

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: CS/SB 1270

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Lee

SUBJECT: Fiduciary Duty of Care for Appointed Public Officials and Executive Officers

DATE: February 10, 2020

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Ponder	McVaney	GO	Fav/CS
2.			CA	
3.			RC	

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1270 creates part IX of chapter 112, F.S., to establish an express fiduciary duty of care for appointed public officials' and executive officers acting on behalf of governmental entities.

The bill makes a statement of legislative findings providing that:

- Appointed public officials and executive offers acting on behalf of governmental entities owe a fiduciary duty to the entities they serve; and
- Codifying a fiduciary duty of care will require that appointed public officials and executive officers stay adequately informed of affairs, perform due diligence, perform reasonable oversight, and practice fiscal responsibility regarding decisions involving corporate and proprietary commitments on behalf of a governmental entity.

The bill provides definitions for relevant terms including, but not limited to “appointed public official,” “executive officer,” and “governmental entity.”

The bill establishes training requirements for each appointed public official and executive officer to begin on January 1, 2021. The bill specifies that a minimum of five hours of board governance training must be completed for each term served. The bill provides three exceptions to the training requirement for appointed public officials and executive officers (i) of governmental entities whose annual revenues are less than \$100,000; who hold elected office in another capacity; or (iii) who complete board governance training involving fiduciary duties or responsibilities which is required under any other state law. The bill requires appointed public

officials and executive officers to provide written certification of compliance with the board governance training.

The bill requires the Department of Business and Professional Regulation (DBPR), by January 1, 2021, to either (i) contract for or approve a board governance training program that includes an affordable web-based electronic media option; or (ii) publish a list of approved Training providers. The bill grants rulemaking authority to the DBPR.

The bill requires the appointment of an executive officer or general counsel be subject to approval by a majority vote of the governing body of the governmental entity. The bill specifies that all legal counsel employed by a governmental entity must represent the legal interest and position of the governing body of the governmental entity, unless such representation is directed by the governmental entity.

The bill will have an indeterminate fiscal impact on the private sector to the extent entities are selected by DBPR to provide training. The bill will have an indeterminate fiscal impact on the local and state government. The DPBR may experience a slightly negative impact in complying with the bill's board governance training program requirements. Additionally, local governments will experience an indeterminate negative impact to the extent its appointed public officials and executive officers are subject to the training requirement.

The bill will take effect on July 1, 2020.

## II. Present Situation:

### Chapter 112

Chapter 112, F.S., contains general provisions governing public officers and employees. Part III of ch. 112, F.S., establishes a Code of Ethics for Public Officers and Employees that sets forth standards of conduct required for public officers and employees in the performance of their official duties.<sup>1</sup> In order to enforce the Code of Ethics, the legislature created the Commission on Ethics (Commission).<sup>2</sup>

Section 112.3145, F.S., requires state and local officers and specified state employees to file a statement of financial interest with the Commission. This section defines a "local officer" to include persons elected to office in any political subdivision of the state, and every person who is appointed to fill a vacancy for an unexpired term in such an elective office.<sup>3</sup>

Additionally, the term includes *appointed* members of specified boards. Specifically, s. 112.3145(1)(a)2., F.S., provides that "public officer" means:

Any appointed member of any of the following boards, councils, commissions, authorities, or other bodies of any county, municipality, school district, independent special district, or other political subdivision of the state:

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<sup>1</sup> Sections 112.311 -112.3261, F.S.

<sup>2</sup> Section 112.320, F.S.

<sup>3</sup> Section 112.3145(1)(a)1., F.S.

- a. The governing body of the political subdivision, if appointed;
- b. A community college or junior college district board of trustees;
- c. A board having the power to enforce local code provisions;
- d. A planning or zoning board, board of adjustment, board of appeals, community redevelopment agency board, or other board having the power to recommend, create, or modify land planning or zoning within the political subdivision, except for citizen advisory committees, technical coordinating committees, and such other groups who only have the power to make recommendations to planning or zoning boards;
- e. A pension board or retirement board having the power to invest pension or retirement funds or the power to make a binding determination of one's entitlement to or amount of a pension or other retirement benefit; or
- f. Any other appointed member of a local government board who is required to file a statement of financial interests by the appointing authority or the enabling legislation, ordinance, or resolution creating the board.

