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FISCAL IMPACT REPORT

SPONSOR <u>SJC</u>	LAST UPDATED <u>3/15/23</u>	ORIGINAL DATE <u>3/11/23</u>
SHORT TITLE <u>Firearms in Unfair Practices Act</u>	BILL NUMBER <u>CS/Senate Bill 428/SJCS</u>	ANALYST <u>Daly</u>

REVENUE* (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY23	FY24	FY25		
\$0.0	Indeterminate but minimally positive	Indeterminate but minimally positive	Recurring	General Fund

Parentheses () indicate revenue decreases.

*Amounts reflect most recent version of this legislation.

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	No Fiscal Impact	Indeterminate but minimal	Indeterminate but minimal	Indeterminate but minimal	Recurring	General Fund

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent version of this legislation.

Sources of Information

LFC Files

Responses Received (on Original) From

Administrative Office of the District Attorneys (AODA)

Department of Public Safety (DPS)

New Mexico Attorney General (NMAG)*

Regulation and Licensing Department (RLD)

*on SJC Substitute

SUMMARY

Synopsis of SJC Substitute for Senate Bill 428

The Senate Judiciary Substitute for Senate Bill 428 (SB428/cs) first amends the Business Corporation Act to provide that a foreign corporation that receives a certificate of authority under that act (which is necessary to transact business in this state) is deemed to have consented to general personal jurisdiction in this state.

SB428/cs also makes numerous changes to the Unfair Practices Act (UPA). In Section 2, it provides new definitions for “destructive device,” “firearm” “firearm part,” “online

marketplace,” “seller,” and “third-party seller.” The substitute also expands the definition of “trade” or “commerce” to incorporate provisions to establish specific jurisdiction in the state courts against a party that systematically serves a market in New Mexico. Further, unfair or deceptive trade practices now include:

- The representation of goods or services as legal to purchase under the laws of New Mexico or the United States when, in fact, the goods or services are not legal to purchase; and
- Knowingly manufacturing, advertising, distributing, or offering for sale a firearm, destructive device, firearm part, or accessory contrary to the laws of New Mexico or the United States (“illegal firearm trade practice”).

In addition, an unconscionable trade practice under SB248/cs now includes goods or services offered for sale by an online marketplace whether directly or by a third-party seller. Actions that violate state or federal law are also newly included as an unconscionable trade practice. The Substitute also clarifies the exemptions to the UPA.

In Section 7, SB428/cs expands the private right of action under the UPA to include not only a person who is likely to be injured by a UPA violation, but also any individual who is aware of a UPA violation. The bill also increases the minimum possible recovery for a successful private suit from \$100 to \$10 thousand, and from \$300 to \$10 thousand for willful violations. For violations of the UPA based on knowingly engaging in the manufacture, advertising, distributing, or sale of firearms that are banned by state or federal law, the court shall award three times actual damages or \$250 thousand per violation, whichever is greater. Existing provisions governing early mediation are stricken. Under SB428/cs, as is true under the existing act, a complainant who prevails under UPA shall be awarded attorney fees and costs, but new language limits the award of attorney fees to a party who successfully defends a lawsuit brought under UPA from an unsuccessful plaintiff to when the court finds that the plaintiff knew its complaint was groundless at the time the suit was initiated.

In a new Subsection F, SB428/cs imposes joint and several liability on multiple parties acting in concert in the commission of an illegal firearm trade practice as well as on an online marketplace that offers for sale or allows third-party sellers to market items that constitute an illegal firearm trade practice.

In an action brought against a third-party seller on an on-line marketplace, the marketplace must provide a plaintiff with a list of specific identifying information about a third-party seller of goods or services on the marketplace. The bill requires the court to award the requesting party \$10 thousand plus attorney fees and costs upon a marketplace’s failure to provide that information (which failure is itself declared to be a violation of UPA). If the case involves an allegation of an illegal firearm trade practice, the award to the requesting party is increased to \$250 thousand, along with attorney fees and costs. Further, certain online marketplaces, sellers or third-party sellers which do not maintain a place of business in the United States or conceal their place of business yet offer goods and services in New Mexico shall be deemed to be subject to suit within the state, subject to the conditions set forth in Section 7(J).

Existing provisions in the UPA provide for a civil penalty due the state of \$5,000 for willful violation of the UPA, which SB428/cs raises to \$25 thousand, unless the violation involved the willful manufacturing, advertising, distribution or sale of a firearm, in which case the penalty is \$250 thousand.

Under Section 9(F) of SB428/cs, information obtained by NMAG through a Civil Investigative Demand (CID) is subject to public disclosure under the Inspection of Public Records Act (IPRA) unless a court orders otherwise. This language amends the existing UPA provision, which provides that documents obtained through a CID are not subject to disclosure under IPRA unless a court orders otherwise.

