

LFC Requester:	Connor Jorgensen
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**AGENCY BILL ANALYSIS
2015 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 checked="" type="checkbox"/>	Date	<u>1/22/2015</u>
Correction	<input type="checkbox"/>	Substitute	<input type="checkbox"/>	Bill No:	<u>SB 192</u>

Sponsor:	<u>Sen. Daniel A. Ivey-Soto</u>	Agency Code:	<u>Attorney General's Office</u>
Short Title:	<u>Special Prosecutor for Election Violations</u>	Person Writing	<u>James Torres</u>
		Phone:	<u>827-6064</u>
		Email	<u>jtorres@nmag.gov</u>

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

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

SECTION III: NARRATIVE

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.

BILL SUMMARY

Synopsis:

First, HB 192 amends and modifies the mechanisms by which the Campaign Reporting Act (“CRA”) is enforced in Section 1-19-36. In its original form, Section 1-19-36 vests the authority to prosecute criminal cases stemming from a violation of the CRA in the attorney general or the district attorney. The proposed amendment instead vests this power in a “special prosecutor” and is ambiguous as to whether enforcement power is removed from district attorneys and the attorney general. The attorney general or the district attorney may appoint the special prosecutor pursuant to Section 36-1-23.1 NMSA 1978.

Second, HB 192 amends and modifies Section 36-1-23.1., which governs special prosecutions in conflict cases (cases in which “the district attorney cannot prosecute a case for ethical reasons or other good cause.”) This section deals specifically with district attorneys, making no mention of the attorney general. HB 192 embeds an amendment in this section eliminating the authority of district attorneys to prosecute violations of the Election Code or the Municipal Election Code referred by the secretary of state or a county clerk. District attorneys are required to appoint a “practicing member of the bar of this state” as a special assistant district attorney within 30 days of referral.

FISCAL IMPLICATIONS

N/A

SIGNIFICANT ISSUES

Since its creation, the CRA and the broader Election Code have been enforced by the attorney general and district attorneys. SB 192 may remove this power from the attorney general and district attorneys, placing it in the hands of an appointed “special prosecutor.” First, SB 192 amends language in Section 1-19-36, which provides for the criminal enforcement of the CRA. Proposed subsection (B) states that the CRA “may” be enforced by special prosecutor. It may be contended that the inherent ambiguity of the word “may” leaves open the possibility of an entity other than a special prosecutor enforcing the CRA. However, “may” was used in the original

version of Section 1-19-36(B) to provide enforcement power to the attorney general or the district attorney. Instead of leaving open the possibility of enforcement power resting in an entity other than an appointed special prosecutor, this language could be interpreted as merely intending to provide discretion to the appointed special prosecutor to determine whether to bring criminal charges for an alleged violation of the CRA.

Ambiguity in the construction of SB 192 also leads to an unclear appointment procedure for a special prosecutor. The amendment to Section 1-19-36(B) provides that a special prosecutor is appointed pursuant to Section 36-1-23.1. As previously mentioned, this section governs the appointment procedure for special assistant district attorneys in conflict cases. The proposed amendments to Section 36-1-23.1 eliminate the possibility of district attorneys prosecuting violations of the Election Code or the Municipal Election Code referred by the secretary of state or a county clerk. It is ambiguous whether all district attorneys are barred from enforcing the Election Code and the Municipal Election Code, or if the district attorney that received the referral from the secretary of state or a county clerk may appoint a separate district attorney as a special prosecutor.

Moreover, the proposed amendment to Section 36-1-23.1 only makes reference to district attorneys; there is no mention of the attorney general. The silence regarding the attorney general's involvement in the enforcement of violations of the Election Code and the Municipal Election Code creates ambiguity as to whether the attorney general is the exclusive conflict prosecutor in these cases or is subject to the same requirement to appoint a special prosecutor. Additionally, the lack of appropriations compiles to the uncertainty of the involvement of the attorney general in these cases.

The original construction of Chapter 1 NMSA 1978 ("Election Code") makes clear that enforcement power is intended to reside in the attorney general or district attorneys. Section 1-2-1(3) states that the secretary of state "shall . . . through the attorney general or the district attorney having jurisdiction, bring such actions as deemed necessary and proper for the enforcement of the provisions of the Election Code." Furthermore, Section 1-2-1.1(A) provides that "[t]he attorney general and the several district attorneys of the state upon request of the secretary of state shall provide to the secretary of state legal advice, assistance, services and representation as counsel in any action to enforce the provisions of the Election Code." SB 192 leaves this language intact. Section 1-19-34.6 is also left intact, which vests civil enforcement power in the attorney general and district attorneys. However, proposed Section 36-1-23.1(B) removes the power to enforce any violation of the Election Code from district attorneys (at least those who received a referral from the secretary of state or a county clerk alleging violations), and is ambiguous as to the role of the attorney general. SB 192 may thus potentially be interpreted as removing both criminal and civil enforcement power from the state's law enforcement agencies. Because SB 192 does all of this work in proposed amendments to Section 1-19-36 without altering the various sections in the Election Code relating to the enforcement power of the attorney general or district attorneys, SB 192 potentially leaves the Election Code in a state of disarray.

The attorney general and the district attorneys are equipped with tried and true experience in prosecuting violations of the Election Code and the Municipal Election Code. SB 192 may disable the ability of our state's law enforcement agencies to apply this experience. Instead, the enforcement power is placed in the hands of an undesignated "member of the bar." Without providing for an appropriation, SB 192 may require the state to hire a special prosecutor every time an alleged violation of the Election Code or the Municipal Election Code arises, costing taxpayers an exorbitant fee for services that could be rendered by their state law enforcement agencies.

PERFORMANCE IMPLICATIONS

N/A

ADMINISTRATIVE IMPLICATIONS

N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

N/A

TECHNICAL ISSUES

Addressed above

OTHER SUBSTANTIVE ISSUES

N/A

ALTERNATIVES

N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status Quo

AMENDMENTS