A “state officer” is defined to mean:

- Any elected public officer, excluding those elected to the U.S. Senate and House of Representatives, not covered elsewhere in this part an any person who is appointed to fill a vacancy for an unexpired term in such an elective office;
- An *appointed* member of each board, commission, authority, or council having statewide jurisdiction, excluding a member of an advisory body;
- A member of the Board of Governors of the State University System or a state university board of trustees, in Chancellor and Vice Chancellors of the State University System, and the president of a state university; or
- A member of the judicial nominating commission for any district court of appeal or any judicial circuit.<sup>4</sup>

### **Fiduciary Duty of Care**

#### ***A Fiduciary Relationship and Breach of Fiduciary Duty***

Black’s Law Dictionary defines “fiduciary relationship” as:

A relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship. • Fiduciary relationships—such as ... principal-agent ...—require an unusually high degree of care. Fiduciary relationships usu[ally] arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.<sup>5</sup>

<sup>4</sup> Section 112.3145(1)(c), F.S.

<sup>5</sup> *Black’s Law Dictionary*, 744 (10<sup>th</sup> ed. 2014).

As explained by the Florida Supreme Court, a fiduciary relationship exists “where confidence is reposed by one party and trust is accepted by the other, or where confidence has been acquired or abused.”<sup>6</sup> In Florida, a breach of fiduciary duty is considered a tort.<sup>7</sup> In order to state a claim for breach of fiduciary duty, a plaintiff must show three elements: (1) the existence of a fiduciary duty, (2) the breach of that duty, and (3) damages resulting from the breach.<sup>8</sup>

A fiduciary relationship may be either express or implied.<sup>9</sup> “Express fiduciary relationships are created by contract, such as principal/agent or can be created by legal proceedings, as in the case of a guardian/ward.”<sup>10</sup> On the other hand, an implied in law fiduciary relationship may be found based on the “specific factual situation surrounding the transaction and the relationship of the parties.”<sup>11</sup> Under Florida law, for an implied fiduciary relationship to exist “there must be substantial evidence showing some dependency by one party and some undertaking by the other party to advise, counsel, and protect the weaker party.”<sup>12</sup>

The most basic duty of a fiduciary is the duty of loyalty, which obligates the fiduciary to put the interests of the beneficiary first, ahead of the fiduciary’s self-interest, and to refrain from exploiting the relationship for the fiduciary’s personal benefit.<sup>13</sup> In addition to a duty of loyalty, a fiduciary also owes a duty care to carry out its responsibilities in an informed and considered manner and to act as an ordinary prudent person would act in the management of his own affairs. For example, under s. 518.11(1)(a), F.S., a trustee has the duty to invest or manage assets of an estate prudently – “as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust.”<sup>14</sup>

### ***Enforcement of Fiduciary Obligations owed by Public Officials***

“Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public’s best interest.”<sup>15</sup> Accordingly, a public official’s fiduciary duty is a general one rather

<sup>6</sup> *Doe v. Evans*, 814 So. 2d 370 (Fla. 2002).

<sup>7</sup> *Doe v. Evans*, 814 So.2d 370, 374 (Fla. 2002)(“ [a] fiduciary who commits a breach of his duty as a fiduciary is guilty of tortious conduct to the person for whom he should act. . . [t]he liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation.”) (quoting Restatement (Second) of Torts § 874 cmt. B(1979)).

<sup>8</sup> *Gracey v. Eaker*, 837 So.2d 348, 353 (Fla.2002).

<sup>9</sup> *Capital Bank v. MVB, Inc.*, 644 So.2d 515, 518 (Fla. 3d DCA 1994).

<sup>10</sup> *MediaXposure Ltd. v. Harrington*, No. 8:11-CV-410-T-TGW, 2012 WL 1805493, at \*6 (M.D.Fla.2012)

<sup>11</sup> *Id.* See e.g., *Fla. Software Svs., Inc. v. Columbia/HCA Healthcare Corp.*, 46 F.Supp.2d 1276, 1286 (M.D.Fla.1999) (stating that “Florida law recognizes fiduciary relationships arising out of joint ventures.”); *Askew v. Allstate Title & Abstract Co., Inc.*, 603 So.2d 29, 31 (Fla. 2d DCA 1992) (stating that “the title agent has a fiduciary duty to both the buyer and the seller ....”); *Cohen v. Hattaway*, 595 So.2d 105, 107 (Fla. 5th DCA 1992) (stating that “[c]orporate directors and officers owe a fiduciary obligation to the corporation and its shareholders and must act in good faith and in the best interest of the corporation.”).

<sup>12</sup> *Lanz v. Resolution Trust Corp.*, 764 F.Supp. 176, 179 (S.D.Fla.1991); See *Maszal v. City of Miami*, 971 So.2d 803, 809 (Fla. 3d DCA 2007).

<sup>13</sup> See Restatement (Third) of Agency §8.01 (2006); see also *Capital Bank*, 644 So. 2d at 520.

