

LFC Requester:	Connor Jorgensen
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**AGENCY BILL ANALYSIS
2016 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{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:

Original <input type="checkbox"/>	Amendment <input type="checkbox"/>	Date February 10, 2016
Correction <input type="checkbox"/>	Substitute <input checked="" type="checkbox"/>	Bill No: HJR 5

Sponsor: Rep. Jim Dines & Rep. Jeff Steinborn	Agency Code: 305
Independent Ethics	Person Writing Caroline Manierre/Stuart Bluestone
Short Title: Commission, CA – House Floor	Phone: 505-827-6079
Substitute	Email cmanierre@nmag.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		

(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						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:

HB 80

SB 124

Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

Synopsis:

House Joint Resolution 5 proposes to amend the New Mexico constitution by creating a new state ethics commission. The commission would be made up of nine commissioners, appointed by the governor, specific members of the legislature, and the chief justice of the supreme court. HJR5 contains specific qualifications for commissioners, lists commission terms and vacancies, powers and duties of the commission, and establishes that action can only be taken by the state ethics commission if at least six members concur. The bill also requires that any complaint filed with the commission “be signed and not anonymous.”

The House Floor Substitute for House Joint Resolution 5 substitutes the original bill, maintaining the majority of the original content, but adding four new provisions. The first amends the qualifications for a commissioner, adding that a commissioner cannot within the previous five years have been “a registered lobbyist or a state contractor. The legislature may provide by law for further restrictions on appointees to the commission.” The Substitute then gives the state ethics commission the ability to dismiss complaints regarded as frivolous or outside the jurisdiction of the commission, and those complaints shall be made public along with a reason for the dismissal. The Substitute then adds a paragraph giving the state ethics commission sole jurisdiction over civil violations of law “within its jurisdiction” and commission adjudications may be appealed to the district courts. Finally, the Substitute adds a paragraph clarifying that the state ethics commission is not an alternative to impeachment proceedings but that the commission can recommend a matter to the legislature for such proceedings.

FISCAL IMPLICATIONS: N/A

SIGNIFICANT ISSUES

The inclusion of a provision in the Substitute stating that the state ethics commission “shall have exclusive jurisdiction over civil violations of law that are within its jurisdiction” effectively strips any other agency that currently has jurisdiction over these matters, such as the office of the Secretary of State, without amending those statutes. If the Substitute passes and is accepted by the voters, those statutes implicated will need to be amended. This provision also creates

exclusive jurisdiction, but House Joint Resolution 5 is not specific in the parameters of that jurisdiction. The violations for which complaints may be initiated, received, or investigated by the commission are for broad categories of conduct or laws, which could result in issues of ambiguity regarding when the commission's exclusive jurisdiction applies.

The following are concerns we raised for the original bill that still appear in the Substitute:

1. 42 other States reportedly have Ethics Commissions. This bill presents NM with the opportunity to create one too, and to engraft it into the State Constitution. Threshold significant issues are thus whether to create such a commission, and if so, whether to do so first with a constitutional amendment or directly by enactment of a new statute with necessary appropriations.
2. A key issue will be whether a new Ethics Commission will have sufficient funding to operate effectively. If the Constitutional Amendment is adopted by the voters, the implementing legislation and funding will need to be provided by law to be enacted later. It should be critical to ensure the new Commission is funded adequately.
3. The powers for the new Ethics Commission as outlined in HJR 5 appear to be appropriate to allow it to address important ethics issues. This includes in particular the power to issue subpoenas to conduct investigations and gather necessary information to rule on ethics complaints. If that power is not retained for the Commission, its ability to function could be seriously impaired.
4. Other Ethics Commission bills have proposed transferring certain ethics and campaign finance related statutory duties from the Sec. of State's Office to the new Commission. HJR 5 does not do so, and that will likely enable the Commission to focus appropriately on important ethics issues rather than being burdened with other administrative responsibilities that would not seem to be central to its core mission.
5. An expected controversial issue in HJR 5 is likely to concern confidential information. The proposed amendment provides that the Commission shall treat an ethics complaint as confidential only until such time as a response is filed or due. Prior bills to create an Ethics Commission have kept an investigation confidential until after a hearing and a finding by the Commission that an ethics violation occurred. There are likely to be arguments pro and con raised as to when to make ethics complaints and investigations confidential or public. Some will likely argue that there is a strong public interest in disclosing complaints, similar to the public pronouncements of indictments in criminal proceedings before a finding of guilt. Others will likely argue that disclosure of ethics complaints can do considerable harm and damage to a person's reputation and that no information should be disclosed publicly unless and until the Commission finds that an ethics violation has been committed.

PERFORMANCE IMPLICATIONS: N/A

ADMINISTRATIVE IMPLICATIONS: N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP:

1. House Bill 80 and Senate Bill 124 both create a state ethics commission. Both of these bills differ in language from House Joint Resolution 5, and were either of the bills as well as the constitutional amendment to be adopted, there would be conflict between the language and requirements regarding the state ethics commission.

TECHNICAL ISSUES:

1. HJR5 states that the commissioners will "draw lots" to determine the length of initial

terms, but does not indicate how this would be handled practically or what “drawing lots” consists of.

2. HJR5 proposes that the executive director “shall be a licensed attorney in the state.” However, it does not clarify whether the attorney must have a New Mexico license, or whether that attorney must be in good standing as an attorney in New Mexico.
3. Subsection I lists what types of violations constitute complaints and refers in multiple places to “standards of conduct” but it is unclear whether these would be officially adopted standards of conduct or a subjective/objective, general standard of conduct for each subset of respondents.

OTHER SUBSTANTIVE ISSUES: N/A

ALTERNATIVES:

1. Create the Ethics Commission by statute rather than Constitutional Amendment. See HB 80 and SB 134.
2. As an alternative to a nine-member Commission, alternatives could be larger (e.g., 11 members, as in HB 80 and SB 124) or smaller (seven, five or three-member Commissions).
3. Given that the proposed Ethics Commission would have jurisdiction over both Executive and Legislative Branch public officials and employees, one alternative is to avoid the potential conflict of interest or “bias perception” problem of having Commissioners appointed by the Governor and Legislative leaders and instead have the Commissioners appointed by a member of the Judicial Branch, e.g., the Chief Justice.
4. Specifically, to address Points 2 and 3 above, one alternative to HJR 5 would be to create a three-member Commission appointed by the Chief Justice. To address geographic diversity concerns, the three Commissioners could be required to be appointed from each of NM’s three congressional districts.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL: Status quo

AMENDMENTS: N/A