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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/29/13

SPONSOR Espinosa LAST UPDATED \_\_\_\_\_ HB 114

SHORT TITLE Prohibit Enforcement of Federal Gun Laws SB \_\_\_\_\_

ANALYST Trowbridge

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	Unknown*	Unknown*	Unknown*	Unknown*	Unknown*	

(Parenthesis ( ) Indicate Expenditure Decreases)

\* See Fiscal Implications

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Public Defender Department (PDD)  
 Administrative Office of the Courts (AOC)  
 Administrative Office of District Attorneys (AODA)  
 Attorney General's Office (AGO)  
 Department of Public Safety (DPS)

### SUMMARY

#### Synopsis of Bill

House Bill 114 would criminalize, as a third degree felony, any enforcement or attempt to enforce federal law (in any form) that deals with personal firearms, firearm accessories or ammunition that are owned or manufactured in New Mexico that remain exclusively within the borders of New Mexico. It also provides that the Attorney General may defend any New Mexico resident prosecuted by the United States Government for violation of federal law relating to the manufacture, sale, transfer or possession of a firearm or ammunition owned or manufactured and retained exclusively within New Mexico borders. It further provides that any federal law, rule, regulation or order created or effective after July 1, 2013 that attempts to ban or restrict ownership of semi-automatic firearms or magazines, or requires the firearm, magazine or accessory to be registered in any manner is unenforceable in New Mexico. Fully automatic weapons and weapons designed to fire rocket propelled grenades and other explosive projectiles are exceptions to the ban on enforcement of federal law.

## **FISCAL IMPLICATIONS**

The Attorney General's Office (AGO) indicates that this bill, if enacted, could result in an increase in criminal matters filed in courts of jurisdiction. It could also result in additional investigative tasks to be conducted by state and local law enforcement personnel.

The Administrative Office of District Attorneys (AODA) states that if HB 114 becomes law, then it is virtually certain to invite litigation from the federal government and other interested persons. AODA states that it would also result in expenses for the Attorney General if he takes on the defense of a person prosecuted by the federal government for violation of federal firearms law. The AODA adds that if HB 114 becomes law, there are new categories of crimes for state prosecution that could increase the caseloads in District Attorney offices, which might result in them being called upon to defend their prosecutions against federal court challenges.

The Public Defender Department (PDD) states that while it is likely that the PDD would be able to absorb some new cases under the proposed law, any increase in the number of prosecutions will bring a concomitant need for an increase in indigent defense funding.

The Administrative Office of the Courts (AOC) notes there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law, commenced prosecutions, and any constitutionally-based challenges to the proposed law. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

## **SIGNIFICANT ISSUES**

The Attorney General's Office (AGO), the Department of Public Safety (DPS) and the Association of District Attorneys (AODA) indicate that the most likely obstacle to this bill is the doctrine of federal preemption, which can be characterized as a product of the United States Constitution's Supremacy Clause (Art. VI) and its Commerce Clause (Art. I, Section 8). AGO notes that the federal government regulates most aspects of the manufacture and transfer of firearms, notwithstanding existing state laws regarding firearms. The federal government's authority to so regulate is based on the notion that firearms are inexorably a part of interstate commerce. Federal authority to regulate firearms based on interstate commerce is not absolute - recent U.S. Supreme Court jurisprudence has signaled that the Commerce Clause may not always justify federal regulation of things and activities ostensibly in interstate commerce. However, this recent trend has not produced a clear precedent holding whether and/or under what circumstances the federal government can regulate firearms based solely on interstate commerce.

Further, the AGO states that while the bill clearly limits its scope to firearms owned or manufactured with the state, it will be difficult to demonstrate that any firearm is truly a product solely of New Mexico origin. Mere ownership of a firearm previously in interstate commerce would constitute an even more tenuous status to fend off federal regulation.

The AGO also observes that numerous states have enacted similar laws. The version of the law enacted into law in the State of Montana is presently being litigated before the United States Court of Appeals for the 9th Circuit. It is not believed that any other state with a similar law is presently litigating before any level of the federal courts.

Additionally, DPS indicates that the bill may be in conflict with NMSA 1978, Section 29-3-3 which requires New Mexico state police to cooperate with other states and the federal government in the process of criminal investigation and identification and NMSA 1978, Section 29-1-10 which authorizes law enforcement participation in the Federal Law Enforcement Assistance Act of 1965. The DPS indicates that its Law Enforcement Program has a number of agreements with various federal law enforcement agencies that could be affected by this proposed legislation. The state's ability to participate in some federal operations could be impacted. Some agreements have monetary value to the state that could be lost.

Also, the New Mexico Public Defender Department (PDD) observes that States are precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance. *See Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 115, 112 S.Ct. 2374. There would be Supremacy Clause issues regarding the holding unenforceable of federal law. U.S. Const. Art. VI. *See Arizona v. United States*, 132 S.Ct 2492 (2012)

The Administrative Office of the Courts (AOC) observes that Section 10-8-3 (G) NMSA 1978 defines "public officer" or "public official," as used in the Per Diem and Mileage Act, to mean, "...every elected or appointed officer of the state, local public body or any public post-secondary educational institution. Public officer includes members of advisory boards appointed by any state agency, local public body or public post-secondary educational institution." HB 114 includes "employees," within the definition of "public officer," whereas the noted definition does not.