<sup>14</sup> See *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003) (a fiduciary administering trust property owes a fundamental common law duty as trustee to preserve and maintain trust assets; “the standard of responsibility is ‘such care and skill as a man of ordinary prudence would exercise in dealing with his own property’”) (citations omitted).

<sup>15</sup> *U.S. v. deVegter*, 198 F.3d 1324, 1328 (11<sup>th</sup> Cir. 1999).

than a specific one.<sup>16</sup> Stated differently, a public official owes a fiduciary to the constituents he or she serves generally, but not to each individual constituents he or she serves.<sup>17</sup> Additionally, Florida recognizes that public officials occupy a fiduciary relationship with respect to public property in that such property is held in trust.<sup>18</sup>

It is well settled in Florida that – absent a constitutional challenge - a taxpayer may bring suit only upon a showing of special injury<sup>19</sup> which is distinct from that suffered by other taxpayers.<sup>20</sup> Thus, a private citizen is precluded from filing a taxpayer complaint to challenge government action unless the private citizen alleges and proves a “special injury,” which is an injury that is different from that of the general public.<sup>21</sup> Thus, Florida law permits a very limited – if nonexistent- remedy in the public official context as opposed to private law. Even if a plaintiff could establish that a public official owed them a special fiduciary duty, they would still have to prove that the official exploited his or her position for private benefit – that is the essence of a breach of fiduciary duty claim.

### **The Department of Business and Professional Regulation**

The Florida DBPR, through various divisions, regulates and licenses businesses and professionals in Florida. The divisions established under DBPR include:

- The Division of Administration;
- The Division of Alcoholic Beverages and Tobacco;
- The Division of Certified Public Accounting;
- The Division of Drugs, Devices, and Cosmetics;
- The Division of Florida Condominiums, Timeshares, and Mobile Homes;
- The Division of Hotels and Restaurants;
- The Division of Pari-mutuel Wagering;
- The Division of Professions;
- The Division of Real Estate;
- The Division of Regulation;
- The Division of Technology; and
- The Division of Service Operations.<sup>22</sup>

The Department through its various divisions oversees and administers certain training programs related to the professions it regulates. Additionally, under the Condominium Act, Chapter 718,

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<sup>16</sup> *Id.*

<sup>17</sup> See *Maryelin Albertov v. Housing Authority of the City of Fort Lauderdale et al.*, 2018 WL 7108227 (Fla. Cir. Ct.) See also *Nussbaum v. Weeks*, 214 Cal. App. 3d 1580, 1598-99 (1990) (holding that the general manager of a water district, as a public official, owed a fiduciary duty to the residents of the water district generally, but not to each resident specifically).

<sup>18</sup> See e.g., *City of Coral Gables v. Hepkins*, 144 So. 385 (Fla. 1932).

<sup>19</sup> This has been termed the “Special injury rule” or “Rickman rule.”

<sup>20</sup> *Dep’t of Rev. v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981); see also *Rickman v. Whitehurst*, 74 So. 205, 207 (Fla. 1917) (Generally, for a taxpayer to have standing to challenge a government’s compliance with the law, the taxpayer must establish a “special damage to his individual interests, distinct from that of every other inhabitant”); *School Bd. of Volusia Co. v. Clayton*, 691 So. 2d 1066, 1068 (Fla. 1997) (requirement of special injury for taxpayer standing is “consistent with long established precedent”).

<sup>21</sup> *N. Broward Hosp. Dist. v. Fornes*, 476 So.2d 154 (Fla. 1985); *Rickman v. Whitehurst*, 73 Fla. 152, 74 So. 205 (1917).

<sup>22</sup> Section 20.165, F.S.

and the Cooperative Act, Chapter 719, F.S., require the Division of Florida Condominiums, Timeshares and Mobile Homes (Division) to provide training and educational programs for condominium and cooperative association board members and unit owners.<sup>23</sup> The training may include web-based electronic media, and live training seminars in various locations throughout the state. The Division is permitted to review and approve education and training programs for board members and unit owners offered by providers and must maintain and make available a current list of approved programs and providers.<sup>24</sup>

Elected and appointed members and directors of the board of a residential condominium association must certify in writing, within 90 days after being elected or appointed, to the secretary of the association that he or she:

- Has read the association’s declaration of condominium, articles of incorporation, bylaws and current written policies;
- That he or she will work to uphold such documents and polies to the best of his or ability; and
- That he or she will faithfully discharge his or her fiduciary responsibility to the association’s members.<sup>25</sup>

To meet the requirements of an educational curriculum for a condominium educational curriculum for a condominium education program under s. 718.112(2)(d)4.b., F.S., the program must cover at least four of the following topics:

