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**AGENCY BILL ANALYSIS
2015 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply: Date 1-26-16
Original **Amendment** **Bill No:** SB124
Correction **Substitute**

Sponsor: Linda M. Lopez **Agency Code:** 264
Short **Person Writing** Gail MacQuesten
Title: State Ethics Commission Act **Phone:** 466-0532 **Emai** gailmacquesten@q.com

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		
0	200	nonrecurring	General fund

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		
0	0	0	n/a	n/a

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	0	minimal	minimal	minimal	Recurring	General

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HB80, HJR5
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

SB124 creates the state ethics commission as an adjunct agency of the executive branch.

Sections 1 through 16 of SB124 set out new material creating the state ethics commission. SB124 defines “ethics violation” as an action that violates: the Gift Act; the Governmental Conduct Act; the Procurement Code; the Lobbyist Regulation Act; the Financial Disclosure Act; the Voter Action Act; Chapter 1, Article 19 NMSA 1978, including the Campaign Reporting Act; or any code of ethics adopted pursuant to those laws or under Section 5 of the State Ethics Commission Act.

It is the responsibility of 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 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.

SB124 specifies the composition of the 7-person commission. The governor appoints 2 commissioners (with one appointee who is a member of the political party with the largest membership in the state and one a member of the political party with the second largest membership in the state). The majority floor leader of the house and the senate each appoint a commissioner, as do the minority floor leader of the house and senate. The chief justice of the supreme court appoints one commissioner, who shall be a retired judge and who shall chair the commission. The appointing authorities are directed to “give due regard to geographic representation and to the cultural diversity of the state.” Commissioners serve staggered 4-year terms, may not serve for more than 2 consecutive terms, and may be removed only by the supreme court for incompetence, neglect of duty or malfeasance in office. Four commissioners consisting of two members of the largest political party and two members of the second largest political party constitute a quorum for the transaction of business. 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. For one year after a commissioner leaves office a former commissioner may not represent a respondent or accept employment or otherwise provide services to a respondent, unless the commissioner accepted employment or provided services prior to the filing of a complaint against the respondent. Commissioners receive only per diem and mileage.

The commission may employ an executive director (who must be an attorney), who in turn may hire additional personnel. It is the executive director’s responsibility to perform investigations, bring complaints and the results of investigations to the commission, prepare the annual budget, and recommend rule changes and legislative changes to the commission. SB124 sets out restrictions on employment that apply when the director leaves service with the commission.

SB124 sets out the procedure for recusals and disqualifications of commission members in proceedings in which the commissioner has a conflict of interest.

SB124 sets out the process for seeking and issuing advisory opinions and the process for filing complaints and conducting hearings on complaints. The commission may appoint a retired judge to preside over and conduct the hearing, but the judge shall have no vote in the proceeding. SB124 prohibits retaliatory action against a person who, in good faith, files a complaint or participates in an investigation or hearing.

The commission shall not take action on complaints against a candidate for public office on or after the filing date for a primary election through election day of the general election (other than the dismissal of frivolous complaints). The commission shall not investigate allegations of misconduct involving campaign advertisements.

SB124 provides that if the commission finds by clear and convincing evidence that an ethics violation occurred, the commission may issue a public reprimand or censure or recommend disciplinary action. If conduct may amount to a criminal violation, the commission “shall immediately refer the matter to the attorney general or an appropriate district attorney,” along with all evidence collected in the investigation.

SB124 addresses confidentiality issues, specifying what matters are confidential, requiring closed hearings, and providing civil and criminal penalties for disclosure of confidential materials by a commissioner, the director, the commission’s employees or agents, and complainants.

Section 17 of SB124 amends the Open Meetings Act to recognize that meetings of the state ethics commission relating to complaints or investigations of alleged ethic violations are closed meetings.

Section 18 of SB 124 provides that the commission shall submit a report to the legislature and the governor by January 1, 2019 regarding extension of commission jurisdiction to elected and appointed officials and employees of political subdivisions of the state, with a plan for the extension, a proposed timeline, an estimate of the amount and type of resources needed, estimated budget increases, estimated annual budget, and any changes needed to existing law.

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SB124 appropriates \$200,000 from the general fund to the state ethics commission for expenditure in fiscal year 2017 to carry out the provisions of the act. Any unencumbered or unexpended balance remaining shall revert to the general fund. No provision is made for future years, although Section 18 requires a report by January 1, 2019 setting out estimated budget increases and an estimated annual budget.

