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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/03/12

SPONSOR Maestas LAST UPDATED \_\_\_\_\_ HB 236

SHORT TITLE Sex Offender Registration Changes SB \_\_\_\_\_

ANALYST Sánchez

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY12	FY13		
	NONE		

(Parenthesis ( ) Indicate Expenditure Decreases)

See Fiscal Implications

Duplicates, Relates to, and Conflicts with HB179

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

New Mexico Municipal League  
Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of Bill

House Bill 236 proposes to amend Section 29-11A-2 NMSA 1978, Sex Offender Registration and Notification Act. The bill removes the requirement that sex offenders register with the county sheriff of the county where the sex offender resides requires the sex offender to register with the state police.

Generally, HB 236 impacts two distinct areas of the law: 1) the Sex Offender Registration and Notification Act, Section 29-11A-1, et seq., NMSA; and 2) the crimes of ‘child solicitation by electronic communication device’ and ‘criminal sexual communication with a child’ found in Sections 30-37-3.2 and 30-37-3.3, NMSA.

It is important to note that there is also a federal SORNA (Sex Offender Registration and Notification Act which is Title I of the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109-248)), and that states, territories and federally recognized Indian tribes are under obligations to substantially implement the federal provisions. A checklist for substantial

implementation compliance exists at [http://www.ojp.usdoj.gov/smart/pdfs/sorna\\_checklist.pdf](http://www.ojp.usdoj.gov/smart/pdfs/sorna_checklist.pdf). More information is provided under significant issues below.

Regarding the state **Sex Offender Registration and Notification Act (SORNA)**, HB 236 generally makes the following changes:

- The entity with which a sex offender must register is changed from the county sheriff to the state police
- References to sex offender as “he” are changed to non-gender specific language
- Plural versus singular language is clarified
- Definitions for business day, department, habitually lives, social networking site, and state police are added
- Sex offender definition is changed to include law from foreign nations, that comports with certain due process attributes, in addition to state, federal, tribal or military law
- Sex offense definition is changed in two ways:
  - By amending the included offenses of kidnapping and false imprisonment by eliminating the language of “when the victim is less than eighteen years of age and the offender is not a parent of the victim” and replacing it with the language of “with intent to inflict a sexual offense”
  - By adding the following additional crimes for convictions occurring on or after January 1, 2013:
    - Patronizing prostitutes (Section 30-9-3, NMSA)
    - Promoting prostitution (Section 30-9-4, NMSA)
    - Accepting earnings of a prostitute (Section 30-9-4.1, NMSA)
    - Human trafficking (Section 30-52-1, NMSA)
    - Criminal sexual communication with a child (Section 30-37-3.3, NMSA – this statutory section to be also amended by this bill)
    - Child solicitation by electronic communication device (this crime had already been in the sex offense definition, but language is added regarding the 1/1/2013 date) (Section 30-37-3.2, NMSA – this statutory section to be also amended by this bill)
    - Sex trafficking of children by force, fraud or coercion (18 USC 1591)
    - Misleading domain names on the internet (18 USC 2252B)
    - Misleading words or digital images on the internet (18 USC 2252C)
    - Travel with intent to engage in illicit sexual conduct (18 USC 2423(b))
    - Engaging in illicit sexual conduct in foreign places (18 USC 2423(c))
    - Failure to file a factual statement about an alien individual (18 USC 2424)
    - Use of interstate facilities to transmit information about a minor (18 USC 2425)
- The terms ‘tier I sex offense’, ‘tier II sex offense’ and ‘tier III sex offense’ are newly added and defined as each including a portion of the offenses included in the definition of sex offense.
- A clarification and distinction is made between initial registration and subsequent verification of registration.
- Time frames for various registration actions are generally reduced from 10 days to 3 business days.
- The types and amount of information a sex offender must provide is increased to include such additional items as: more address information, social networking names/e-mails/monikers, landline/cellular phone numbers, professional licenses, license plate

information, names of schools/higher education institutions attending, passport/immigration document copies, and palm print.

- Adds a provision that an already registered sex offender who is subsequently incarcerated for more than 10 consecutive days must report to state police no later than 7 days from release.
- Clarifies that sex offenders who are homeless or without established residence must register each address or temporary location.
- Provides that for:
  - Tier III sex offenses registration verification shall be not less than once in each 90 day period for the remainder of the sex offender’s natural life
  - Tier II sex offenses registration verification shall be every 6 months for 25 years
  - Tier I sex offenses registration verification shall be annual prior to each December 31 for 15 years
  - Tier II and Tier I, if there is a second or subsequent sex offense, the sex offender shall verify registration not less than once in each 90 day period for the remainder of the sex offender’s natural life
  - Sex offenders registered prior to the effective date of this bill shall register for the lesser duration of time required by this bill or as required when the sex offender first registered.
- Adds a provision that the Department of Public Safety must mail notice to every sex offender at least 15 days prior to when verification is required; however, even if the sex offender does not receive the notice they must appear in person to meet the verification requirements.
- Adds a provision requiring the Department of Public Safety to establish a secure system to allow sex offenders to electronically submit changes in registration information.
- Adds a new section providing:
  - that credit will be given to a sex offender for time registered in another jurisdiction prior to registering in New Mexico or when the sex offender was on probation or parole in New Mexico for a sex offense
  - for a Tier I sex offender that the term of registration shall be reduced to 10 years if in the 10 years the sex offender complied with registration requirements, was not convicted of a felony offense or sex offense, and successfully completed supervised release, probation or parole.
- Eliminates the local registry requirement (the central registry remains).
- Clarifies and changes the Department of Public Safety’s record retention requirements to match the tiered system of offenses.
- Amends the information available to the public:
  - Social security and DNA information is only included for sex offenders who have employment that requires unsupervised contact with children under 16
  - Provides a new specific list of registration information to be included on the internet web site, and the internet web site shall only provide that listed information.
- Adds the following to the already existing state preemption provision:
  - Cities, counties, home rule municipalities and other political subdivisions of the state are prohibited “...from imposing any other restrictions on sex offenders that are not included in the Sex Offender Registration and Notification Act.”