Finally, in Section 12, a new provision of UPA is enacted which makes it unlawful under UPA to unlawfully sell, possess, or transport explosives, or to violate any state or federal law controlling the manufacture, advertising, distribution or sale of firearms.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

Revenue. Senate Bill 428/cs provides for a civil penalty that may be imposed in an action brought by NMAG under the UPA for knowingly engaging in an illegal firearm trade practice of up to \$250 thousand per violation. Because this is a new, relatively narrow category of unfair practice, it is difficult to predict how many cases will result in the imposition of such a penalty, or the amount of any penalty imposed in a case. As a result, LFC staff estimates the fiscal impact on revenues to be indeterminate but minimally positive.

Operating Budget Impact. Under existing law, NMAG is authorized to bring an action in the name of the state alleging a violation of the UPA. SB428 expands the scope of coverage of the UPA, but that agency reports no fiscal impact on its operating budget under this bill.

SIGNIFICANT ISSUES

NMAG objects to the provisions of Section 9 making documents produced in response to a CID public records, absent a court ruling otherwise, which reverses the presumption in the current version of the UPA that these documents are not public records. It explains the basis for the current law providing for nondisclosure of CID materials as a general rule:

The Office of the Attorney General uses CIDs as a tool to investigate potential violations of the UPA before filing a lawsuit. By making information obtained through a CID subject to public disclosure under IPRA, the bill would significantly impact the Attorney General's ability to carry out its enforcement authority under the UPA for at least three reasons.

First, CIDs often seek highly sensitive information, including HIPAA protected health information, private banking information including detailed transaction logs, and confidential trade secrets. Targets of CIDs commonly object to providing full responses on the basis that such material is too sensitive to turn over. The default confidentiality and IPRA exception in the current CID provisions of the UPA provide a way for the Attorney General to overcome those objections and compel production of such materials because they will not be subject to public disclosure. If CID materials become subject to public disclosure through IPRA by default, the office will face extensive litigation over confidentiality over the majority of CIDs issued by the office.

Second, at times, the Attorney General issues CIDs to third party entities to obtain

information about a potential defendant’s UPA violation. When this happens, the fact that a third-party CID has been issued, and the information obtained, is not disclosed to any party unless and until the Attorney General files a lawsuit against the defendant. If documents obtained through a CID become subject to disclosure under IPRA by default, a potential defendant which has some reason to suspect that it is under investigation by the Attorney General may be able to submit its own IPRA request to obtain and review information obtained by the Attorney General from third parties before a lawsuit is filed. Generally, parties to litigation are not entitled to obtain materials created by an opposing party in anticipation of litigation, particularly when those materials may reveal the “mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.” NMRA Rule 1-026(B)(5). The pre-suit disclosure of CID evidence sought and obtained by the Attorney General related to a potential UPA lawsuit would likely reveal much about the opinions or legal theories of the office leading up to the filing of the lawsuit, and be a significant disadvantage to the office in pursuing its enforcement authority under the UPA through litigation.

Finally, the Attorney General commonly participates in multi-state enforcement efforts with other Attorneys General to investigate a specific potential defendant or group of defendants whose conduct may have violated consumer protection laws in multiple states. These multi-state groups commonly involve entering into a Common Interest Agreement to allow the participating Attorneys General to communicate and share investigative materials without waiving attorney/client privilege or attorney work product privilege. If CIDs issued under the New Mexico UPA are subject to disclosure under IPRA, New Mexico may not be able to participate fully in such multi-state enforcement efforts in the future because of the confidentiality requirements included in group Common Interest Agreements.

NMAG also comments on the new language in Section 4(C)(1) of SB408/cs that exempts from the UPA a claim that does not include an allegation of proximate cause resulting in harm, if that allegation is specifically required by New Mexico or federal law. It points out that an allegation of proximate cause resulting in harm is usually required to give a party standing to file a lawsuit in both New Mexico and federal court, so its earlier objection to the language in Section 7 allowing a person “aware of” a trade practice that might violate the UPA may be resolved by Section 4(C)(1).

TECHNICAL ISSUES

Section 1 amends a section in the Business Corporation Act which does not appear to be reflected in the title of SB428/cs.

Page 17, line 4: the UPA term used in the definitions section of the UPA and throughout the act is “unfair or deceptive trade practice” (see Section 2(L)) which might be used in place of “trade practice” here.

Page 21, line 6: “haled” should be “hailed”.

Page 21, lines 17-22: this description of an illegal firearm trade practice does not encompass all the activities contained in the definition of this UPA violation at Section 1(J)(21) on page 9, lines 21-24.

Page 4, line 24: NMAG notes that adding “or internet” to the definition of “seller-initiated telephone sale” may have no effect on the scope or application of the UPA, since as a result of a substantial rewrite of this Act in 2003, this term does not appear anywhere else in the UPA. Further, most of the prohibitions in Section 57-12-22 are specific to telephone-based sales solicitations and are not applicable to email or website-based solicitations.

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