It is not known whether SB124 will have any fiscal implications for the AODA or the district attorneys because it is not known whether SB124 will affect the number of potential criminal cases referred to district attorneys, or affect the number of ethics investigations that will be requested by the district attorneys or the number of ethics cases to which the district attorneys will need to respond.

Because SB124 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

SB124 creates an independent state ethics commission, with detailed requirements for the composition and operation of the commission. The commission is responsible for investigating ethical violations under a number of existing acts, and has additional responsibilities related to ethics in state government. The act contemplates future expansion of the commission's jurisdiction to elected and appointed officials and employees of political subdivisions of the state.

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.)

SB124 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.

SB124 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).

SB124 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 5 members is not specified. But SB124 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.

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.

The district attorneys will receive referrals for criminal cases from the ethics commission, in addition to referrals from the secretary of state, who is responsible for administering the acts listed in SB124. In addition, SB124 creates one new crime, related to the release of information that is confidential under the State Ethics Commission Act.

ADMINISTRATIVE IMPLICATIONS

See Performance Implications, above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HJR5 and HB80 would also create a state ethics commission. There are important differences in the three proposals. HJR5 would create a commission through a constitutional amendment. HB80, like SB124, would create a commission through legislation, creating an adjunct agency. HB80, however, would make the commission responsible for administering acts currently administered by the office of the secretary of state; SB124 would give the commission power to investigate ethical violations arising from those acts but would leave the administrative powers in the office of the secretary of state.

HJR5 proposes an amendment to Article 5 of the New Mexico Constitution to create a state ethics commission as an independent state agency to oversee the conduct of executive and legislative branch state officers, employees in the executive and legislative branches, government contractors and lobbyists. HJR5 sets out in detail the structure and duties of the commission, which differ slightly from the structure and duties described in SB124. For example, the committee established by HJR5 is to be made up of nine commissioners (with selection requirements set out to ensure political and geographic diversity). No action may be taken by the commission unless six members concur. HJR5 allows the commission to impose penalties and sanctions as provided by the laws setting out the ethical violations it investigates. Complaints and responses are to be kept confidential “until such time as the response is filed or the date the response is due to be filed, whichever is earlier.” HJR5 provides that the commission may have such other powers and duties and administer or enforce such other acts as the legislature provides. If the amendment proposed under HJR5 is adopted after the passage of SB124, its provisions will have to be amended or replaced to make it consistent with the new constitutional provision.

HB80, like SB124, creates a state ethics commission as an adjunct agency of the executive branch. The most significant difference in the two acts is that HB80 puts the ethics commission in charge of various acts currently administered by the secretary of state: the Campaign Reporting Act, the Voter Action Act, the Lobbyist Regulation Act, the Governmental Conduct Act, the Financial Disclosure Act, and the Gift Act. (SB124 would only allow the ethics commission to review ethical violations arising out of those acts, but would leave the secretary of state as the administrator of those acts.) Giving the ethics commission the responsibility for administering the acts would greatly increase its duties and powers. It would be able to administer the acts, make rules regarding the acts, and have the enforcement powers granted under those acts, which usually involve civil penalties. (In civil cases, SB124 provides only for public reprimand, censure, and referral for disciplinary proceedings.) To effectuate the transition from the office of the Secretary of State to the commission, HB80 contains a temporary provision providing that on January 1, 2017 all functions, appropriations, money, records, property, equipment and supplies of the office of the secretary of state used in administering the relevant acts will transfer to the commission, along with contracts, grants, agreements and other obligations, and provides that the rules of the secretary of state pertaining to the administration of those acts shall be considered rules of the state ethics commission. HB80 does not contain any additional appropriations, however.

Note that the structure, duties and issues addressed under HB80 and SB124 are otherwise similar, but not identical. For example, the make-up of the commission under HB80 is different from the make-up under SB124, as is the appointment of the chair of the commission (under HB80 the chair is a governor appointee, and under SB123 the chair is a retired judge appointed by the chief justice of the supreme court). Other differences appear throughout the bills.

TECHNICAL ISSUES

None noted.

OTHER SUBSTANTIVE ISSUES

None.

ALTERNATIVES

None.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Administration of New Mexico's existing statutes related to governmental ethics will be administered by the secretary of state.

AMENDMENTS

None proposed.