The AODA also notes that the United States Supreme Court has invalidated some federal and local laws dealing with firearms, usually because they were contrary to the Second Amendment to U.S. Constitution (*See, District of Columbia v. Heller, McDonald v. City of Chicago*) or forced local officials to carry out a federal responsibility dealing with background checks for firearms purchases. (*See, Printz v. United States*). Succeeding on any similar claim based on this bill seems unlikely.

AODA adds that the bill would remove practically all federal controls relating to persons with guns in New Mexico. Those restrictions include: age (children could possess guns, including assault weapons), fugitives, persons using or addicted to illegal drugs, illegal aliens, persons with a valid court order prohibiting them from stalking, harassing or intimidating an intimate partner or their children, persons convicted of domestic violence, persons who were dishonorably discharged from the military and persons who have renounced their citizenship, and even persons with felony convictions

AODA also indicates that New Mexico law currently prohibits felons from possession of a firearm (See, Section 30-7-16, NMSA 1978) just like federal law does (See, 18 U.S.C. 922[g][1]). If a state or federal officer or firearm dealer attempted to verify whether the person wanting a firearm is a convicted felon—to make sure the persons involved—whether seller, dealer or donor--couldn't be prosecuted as an accessory to a state felon in possession charge—they would, arguably, be in violation of this proposed legislation because federal law is similar on felons possessing firearms.

Further, the AODA states that the bill creates some practical problems. It applies only to "a personal firearm or firearm accessory," or ammunition, that "remains exclusively within the borders of New Mexico." There is no definition of what makes a firearm, or accessory, a

“personal” firearm. Although someone might claim the firearm or accessory was personal and obtain a weapon or ammunition that is otherwise prohibited by federal law, they could then immediately transfer it to someone who might not be permitted to have it because of their age, prior criminal history, drug usage, mental status, etc. An easy defense for someone who might be prosecuted under this proposed legislation is to claim it was reported that the item was not personal. The proposed legislation is also limited to banning enforcement of laws regarding firearms or accessories or ammunition that “remains exclusively within the borders of New Mexico.” The proof problems inherent with that element are probably insurmountable.

The bill provides that the Attorney General (“AG”) may defend a New Mexico resident prosecuted by the federal government for violation of federal firearms law of a firearm, accessory or ammunition retained exclusively within the borders of New Mexico. The proof problems stated above apply in this portion as well. There is no standard stated on which cases the AG should defend, and no information on such fundamental matters on whether the AG should be paid for handling the defense or cover the costs related to the defense. Since the AG is empowered to prosecute criminal cases if a district attorney does not proceed, if the AG determines it is appropriate to do so (See, Section 8-5-3, NMSA 1978), he could be called upon to prosecute some persons in state court for enforcing federal law, yet called upon to defend them or their associates in federal court for not doing so.

The Attorney General’s Office indicates this bill, if enacted, could result in an increase in criminal matters filed in courts of jurisdiction. It could also result in additional investigative tasks to be conducted by state and local law enforcement personnel.

The Department of Public Safety states that officers would be required to enforce this proposed legislation, adding that this could become problematic.

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

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

The AGO points to HB77 – “FIREARMS TRANSFER ACT” (Miguel P. Garcia), which would impose requirements and limitations on the transfer of firearms in certain situations. These requirements and limitations appear to mirror federal law, which would basically de-federalize the most common firearm laws and regulations and enumerate them as state law. If both bills are passed into law, the effect of the instant bill could be gutted in that it directs its application to federal firearms laws and regulations only.

### **TECHNICAL ISSUES**

DPS notes that this bill addresses enforcement of federal gun laws only. Should the legislature pass similar or more restrictive gun laws, this bill would not be effective against the legislation.

**OTHER SUBSTANTIVE ISSUES**

The AGO indicates that if enacted into law, this bill could create a “Catch-22” situation where a holder of a Federal Firearms License (FFL) would be faced with a choice of obeying state law while violating federal law and *vice versa*. State, local, and even federal law enforcement personnel would confront an equivalent Morton’s fork.

**AMENDMENTS NEEDED TO IMPROVE THIS BILL**

The Attorney General’s Office suggests the following amendments to improve HB 114:

- Remove the provision barring the application of federal laws and regulations to firearms, accessories, and ammunition that is merely “owned” in New Mexico, irrespective of the origins of the item in question.
- Remove criminal penalties.
- Require some means of demonstrating that a firearm, firearm accessory, or ammunition is solely manufactured within the borders of the State of New Mexico.
- Remove Section C as providing private legal representation to federal criminal defendants is not one of the duties enumerated in §8-5-2 NMSA.

TT/svb