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FISCAL IMPACT REPORT

ORIGINAL DATE 2/8/16

SPONSOR Garcia LAST UPDATED _____ HB 51

SHORT TITLE Firearm Transfer Act SB _____

ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate	Indeterminate		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB91

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General's Office (AGO)
 Department of Public Safety (DPS)
 Public Defender Department (PDD)
 Administrative Office of the District Attorneys (AODA)
 New Mexico Sentencing Commission (NMSC)
 New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

House Bill 51 proposes to create the Firearms Transfer Act. The new act would require a background checks for the transfer (sale, transfer, delivery or passing possession) of firearms at a gun show. Vendors at gun shows that are not a federal firearms licensee are not allowed to transfer a firearm to person that is not a federal firearm licensee. The bill requires background checks to be conducted by a federal firearm licensee. If the check reveals that the transferee is prohibited from receiving a firearm, the federal firearms licensee shall inform the vendor and transferee of that fact and the transfer must not occur. The background check requirement does not apply to the transfer of antique or relic firearms. However, antique or relic firearm does not include those which can be readily converted to use fixed ammunition.

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A person organizing or promoting a gun show will be required to post a notification of background checks at the entrance of the venue, have a federal firearms licensee on the premises to conduct background for a fee not to exceed \$25.

A person who unlawfully transfers a firearm at a gun show is guilty of a misdemeanor. A transferor or federal firearm licensee is immune from civil liability unless the individual knows or should reasonably know that the transferee will commit a crime with a firearm or will give it to another person prohibited from purchasing or receiving a firearm.

The AOC would be required to notify the Federal Bureau of Investigation (FBI) National Instant Criminal Background Check System (NICS) results of court proceedings addressing the eligibility to possess or receive firearms. Individuals may petition the court for restoration of their rights to possess a firearm should their name be reported to the FBI. AOC would be responsible to report such restoration of rights to the FBI. Information submitted is limited to that which can be used to identify the person.

The bill provides that no record created or maintained pursuant to the FTA shall be subject to inspection or disclosure pursuant to the Inspection of Public Records Act (IPRA).

Finally, the Act is repealed on the effective date of any federal law requiring a background check for the transfer of a firearm, other than a firearm defined in 26 USC Section 5845 (a), between two persons who are not federal firearms licensees and who reside in the same state, whether or not the transfer takes place at a gun show; or on the effective date of any federal law which expressly exempts the state from enforcing the Act (other than the repeal section).

FISCAL IMPLICATIONS

The fiscal impact of HB51 is indeterminate.

SIGNIFICANT ISSUES

AOC reports that HB51 codifies its practice of de novo redetermination absent legislative direction, contingent repeal if there are changes to the federal law and finally codifies AOC's reporting practice to the FBI.

AODA points out that it can take up to three days for the background check to be completed and results received. The bill states that if the check reveals that the transferee is prohibited from receiving a firearm the transfer shall not take place. It is not clear what can take place in the interim, i.e. can funds be exchanged, or can a firearms transfer take place, albeit subject to rescission if the recipient is found to be prohibited from gun possession or ownership? A vendor might reasonably argue they had a background check done as required and had no indication when it was commenced that the prospective recipient would not be allowed to possess or receive a firearm. Some vendors could also make a connection at a gun show with a prospective purchaser and conduct their transactions in another place or time instead of going through the process to obtain a federal firearms transfer background check. The Act would only apply to a gun show, defined as an event in which more than 25 firearms are on site and available for transfer, so "private" events like street corner sales and other potential affairs with 25 or fewer firearms available would not be covered. The criminal violations listed are all misdemeanors or petty misdemeanors that carry relatively light punishments, with no increase in punishment,

regardless of the number or violations and whether it is a first offense or subsequent offense(s). The only inhibition against selling or transferring a firearm to a “straw man” purchaser acting to obtain a gun for someone who is ineligible to receive or possess a firearm is presumptive immunity from civil liability unless the transferor knew or had reason to know the firearm was going to wind up with an ineligible person.

AODA further states that it is unclear whether someone who is not mentally competent to stand trial (See, Sec. 31-9-1, et seq., NMSA) would be considered a “mental defective” who must be reported to the national criminal background check system. That could affect which court hears and decides a petition for redetermination of eligibility since both district court and metropolitan court can find someone mentally incompetent to stand trial. The bill is also unclear on the procedure stating only that “A copy of the petition (seeking a redetermination of the person’s mental condition for the purpose of restoring the person’s right to receive or possess any firearm or ammunition) shall be served upon the office of the attorney general and upon all parties to the proceeding resulting in a court order, judgment or verdict” that the person is a mental defective or committed to a mental institution. Among other things, it is not specified if the other parties will be entitled to participate in the hearing—and if so, in what manner. It is unclear if the local prosecutor and/or victims or persons acting on behalf of victims be included as “parties.” The bill also does not indicate whether the hearing would be public (the record would be sealed unless the decision is appealed by the petitioner), or even what the standard of proof should be. The only guidance specified is a requirement for a finding by the court, “that the person will not be likely to act in a manner dangerous to public safety,” and restoration of their firearm possession rights “is not contrary to the public interest.” Although the petitioner can appeal the court’s decision for restoration of their right to receive or possess a firearm or ammunition, there is no similar appeal provision for the attorney general or the other parties entitled to notice.