- Budgets and reserves.
- Elections.
- Financial reporting.
- Condominium operations.
- Records maintenance, including unit owner access to records.
- Dispute resolution.
- Bids and contracts.<sup>26</sup>

Each condominium association which operates more than two units must pay the Division an annual fee in the amount of \$4 for each residential unit in the condominiums operated by the association.<sup>27</sup> The association is assessed a penalty of 10 percent of the amount due, if the fee is not paid by March 1.<sup>28</sup> Additionally, until the amount due, plus any penalty, is paid, the association will not have standing to maintain or defend any action in the courts.<sup>29</sup>

### III. Effect of Proposed Changes:

**Section 1** creates part IX of chapter 112, F.S., consisting of s. 112.89, F.S., to be entitled “Fiduciary Duty of Care for Appointed Public Officials and Executive Officers.”

<sup>23</sup> See Sections 718.501 and 719.501, F.S.

<sup>24</sup> Section 718.501(1)(j), F.S.

<sup>25</sup> Section 718.112(2)(d)4.b., F.S.

<sup>26</sup> Rule 61B-19.001, F.A.C.

<sup>27</sup> Section 718.501(2)(a), F.S.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

**Section 2** creates s. 112.89, F.S., to establish a fiduciary duty of care for appointed public officials and executive officers acting to the applicable entity in accordance with law he or she serves. The bill makes a statement of legislative findings providing that:

- Appointed public officials and executive officers acting on behalf of governmental entities owe a fiduciary duty to the entities they serve; and
- Codifying a fiduciary duty of care will require that appointed public officials and executive officers stay adequately informed of affairs, perform due diligence, perform reasonable oversight, and practice fiscal responsibility regarding decisions involving corporate and proprietary commitments on behalf of a governmental entity.

The bill includes the following definitions:

- “Appointed public official” means either a “local officer” as defined in s. 112.3145(1)(a)2. or a “state officer” as defined in s. 112.3145(1)(c)2. and 3;<sup>30</sup>
- “Department” means the DBPR;
- “Executive officer” means the chief executive officer of a governmental entity to which an appointed public official is appointed; and
- “Governmental entity” means the entity, or a board, a council, a commission, an authority, or other body thereof, to which an appointed public official or an executive officer is appointed or hired.

The bill establishes an express fiduciary duty of care for each appointed public official and executive director owed to the applicable entity in accordance with law he or she serves. The bill specifies that each appointed public official and executive officer has the duty to:

- Act in accordance with the laws, ordinances, rules, policies, and terms governing his or her office or employment;
- Act with the care, competence, and diligence normally exercised by private business professionals in similar corporate and proprietary circumstances;
- Act only within the scope of his or her authority;
- Refrain from conduct that is likely to damage the financial or economic interests of the governmental entity;
- Use reasonable efforts to maintain documentation in accordance with applicable laws; and
- Maintain reasonable oversight of any delegated authority and discharge his or her duties with the care that a reasonably prudent person in a like business position would believe appropriate under the circumstances.

The bill provides that the duty to maintaining reasonable oversight includes (i) becoming reasonably informed in connection with any decision-making function and when devoting attention to any oversight function; and (ii) keeping reasonably informed concerning the affairs of the governmental entity concerning the performance of a governmental entity’s executive officers or other officers, agents, or employees. While this provision creates express fiduciary duties for appointed public officials and state officers, it does not create a private cause of action or enforcement mechanism.

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<sup>30</sup> Approximately 16,785 individuals report under these provisions (approximately 15,195 reporting under subsection (1)(a)2); approximately 1,415 reporting under subsection (1)(c)2., and approximately 175 under subsection (1)(c)3.) Telephone Interview with Steven Zuilkowski, Attorney, Florida Commission on Ethics (January 30, 2020).

Section 2 also establishes training requirements. Each appointed public official and executive officer, beginning January 1, 2021, must complete a minimum of 5 hours of board governance training (Training) for each term served. For those holding office or employed by a governmental entity on January 1, 2021, he or she is required to complete 5 hours of Training before the expiration of his or her term of service. If the appointed public official or appointed executive officer is appointed, reappointed, or hired after January 1, 2021, the bill specifies that he or she shall complete 5 hours of Training within 180 days of the appointment, reappointment or hire. If an appointed public official or executive officer is employed under a contract that does not specify a termination date for employment, the public official or executive officer shall complete the 5 hours of training by January 1, 2022, and once every 4 years, thereafter for the duration of their employment.

