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FISCAL IMPACT REPORT

SPONSOR Lane/Sweetser/ **ORIGINAL DATE** 02/22/21
Armstrong, G/ Lord **LAST UPDATED** _____ **HB** 283
SHORT TITLE No Film Tax Credits For Certain Films **SB** _____
ANALYST Torres

REVENUE (dollars in thousands)

Estimated Revenue					Recurring or Nonrecurring	Fund Affected
FY20	FY21	FY22	FY23	FY24		
		Likely Positive			Recurring	General Fund

Parenthesis () indicate revenue decreases

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)
 Taxation and Revenue Department (TRD)
 Economic Development Department (EDD)

SUMMARY

Synopsis of Bill

House Bill 283 (HB283) bars films that contain or display sexually explicitly conduct from receiving the film production tax credit. The bill also bars films that “most parents would consider patently too adult for their children aged seventeen and under...” in the view of an industry film rating board or association.

The effective date of this bill is July 1, 2021.

FISCAL IMPLICATIONS

The EDD notes that the bill is likely to reduce direct and indirect production spending in New Mexico by the film industry. Should the bill divert productions from New Mexico, HB283 will result in fewer film tax credit claims and refunds. Most studies on film tax credits conclude that the state generates less than \$1 of tax revenue for every \$1 spent in credits. Therefore, tax collections lost on film productions due to HB283 is unlikely to exceed total tax revenue saved from fewer film tax credits paid to the industry. This would result in a net positive impact to the general fund, although unquantifiable, from HB283.

SIGNIFICANT ISSUES

EDD notes the following issues:

Ratings systems and organizations currently exist to rigorously analyze content and provide standardized ratings for films and television productions which thereby inform parents, guardians and caregivers about content, recommended audiences and viewership for children and teenagers.

Ratings by organizations (i.e., Motion Picture Association) cannot be determined until post-production is complete, and prior to distribution, by which point the production company has already filed to claim the tax credit.

The film division does not have the ability, nor expertise, to analyze content, and thus predict, guess, or determine potential ratings and audiences for film and TV productions. Nor can the film division determine in advance what visual content will appear in the final commercial product.

Furthermore, the Taxation and Revenue Department (TRD) does not have the ability, nor expertise, to analyze content, and thus, predict, guess, or determine potential ratings and audiences for film and TV productions. Nor can TRD determine in advance what visual content will appear in the final commercial product.

This bill is ambiguous relating to the phrasing on page 7, paragraph 5, in what seems to be references to ratings. This ambiguity around ratings could lead to decreased interest in New Mexico as a production location, decreased spend, decreased jobs, decreased business revenue, and decreased tax revenue.

This bill would damage businesses in New Mexico, including long-time local filmmakers as well as those companies with existing long-term partnerships such as Netflix and NBC Universal. By creating significant ambiguity and uncertainty and limiting the studios' ability to produce planned content in New Mexico, this bill could trigger an adverse business climate and potentially the termination of such partnerships. It could also dissuade future businesses in this industry from investing in New Mexico.

... if this bill is enacted, it could lead to severely decreased direct and indirect spend in New Mexico by the film industry, decreased jobs, decreased revenues for businesses, and decreased tax revenues across New Mexico.

The New Mexico Attorney General notes:

While this bill does not purport to ban or restrict certain types of speech, it does place additional financial burdens on specific content. This could raise 1st Amendment concerns.

- State regulation of sexually explicit speech is governed by *Miller v. California*, 413 U.S. 15 (1973). Per the *Miller* standard, a work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political or scientific value.

- The bill’s definition of “sexually explicit conduct” in Section 1H4 that would preclude the receipt of tax credits is A) not limited to work that appeals to the prurient interest in sex, B) not limited to patently offensive portrayals of sexual conduct, and C) makes no allowance for analysis of serious literary, artistic, political, or scientific value. It is possible that a film could be acceptable under the *Miller* standard yet still be impacted by this bill, so it is likely that this bill is overbroad and could expose the state to the risk of litigation should the state attempt to enforce it.

The first two prongs of the *Miller* test apply a community standard. New language in Section 1H5 of this bill appears to call for a national standard instead.

In addition to “sexually explicit conduct,” the Section 1H5 bars from receiving tax credits under the act films that are “what most parents would consider patently too adult for their children aged seventeen or under, in the view of a board or association commonly known in the industry to issue ratings for films exhibited and distributed commercially to the public in the United States.”

- “Board or association commonly known in the industry to issue ratings” presumably refers to the MPAA audience suitability rating. However, Netflix and HBO have their own rating systems which likely impact as many people as the MPAA’s, and various media organizations have rating systems focused on the overall quality and artistic value of a film. While it is not difficult to infer the bill’s meaning, but the vague language will likely make it very difficult to enforce.
- Assuming Section 1H5 specifies the MPAA ratings system, it shall be noted that these ratings are not issued until after footage has been filmed (“After a movie is screened, the first votes are cast without discussion...” <https://www.latimes.com/business/hollywood/la-fi-ct-mpaa-ratings-20181029-story.html>).
- In the absence of a designated ratings body, “what most parents would consider patently too adult” is likely an unenforceable standard in court.

Section 1H4 refers to material either contained *or* displayed in film, so it can be inferred that these terms are to be read separately. Material that is contained and not displayed is not further defined – unclear if the bill is addressing audio depictions of explicit material, allusions or references to sexually explicit material, or something else entirely.

TECHNICAL ISSUES

EDD must approve films for film tax credits before production begins and before any film rating agencies have made final decisions. It is unclear how films could be pre-certified under current law with the additional requirement that they must meet certain ratings criteria.

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