HB51 provides for repeal if a federal law is passed requiring a background check for transfer of a firearm (except sawed-off shotgun, machine gun, etc.) if the two persons involved are not federal firearms licensees and reside in the same state. That means the entire law could be repealed but leaves firearms transactions without background checks for persons who do not reside in the same state. It seems likely persons would cross state lines to participate in gun shows and they would not be required to get a background check of their prospective purchasers before transferring any firearm(s).

According to DPS this bill will support the sharing of mental health records in compliance with the 2008 NICS Improvement Act by Codifying New Mexico Administrative Office of the Courts reporting disqualifiers to the Federal Bureau of Investigation (FBI), National Instant Background Check System (NICS); and it will create a relief mechanism for persons entered into the Denied Persons file in NICS through the judicial process. If granted then individuals would be removed from the file.

DOH reports that as of August 2015, 10 states have enacted legislation requiring a background check of a prospective buyer of any firearm at a gun show, and six states have enacted similar legislation for the purchase of a handgun (<http://www.governing.com/gov-data/safety-justice/gun-show-firearms-background-checks-state-laws-map.html>).

In 2015, there were a total of 147,912 NICS firearm background checks conducted for firearm transfers in New Mexico

(https://www.fbi.gov/about-us/cjis/nics/reports/nics_firearm_checks_-

[month_year_by_state.pdf](#)). In a table of federal denials listing reasons why the NICS Section system denied gun transfers between November 30, 1998 and December 31, 2015, 54.9% were because of a transferee’s criminal history; 11.6% were because the transferee was a fugitive from justice; 9.5% were because the transferee had a misdemeanor domestic violence conviction; 8.4% were because the transferee was an unlawful user of or addicted to a controlled substance, 4.0% were because the transferee was under a restraining order for domestic violence, and 1.7% were because the applicant had been adjudicated for a mental health diagnosis (NICS Federal Denials, FBI at <https://www.fbi.gov/about-us/cjis/nics>). Reporting of information from court proceedings about a person’s eligibility to receive or possess a firearm to NICS could potentially reduce and prevent firearm injuries and deaths in New Mexico.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to House Bill 91- Background Checks Reporting for Firearms

TECHNICAL ISSUES

According to AOC, HB51 applies to transfers at “gun shows” defined as an event at which more than 25 firearms are present and offered for sale. By implication, a transfer of 25 or fewer firearms is a private sale not subject to the background check required by HB 51. This distinction could be made explicit to avoid possible confusion and litigation.

OTHER SUBSTANTIVE ISSUES

On January 4, 2016, President Obama announced a series of executive actions aimed at reducing gun violence. The White House Fact Sheet states that the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) has clarified that a person engaged in the business of dealing in firearms must be licensed as a federal firearms dealer, even if they only conduct business through the internet or at gun shows, just like a dealer whose business is run out of a traditional brick-and-mortar store. The Fact Sheet noted that quantity and frequency of sales are relevant indicators but there is no specific threshold number of firearms purchased or sold that triggers the licensing requirements. They noted that courts have upheld convictions for dealing without a license when as few as two firearms were sold or when only one or two transactions took place, when other factors are present. The federal statute states that “...dealer means (A) any person engaged in the business of selling firearms at wholesale or retail, (B) any person engaged in the business of repairing firearms or making or fitting special barrels, stocks or trigger mechanisms, or (C) any person who is a pawnbroker.” [See, 18 U.S.C. 921(a)(11)]

The White House also announced that ATF is finalizing a rule that makes clear persons will no longer be able to avoid background checks by buying guns and other items through a trust or corporation. The announcement stated that in 2015 the National Instant Criminal Background Check System (“NICS”) processed more than 22.2 million background checks and, by law, a gun dealer can complete a sale to a customer if the background checks comes back clean or has taken more than three days to complete. The FBI is planning to hire more than 230 additional NICS examiners and other staff members to assist with processing mandatory background checks and will utilize new digital technology to process background checks 24 hours a day, seven days a week.

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The White House also reported that less than half the persons with diagnosable mental health problems receive the treatment they need and proposed a new \$500 million investment to aid them. They also reported the Social Security Administration will, with the Department of Justice, issue rules regarding approximately 75,000 people each year who have documented mental health issues and receive disability benefits because of their mental impairment, or have been found by a state or federal court to be legally incompetent.

NMSC reports that under the Gun Control Act of 1968, federal law clearly defined private sellers as anyone who sold no more than four firearms per year. The 1986 Firearm Owners Protection Act lifted that restriction and loosely defined private sellers as people who do not rely on gun sales as the principal way of obtaining their livelihood.

“License to Buy and Sell Firearms, Guidance to help you understand when a Federal Firearms License is required under federal law” by the Bureau of Alcohol Tobacco and Firearms and Explosives provides guidelines and definitions that can be used to clarify federal requirements of those dealing in firearms.

According to the [Law Center to Prevent Gun Violence](#) there are 10 states and the District of Columbia that require universal background checks for all firearm transfers wherever the transfer takes place. Six other states do the same, but only for handguns. Eleven 11 states impose additional requirements for background checks for gun show sales of firearms: AL, CA, CO, CT, IL, ME, NY, OK, OR, TN, VA.

Since HB 51 provides for records created or maintained to be exempt from IPRA, it may be advisable that the IPRA statutory exceptions found at Section 14-2-1 NMSA 1978 be amended to include the new exception listed in the bill.

ABS/jle