

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website ([www.nmlegis.gov](http://www.nmlegis.gov)) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

SPONSOR Padilla ORIGINAL DATE 2/6/19  
LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_  
SHORT TITLE Firearm Transfer Act SB 201  
ANALYST Edwards

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

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		No Fiscal Implications				

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to House Bill 8, Senate Bill 8, House Bill 40.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Department of Health (DOH)

Department of Public Safety (DPS)

New Mexico Attorney General (NMAG)

Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of Bill

Senate Bill 201 creates the “Firearm Transfer Act,” requiring a firearm transfer background check on any gun transfer unless the gun is an antique or relic firearm. The bill prohibits a person who is not a federal firearms licensee (FFL), as defined in the bill, from transferring or attempting to transfer a firearm unless the transfer is conducted through a FFL. If the background check reveals the transferee is prohibited from receiving a firearm, the transfer shall not take place. The bill provides immunity from civil liability for those who fulfill the requirements of the bill. The bill makes the unlawful transfer of a firearm without the required background check a misdemeanor pursuant to 31-19-1 NMSA 1978. No records created or maintained pursuant to this Bill shall be subject to the Inspection of Public Records Act (IPRA).

The bill requires the Administrative Office of the Courts to obtain and electronically submit information from court proceedings related to eligibility to the Federal Bureau of Investigation’s (FBI) national instant criminal background check system. AOC must also report to the FBI changes in a person’s eligibility and if a person is deemed unfit to possess a firearm due to

mental health issues. Pursuant to federal law, individuals may petition the court making said determination, or any other court of competent jurisdiction, to redetermine their mental condition to restore eligibility. A copy of this petition shall be served on the Office of the Attorney General and all parties to the resulting court order. If the court determined the person is not likely to act in a manner that endanger public safety or contrary to public interest, the court may restore the individual's eligibility. AOC must report to the FBI if a person's eligibility is restored.

The bill will be repealed on the effective date of a federal bill that requires background checks between to persons who are not FFLs and who are not transferring a firearm as defined in 26 U.S.C 5845(a) and that expressly preempts the state from enforcing the provisions of the act.

## **FISCAL IMPLICATIONS**

There will be 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 and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase the caseloads in the courts, thus requiring additional resources to handle the increase.

## **SIGNIFICANT ISSUES**

AOC submitted the following detailed analysis of the bill and the agency's current procedures:

Although federal law requires licensed firearm dealers to perform background checks on potential purchasers, it does not require unlicensed sellers to do so. Senate Bill 201 appears to address this issue by requiring all firearm sales in New Mexico to involve a background check by a federal firearms licensee (FFL). Twenty states and Washington DC have extended the background check requirement beyond federal law to include at least some private sales. Eleven states (California, Colorado, Connecticut, Delaware, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington) and the District of Columbia require universal background checks at the point of sale for all sales and transfers of all classes of firearms, whether they are purchased from a licensed dealer or an unlicensed seller.

Section 3 – including “leasing or otherwise transferring” to the definition of a federal firearms licensee may duplicate the definition of “transfer” in this same section since transfer is defined in Senate Bill 201 as the “sale, lease, delivery or other passing of possession or control of a firearm”. It may be useful to indicate that antique firearms are exempt from the definition of firearm in this section to better align with the federal definition of a firearm and with section 5 of Senate Bill 201.

Section 5 – it may be helpful to remove “relic firearm” as being excluded from the requirements of the firearm transfer act since federal definitions typically use the phrase “antique firearm”.

Section 9 contains several significant issues since Senate Bill 201 appears to duplicate section 34-9-19 NMSA 1978 but contains significant omissions and changes to the existing statute. The following issues in [the] section are separated by subsection as follows:

A. For the sake of consistency, it may be helpful to include the term “ammunition” after

“firearm” when discussing a person’s eligibility to possess a firearm since federal law prohibits individuals from possessing both firearms and ammunition and other sections of Senate Bill 201, such as subsections D, E, F and G of section 9, reference both firearms and ammunition.