The bill requires DBPR, by January 1, 2021, to either (i) contract for or approve a Training program that includes an affordable web-based electronic media option; or (ii) publish a list of approved Training providers. The bill provides that the Training programs, at a minimum, must include education materials and instruction related to:

- Generally accepted corporate board governance principles and best practices;
- Corporate board fiduciary duty of care legal analyses;
- Corporate board oversight and evaluation procedures;
- Governmental entity responsibilities;
- Executive officer responsibilities;
- Executive officer performance evaluations;
- Selecting, monitoring, and evaluating an executive management team;
- Reviewing and approving proposed investments, expenditures, and budget plans;
- Financial accounting and capital allocation principles and practices;
- New governmental entity member orientation; and
- The fiduciary duty of care and obligations imposed upon appointed public officials and executive officers pursuant to this section.

The bill allows governmental entities with annual revenues of less than \$300,000 to use in-house counsel or the unit of government that created the entity, to provide training as long as it comports with the minimum course content established by DBPR rule.

The bill sets forth Training compliance requirements. Each appointed public official and executive officer must certify, in writing or electronic form and under oath to DBPR that she or he has completed the Training, has read the laws and policies applicable to her position, will work to uphold such laws and policies, and will faithfully discharge his or her fiduciary responsibility. This certification must be submitted within 30 days of completing the Training.

The bill provides three exceptions to the training requirement for (i) appointed public officials and executive officers of governmental entities whose annual revenues are less than \$100,000; appointed officials who hold elected office in another capacity; or (iii) appointed public officials or executive officers who complete board governance training involving fiduciary duties or responsibilities which is required under any other state law.

The bill grants rulemaking authority to the DBPR.



The bill requires approval by a majority vote of the governing body of the governmental entity for the appointment of any executive officer or general counsel.

The bill provides standards for legal counsel requiring all legal counsel employed by a governmental entity must represent the legal interest and position of the governmental entity and not the interest of any individual or employee of the governmental entity, unless such representation is directed by the governmental entity. (emphasis added).

**Section 3** provides that the bill will take effect on July 1, 2020.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

Article VII, subsection (a) of section 18 of the Florida Constitution provides that cities and counties are not bound by general laws requiring them to spend funds or take action that requires the expenditure of funds unless certain specified exemptions or exceptions are met.

Under this bill, cities, and counties may incur costs relating to the board governance training. However, the mandate requirements do not apply to laws having an insignificant impact which, for impact, which, for Fiscal Year 2020-2021, is forecast at slightly over \$2.1 million.<sup>31,32,33</sup> The impact of this bill on cities and counties is indeterminate.

If such costs are determined to exceed \$2.1 million in the aggregate, the bill may be binding on cities and counties if the bill contains a finding of important state interest and meets one of the exceptions specified in State Constitution (e.g., applies to all persons similarly situated (i.e., cities, counties, and all other state and local governing entities with appointed officials) or enactment by vote of two-thirds of the membership of each house).

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

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<sup>31</sup> FLA. CONST. art. VII, s. 18(d).

<sup>32</sup> An insignificant fiscal impact is the amount not greater than the average statewide population for the applicable fiscal year times \$0.10. See Florida Senate Committee on Community Affairs, Interim Report 2012-115: Insignificant Impact, (Sept. 2011), available at <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-115ca.pdf> (last visited Dec. 20, 2019).

<sup>33</sup> Based on the Florida Demographic Estimating Conference's December 3, 2019, population forecast for 2020 of 21,555,986. The conference packet is available at <http://edr.state.fl.us/Content/conferences/population/ConferenceResults.pdf> (last visited Dec. 20, 2019).

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector will experience an indeterminate positive fiscal impact to the extent DBPR contracts with private entities for the required Training.

C. Government Sector Impact:

The DBPR will experience a slightly negative fiscal impact as it uses resources to implement the provisions of the bill related to Training and processes the certification of completed Training. Additionally, governmental entities that fall under this bill will be required to expend funds in providing the Training to its appointed public officials or executive officers.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates the following section of the Florida Statutes: 112.89.

**IX. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Governmental Oversight and Accountability on February 10, 2020:**

The committee substitute:

- Revises the definition of “executive officer.”
- Clarifies the applicable fiduciary duty of care standard.

- Amends the provision regarding the duty to maintain reasonable oversight to provide that it be discharged with the care that reasonably prudent person in a like business position would believe appropriate under the circumstances.
- Provides for training requirements for appointed public officials or executive officers employed by a governmental entity under a contract without a termination date.
- Makes technical changes to the minimum education materials to be included in the training program.
- Makes those appointed public officials or executive offers who complete board governance training involving fiduciary duties or responsibilities as required under any other state law exempt from the training requirements under the bill.
- Amends the legal counsel standards provision.

**B. Amendments:**

None.