Public Accountability Act; SB218, State Ethics Commission Act; HB10, Public Accountability Act; HB462, Public Accountability Act; HJR8, State Ethics Commission, CA.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General’s Office (AGO)  
 New Mexico Finance Authority (NMFA)  
 New Mexico Housing Authority  
 New Mexico Lottery Authority  
 Regulation and Licensing Department (RLD)  
 Secretary of State’s Office (SOS)

### SUMMARY

#### Synopsis of Bill

The Senate Judiciary Committee substitute for Senate Bill 505 (SB505/SJCS) would create the New Mexico Ethics Commission to investigate complaints, issue advisory opinions and enforce civil compliance provisions of the Campaign Reporting Act, Financial Disclosure Act, Gift Act, Governmental Conduct Act, Lobbyist Regulation Act, Procurement Code, Public Accountability Act, School District Campaign Reporting Act and Voter Action Act.

The bill proposes creation of a New Mexico Ethics Commission as an adjunct agency under the direction of 10 commissioners, no more than five from same political party, with appointments made by the Governor, Senate President Pro Tem, Senate Minority Leader, Speaker of the House and House Minority Floor Leader. Each member will serve for four years with no more than two

consecutive terms. Vacancies are filled by appointment of the original appointing authority. No action shall be taken by the Commission unless at least six commissioners concur. The bill includes a list of commissioners' qualifications and includes term limits, powers and duties, and gives exclusive jurisdiction to the Supreme Court over proceedings to remove commissioners. The Commission would have an executive director with specific power and duties.

The Commission and the executive director may issue advisory opinions and oversee any complaints, hearings, subpoenas and follow procedures outlined in the bill and report these findings. The Ethics Commission would investigate complaints and oversee hearings regarding allegations of violations of the Acts under its jurisdiction filed against state officials, state employees, government contractors, candidates and lobbyists. The Commission would be required to assess complaints and dismiss complaints deemed frivolous or for the purpose of publicity and shall forward complaints deemed outside of its jurisdiction to the appropriate entity. The bill indicates that the complaint and any response be made public within 30 days. Additionally, the bill requires notification to the respondent and move toward action on legitimate complaints within 60 days of filing. The Ethics Commission will restrict the acceptance of complaints that are received within 2 years of the alleged breach occurring. All records and communication collected or generated are confidential.

The provisions of the Public Accountability Act apply to conduct that occurs on or after July 1, 2019. The appointments of the Commission and executive director are effective January 1, 2019 and the execution of the powers and duties of the Commission are effective July 1, 2019.

## **FISCAL IMPLICATIONS**

The Secretary of State's Office (SOS) notes due to the effective dates in SB505/SJCS, most costs associated with the proposed legislation would begin in FY20. The bill provides the Commission is authorized to hire/appoint an executive director (an attorney or retired state judge), 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. The bill does not include an appropriation to cover the expenses contemplated by the provisions of the Act.

The SOS notes costs for a 10 member Commission to meet bi-monthly is estimated to be approximately \$72,000 per year (10 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 or retired judge. 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 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 Attorney General's Office (AGO) notes it is likely the Commission would require some assistance from the AGO, which could necessitate significant additional staff resources.

### **SIGNIFICANT ISSUES**

The New Mexico Finance Authority (NMFA) notes SB505/SJCS contains no mechanism for appealing the Commission's decision.

The Secretary of State's Office (SOS) notes conforming language changes are needed in the relevant Acts that will fall under the enforcement authority of the Ethics Commission to create clear lines of authority between the new Commission and the SOS. As written, it is unclear whether compliance issues would be handled by both entities. Additionally, the proposed bill provides authority to the Ethics Commission to issue advisory opinions and promulgate rules; however, existing language in the Acts currently administered by the SOS also provide this authority to the SOS. This could lead to confusion and conflicting guidance being providing to public officials.

SB505/SJCS does not clearly define the roles and responsibilities or transfer of such civil enforcement powers from the Secretary of State or the Attorney General. Indeed, the bill acknowledges such potential conflict by specifically stating that the Commission shall have concurrent jurisdiction to enforce applicable civil compliance provisions of certain laws. This concurrent jurisdiction may lead to confusion and additional enforcement and defense costs.

SB505 also empowers the Commission to issue a public reprimand, censure or make recommendations for disciplinary action, yet these powers may conflict with that of the State Personnel Board or provisions contained in union agreements.

SB505 empowers the Commission to issue advisory opinions. The advisory opinions would not have the force of law and the legal weight, and any potential decision of the Commission based on such opinion could easily be challenged. There is also risk that the Commission's opinions could conflict with those of the Office of Attorney General.

The Attorney General's Office notes the bill adds definitions of "public officer" and "public employee" to the proposed legislation that effectively expand the jurisdiction of the Commission to include elected officers and employees of local governments.

### **PERFORMANCE IMPLICATIONS**

The Secretary of State's Office (SOS) notes the proposed 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.

The SOS received a total of 70 complaints in 2016, of which approximately 30 were received regarding potential violations of the CRA, LRA, GCA, and FDA. Many complaints are resolved by reviewing each party's correspondence and ensuring voluntary compliance.

#### **ADMINISTRATIVE IMPLICATIONS**

The AGO notes a proceeding for the removal of a commissioner may be commenced by the Attorney General; however, it is not clear from the text of SB505/SJCS if the Attorney General's Office would provide general counsel and administrative prosecutor services for the Commission as the AGO currently does for many boards and commissions.

#### **TECHNICAL ISSUES**

The Attorney General's Office notes SB505/SJCS exempts information and reports from the Inspection of Public Records Act (IPRA). This exemption should be analyzed carefully. Even the law enforcement exception of IPRA, 12-2-1(A)(4), is time sensitive allowing for information to be released based on the phase of the investigation. Currently, SB505/SJCS does not allow any records release. New Mexico courts have routinely held that "a citizen has a fundamental right to have access to public records. The citizen's right to know is the rule and secrecy is the exception". [Newsome, 90 N.M. at 797.]

RAE/al