- B. Including a specific reference to 18 U.S.C 922 (d)(4) and (g)(4) in Senate Bill 201 may be problematic if there are any future changes to federal firearms laws, in particular relating the mental health disabilities. Since the federal law uses the outdated term “mental defective” it is highly likely that the federal definition is likely to change in the future.
- C. The omission in Senate Bill 201 of the court’s requirement to notify an individual adjudicated mentally defective and reported to the FBI for inclusion in the NICS database appears to deviate significantly from the current requirements in statute 34-9-19 NMSA 1978. It may be beneficial to include the last portion of section 34-9-19(C) NMSA 1973 which requires the AOC to provide notice to the individual that they are prohibited by federal law from owning or possessing a firearm or ammunition but may be able to regain this right if the mental health condition changes and improves in the future.
- D. Senate Bill 201 omits all references to concealed handgun license and only focuses on the mental health condition as it relates to restoring a person’s right to receive or possess a firearm or ammunition.
- E. Senate Bill 201 completely omits section 34-9-19(E) NMSA 1978 which lists the type of evidence that a court should consider when determining whether to a person’s right to possess a firearm due to a previous mental health court order. Omitting the types of evidence a court may consider will likely create confusion for the petitioner and not provide the court with sufficient guidance on the type of evidence that should be considered in a restoration hearing.
- F. Senate Bill 201 completely omits any requisite standard for the court to find whether or not a person’s right to possess a firearm should be restored. Section 34-9-19(F) NMSA 1978 sets the standard as a “preponderance of the evidence”. If Senate Bill 201 is silent as to the type of standard that should be applied, this will likely result in confusion as to the necessary standard that should be applied in restoration hearings. In addition, this subsection requires that these types of hearings be sealed, which is not included in section 34-9-19 NMSA 1978, and provides for an appellate process, that must be on the record. These additional requirements in Senate Bill 201 are likely to create an additional burden on the judiciary’s already limited resources.
- I. Senate Bill 201 creates a greater protection for the information being transmitted by defining that the information is “confidential” and may only be disclosed to the person who is the subject of the report, or an authorized representative. There may be an issue with this language as drafted because the AOC does not issue a report to the FBI, but rather only submits general information, such as the name, date of birth and gender of the person that should be added to the NICS database. The AOC electronically transmits information to the FBI by conducting a query on the court’s case management system. The AOC does not provide the FBI with any court documents or create a report for the FBI. As drafted, the AOC would not be able to comply with this subsection of section 9 because the “report” does not exist.
- J. Senate Bill 201 presumes that an individual would be able to “inspect and correct information contained in such report”. As discussed above, the AOC does not submit any type of report to the FBI.
- K. Senate Bill 201 presumes that an individual would be able to inspect and correct

information “contained in such report”. As discussed above no such reports exist within AOC.

DOH provided the following statistics on firearm deaths:

In the United States, 39,733 persons died from a firearm injury in 2017, and the firearm mortality rate was 12 per 100,000 population (<https://wonder.cdc.gov/>). In New Mexico, 394 residents died from a firearm injury in 2017, and the firearm mortality rate was 18 per 100,000 population (NM IBIS website: <http://ibis.health.state.nm.us/>). In 2017, 261 New Mexicans died by suicide by firearms, accounting for 66 percent of all resident firearm deaths. There were 119 homicides by firearms in 2017 among state residents accounting for 30% of firearm deaths. There were six firearm deaths in 2017 determined to be accidental, and eight firearm deaths where the intent could not be determined (<http://ibis.health.state.nm.us/>).

[According to the [FBI](#),] [i]n 2018, there were a total of 140,897 background checks conducted for firearm transfers in New Mexico.

According to the Law Center to Prevent Gun Violence, in 2017, New Mexico ranked 29<sup>th</sup> in the nation for gun law strength, receiving a grade of “F” according to the Center’s report card system, and ranks in the top ten states for gun-related death rate (<http://lawcenter.giffords.org/scorecard/>). New Mexico does not currently require a background check prior to the transfer of a firearm between private parties. A 2016 study in [The Lancet](#) found that background checks were associated with both reduced overall firearm mortality and reduced firearm homicides.

Nineteen states and Washington D.C. have enacted laws that extend the background check requirement beyond federal law to at least some private sales. Nine states, including California, Nevada, and Colorado, [require](#) background checks at the point of sale for all sales and transfers of all classes of firearms regardless of where they are purchased. A background check law could potentially reduce and prevent firearm injuries and deaths in New Mexico.

The NMAG explains the bill requires their office to receive notice when an individual challenges their eligibility for reasons relating to their mental health status and asks for a redetermination of said status. There is no other direction as to what the NMAG’s office is required to do at that time or whether the NMAG’s office will defend the state in the matter.

The NMAG also explains:

Issues brought up in previous analysis of similar legislation, specifically House Bill 50 (2017), were that Senate Bill 201 would impact law enforcement by requiring law enforcement to monitor and enforce firearm transfer violations. Senate Bill 201 differs slightly in that it appears to create consequences to an unlawful transfer after another crime is committed, bringing to the attention of law enforcement and prosecution the manner in which the firearm was acquired and whether the proper background checks were performed in the transfer. Senate Bill 201 creates both criminal and civil consequences for violating the proposed law.

Under Section 6(B), making a transferor liable for proximate and actual damage caused by the use or handling of a firearm when the transferor violated the provisions of this act may apply to a number of situations. With this, the use or handling of the firearm that results in damage to the transferee seems to be covered under this bill, which may or may not be the intent of the writers.

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

Related – House Bill 8 – requires the same type of background check for firearm sales, but does not provide for civil penalties; allows transfers between law enforcement officers; does not apply to law enforcement agencies; and does not have exceptions for certain types of firearms. There is no provision for record-keeping in HB 8, including IPRA exceptions.

