

<b>LFC Requester:</b>	<b>Ruby Ann Esquibel</b>
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**AGENCY BILL ANALYSIS  
2017 REGULAR SESSION  
WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:**

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**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** 2/2/2017  
**Original**     **Amendment**        **Bill No:** SB218  
**Correction**     **Substitute**   

**Sponsor:** Senator Linda M. Lopez    **Agency Code:** 924  
**Short**    STATE ETHICS    **Person Writing**    Aguilar/Pahl/Mastalir  
**Title:**    COMMISSION ACT    **Phone:** 505-827-6519    **Email** Paulj.aguilar@state.nm.us

**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		
	200.0	Recurring	General fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Potentially conflicts with all pre-existing Codes of Ethics in the State, including, but not limited to, those related to specific professions.

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis: Senate Bill 218 (SB-218), the “State Ethics Commission Act, is new legislation, creating a State Ethics Commission. The act provides for an executive director of the Commission; provides for annual ethics training and the publication of ethics guides by the Commission; requires the development of an Ethics Code; provides for the authority of the Commission to issue advisory opinions; provides for the investigation of complaints filed, or initiated, against public employees, government contractors and lobbyists, by the commission; granting the Commission the authority to issue subpoenas and conduct hearings; requiring that certain documents and records relating to investigations by the

Commission remain confidential; prohibiting retaliation against complainants; providing penalties for the breach of confidentiality provisions, and making an appropriation from the general fund for FY18.

## **FISCAL IMPLICATIONS**

SB-218 contains a recurring appropriation from the general fund. While the language in the bill appears to be a one-time appropriation, expectations will be that the commission operates into the future creating a recurring liability to the general fund.

It appears that the appropriation contained in the bill will not be sufficient to pay salaries, benefits and operating costs of the commission.

Section 19 of the act appropriates \$200,000 from the general fund to the State Ethics Commission for expenditure in fiscal year 2018 to carry out the provisions of the act. Given this appropriation, the Commission is authorized to hire/appoint an executive director (an attorney well versed in ethics law), and pay them a salary, 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.

## **SIGNIFICANT ISSUES**

There is an overriding concern that 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, with regard to this code, that 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.

Further, 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.

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 constitution 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. Given the spirit of the act, 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. However this should be given close scrutiny.

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.” This discrepancy should be addressed.

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.

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

See comments throughout analysis.

## **ALTERNATIVES**

Reliance on existing ethical codes and the entities currently responsible for enforcement.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Based on the assumption that most of the conduct that would be addressed by this new State Ethics Commission is already addressed by a variety of ethical codes, statutes, regulations and professional requirements, the consequences of not enacting this bill would be minimal and in fact, might reduce confusion and conflict between existing requirements and the entities enforcing them.