

# Department of Finance and Administration

## Legislative Impact Statement

**Bill: HB2132**

**As Engrossed: 3/28/2013**

**Bill Subtitle: TO ESTABLISH THE OFFICE OF GOVERNMENT ACCOUNTABILITY AND VIABILITY TO ADMINISTER THE ARKANSAS WHISTLE-BLOWER ACT, ? 21-1-601 ET SEQ.**

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### **Basic Change :**

Rep. Hammer,

The bill provides for creation and staffing of the Office of Government Accountability and Viability and provides that the Governor, Senate President Pro Tempore, and Speaker of the House are to jointly select the managing attorney to be responsible for the office operations. The operating expenses of the office are to be paid either by (1) a monthly transfer from DFA of a portion of net state sales and use tax collections from state agencies to be deposited into a cash fund; or (2) a loan of up to \$250,000 from the Budget Stabilization Trust Fund and deposited into a cash fund.

### **Revenue Impact :**

None

### **Taxpayer Impact :**

None

### **Resources Required :**

\$250,000 per year to pay salary and expenses of the office.

### **Legal Analysis :**

HB2132, as engrossed H3-28-13 provides revenues to the Office of Government Accountability and Viability (OGAV) without subjecting the revenues to appropriation, contrary to Article 5, § 29 of the Arkansas Constitution, which states that all money disbursed from the state treasury must be based on a legislative appropriation. HB2132 attempts to avoid the appropriation issue by diverting sales tax revenues and depositing them as cash funds before they are deposited into the state treasury.

The Arkansas Supreme Court has held that the appropriation requirement does not refer to cash funds since this money has never reached the state treasury. *Gipson v. Ingram*, 215 Ark. 812 (1949). In *Gipson*, the Court held that "cash funds" are those received by state agencies and institutions from sources other than taxes, as the term "taxes" is ordinarily used (215 Ark. at 817). In *Miles v. Gordon*, 234 Ark. 525, 353 S.W.2d 157 (1962), the Court, citing *Gipson*, held that interest collected on taxes should be distinguished from the taxes themselves and could be deposited as cash funds. The logical conclusion of this finding is that the tax portion must be deposited in the state treasury subject to the appropriation requirement.

This bill directs the diversion of sales and use taxes from the state treasury and the normal general revenue stream, using the tax revenue for purposes not subject to appropriation. This diversion could be deemed a misapplication of public funds and could be challenged as an illegal exaction under Article 16, § 13 of the Arkansas Constitution.

The bill authorizes the OGAV managing attorney to develop and adopt rules to administer the act as well as an education program for public employers and employees. However, the bill provides no direction or other criteria as to how to exercise this authority, which on its face raises constitutional questions of unlawful delegation. Also if OGAV is to "administer" the Arkansas Whistleblower Act (AWBA), it must be determined how the office will work within existing AWBA provisions. Currently, the AWBA designates an "appropriate authority" to investigate whistle-blower complaints [Ark. Code Ann. Ark. Code Ann. § 21-1-602(2)], but the term is broad and indeterminate and can apply to a number of state and local entities and officials, such as a state agency, the Attorney General, the

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Ethics Commission, or a municipal governmental department. The individual whistle-blower has the discretion to choose an appropriate authority for the purpose of making a protected communication. The bill does not provide any guidance as to whether OGVA can work independently of an AWBA "appropriate authority," or as to what part OGVA would play in existing AWBA procedures concerning judicial relief and the new whistle-blower reward system established under Act 211 of 2013.

Certain provisions of HB2132 raise questions of separation of powers under the Arkansas Constitution. Article 4, § 2 of the Arkansas Constitution, the basis for the separation of powers doctrine, states that no branch of government shall exercise any power belonging to either of the others. The bill provides that the managing attorney of OGAV will be selected by a majority vote of a group consisting of the Governor, Senate President Pro Tempore and the Speaker of the House. It is unclear under the bill whether the managing attorney will be an employee of the executive branch or the legislative branch. This could have the effect of a member of one branch effectively hiring an employee of another branch, an exercise of power by a member of one branch that is reserved to another branch. Questions concerning personnel decisions involving the managing attorney and oversight of the managing attorney's daily activities are neither clearly within the executive branch or the legislative branch. This presents a unique separation of powers issue.

It should also be noted that the Arkansas Code section number established in the bill (21-1-610) has already been used in Act 211 of 2013.