Related – House Bill 40 – “Gun Show Firearm Transfer Act” is similar to Senate Bill 201, except that it applies specifically to transactions that take place at Gun Shows. HB 40 provides for exceptions for federal firearm licensees, for antique and special firearm exceptions, record-keeping and IPRA exceptions, and makes the transfer of a firearm outside the provisions of HB 40 a misdemeanor.

Related – Senate Bill 8 – “Firearm Sale Background Check” makes it a misdemeanor to conduct the sale of a firearm without a federal instant background check. This bill is akin to HB 8 in that it is very limited by comparison to Senate Bill 201.

TE/gb

# **New Mexico Administrative Office of the Courts Reporting to the National Instant Criminal Background Check System (NICS)**

## **FEDERAL LAW**

Subsection (g) of Section 922 of Title 18, U.S.C. describes nine categories that prohibit an individual from being able possessing or receiving a firearm or ammunition under federal law.

In 2016 the New Mexico legislature enacted a new law that imposes firearm-related notice and reporting requirements as they relate to a person who has been “adjudicated as a mental defective” or “committed to a mental institution.” Those terms are used in HB 336 and are taken from the Brady Handgun Violence Protection Act of 1993. *See* 18 U.S.C. § 922(g)(4) (declaring it a federal crime for a person who has been “adjudicated as a mental defective” or “committed to a mental institution” to receive or possess a firearm or ammunition); 27 C.F.R. § 478.11 (defining the terms “adjudicated as a mental defective” and “committed to a mental institution”). *See* NMSA 1978, Section 34-9-19, “Reporting to the national instant criminal background check system.”

## **REPORTING BY AOC**

Since 2010, AOC has reported four different case types to NICS:

- felony convictions
- domestic violence protective orders
- involuntary commitments
- misdemeanor violence convictions

AOC currently submits data to electronically to NICS on a nightly basis and includes the following information: New Mexico’s Unique Identifier; last name, first name, middle initial, gender, date of birth, height, weight, eye color, hair color, social security number; record type; case number; charge number; court of case origin; and statute specific to charge. Only information available in the court record is reported.

## **THE AOC CURRENTLY REPORTS THE FOLLOWING CASE TYPES TO NICS:**

### **Felony Convictions under 922(G)(1)**

All felony convictions are reported by AOC to NICS. Conditional discharges and deferred sentences should only be reported to NICS and remain in NICS while the court has jurisdiction over the defendant. The AOC is currently working on developing a system to remove conditional discharges and deferred sentences from the NICS database following successful completion of all obligations to the court.

### **Misdemeanor Domestic Violence Convictions under 922(G)(9)**

The AOC currently reports all misdemeanor domestic violence crimes to NICS. Only cases that involve “intimate partners” under federal law should be reported to NICS. The AOC is

in the process developing a court process that would require judges to make a specific finding in misdemeanor domestic cases that clearly identifies whether a qualifying relationship exists between the parties as these are the only types of misdemeanor domestic violence crimes that should be reported and entered into NICS.

### **Orders Of Protection under 922(G)(8)**

The AOC currently reports all orders of protection to NICS. The AOC is in the process of developing a court process that would require all judges that issue an order of protection to include a specific finding that clearly identifies whether a qualifying relationship exists between the parties. This proposed change requires a change to Supreme Court approved forms. The Domestic Relations Rules Committee considered a request by the AOC to make this change to the Supreme Court approved forms and has submitted a recommendation to the Supreme Court to authorize this change. The AOC is currently waiting to obtain final approval from the Supreme Court on this change to the Supreme Court Approved forms.

### **Mental Health Adjudications under Section 922(G)(4)**

The Supreme Court Mental Health Rules Committee recommended that only certain mental health cases be reported to NICS. Supreme Court Civil Rule 1-131 authorizes the following cases to be reported to NICS: plenary/full adult guardianship and/or conservatorship cases with a specific finding that the “person is totally incapacitated”, orders to participate in Assisted Outpatient Treatment (AOT) if the order includes a finding of serious violent behavior or of threatened or attempted serious physical harm; orders of involuntary commitment; and orders for involuntary protective services or protective placement. Supreme Court Criminal Rule 5-615 authorizes reporting orders finding defendant incompetent to stand trial and orders finding defendant not guilty by reason of insanity to NICS.

### **OTHER FEDERAL PROHIBITORS**

Other case types that can prohibit an individual from possessing a firearm or ammunition under subsection (g) of Section 922 of Title 18, U.S.C. (but are not currently reported by AOC) include:

- Section 922(g)(2) - Fugitives From Justice
- Section 922(g)(3) - Unlawful user of or addicted to any controlled substance
- Section 922(g)(5) - Aliens Illegally or Unlawfully in the United States
- Section 922(g)(6) - Discharges From Armed Forces Under Dishonorable Conditions
- Section 922(g)(7) - Citizens of the United States Who Have Renounced Their U.S. Citizenship
- Section 922(n) - Under Indictment or Information for a Crime Punishable by Imprisonment for a Term Exceeding One Year or a Misdemeanor Punishable for a Term Exceeding Two Years—922(a)