- “Law enforcement agencies shall not require a sex offender to report or to register more frequently or to provide information not required by the Sex Offender Registration and Notification Act.”
- Provides an applicability provision for the SORNA provisions of this bill only, stating that the provisions apply to a person convicted of a sex offense on or after July 1, 2005 and to a person convicted prior to that date who on July 1, 2005 was still incarcerated, on probation, or on parole for commission of the sex offense.

Regarding the two specific crimes of **Child Solicitation by Electronic Communication Device** and **Criminal Sexual Communication with a Child**, HB236 generally makes the following changes:

- For Child Solicitation by Electronic Communication Device:
  - Clarifies the intent required
  - Adds a soliciting definition
  - Provides that the notice provisions of Section 30-37-4, NMSA do not apply
- For Criminal Sexual Communication with a Child:
  - Provides that the notice provisions of Section 30-37-4, NMSA do not apply

The amendments under HB 236 would take effect on January 1, 2013.

HB 236 amends provisions that directly impact the court’s role and amends other provisions that impact the courts in other ways. Sections that directly impact the court’s role include:

- Under Section 29-11A-7(A), NMSA of SORNA, courts are required to provide written notice to sex offenders of their duty to register. HB236 makes only minor changes to this section that will not greatly impact this court role. The court’s written notices will need minor changes to comport with the statutory changes.
- Under Section 29-11A-7(C), NMSA of SORNA, courts are required to provide written notification of a sex offender’s release. HB236 eliminates the need to make this notification to the county sheriff and retains the need to notify the Department of Public Safety. This will not greatly impact the court’s role.
- Section 30-37-4, NMSA, provides for a cause of action for obtaining a judicial determination of the correctness of a prior district attorney determination about harm to a minor. The judicial determination must be sought within 30 days from notice of the DA’s determination. HB236 removes two crimes from the notice requirement (there is already one crime that has been removed from the notice requirement previously, Section 30-37-3.1, NMSA), which might reduce the number of judicial determinations requested.

The remainder of the SORNA changes in HB236 might have other impacts on the courts such as: defendants may be less likely to plead to charges that require sex offender registration, thus possibly increasing the numbers of trials for these sex offenses.

## **FISCAL IMPLICATIONS**

According to the Administrative office of the Courts (AOC), courts will also have to revise their written notifications to sex offenders of the requirement to register.

The requirement of sex offender registration is considered so severe that many accused persons will invoke their right to trial and their right to trial by jury. More trials and more jury trials will

require additional judge time, courtroom staff time, courtroom availability, and jury fees. These additional costs are not capable of quantification.

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 caseloads in the courts, thus requiring additional resources to handle the increase. The AOC is currently working on possible parameters to measure resulting case increase.

## **SIGNIFICANT ISSUES**

According to the Municipal League, the most notable change affecting local governments is in section 9 of the bill. That section prohibits cities, counties home rule municipalities and other political subdivisions of the state imposing any other restrictions on sex offenders that are not included in the Sex Offender Registration and Notification Act. Local law enforcement agencies will not be permitted to require a sex offender to report or to register more frequently or to provide information not required by the Sex Offender Registration and Notification Act.

The AOC reports that There are federal requirements upon states, territories and federally recognized Indian tribes to implement various provisions under federal SORNA (Sex Offender Registration and Notification Act which is Title I of the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109-248)). Certain federal funds are tied to the success of each jurisdiction substantially implementing federal SORNA. More information about federal SORNA requirements can be found at the federal Office of Justice Programs SMART web site located at: <http://www.ojp.usdoj.gov/smart/sorna.htm>.

Currently New Mexico is NOT listed on this web site as being in substantial implementation compliance. If it has not already taken place, it would seem important for HB 236 to be assessed for whether or not it would bring New Mexico to the point of substantial implementation compliance. The related bill, HB 179, could also be assessed for whether or not it meets the federal requirements. A checklist for substantial implementation compliance is located at: [http://www.ojp.usdoj.gov/smart/pdfs/sorna\\_checklist.pdf](http://www.ojp.usdoj.gov/smart/pdfs/sorna_checklist.pdf). Many of the items contained on this checklist are included in HB236; however, further examination of this issue may be appropriate.

Federally recognized tribes also must comply with the federal requirements. In some instances, if a tribe is unable to comply then the authority for sex offender registration may be delegated to a state. Also, Office of Justice Programs August 2011 documentation indicates that:

“In the event that all of the foregoing efforts to assist the tribe to either work towards substantial implementation or “opt out” have failed, the responsibility for sex offender registration and notification will be delegated to the state(s) in which the territory of the tribe is located. The delegation will take place upon issuance of a letter addressed to the tribal leader from the SMART Office, via certified mail, that indicates that the tribe’s responsibility for sex offender registration and notification has been delegated to the state(s). A second letter will be sent to the governor of the state(s) in which the territory of the tribe is located, indicating that this delegation has taken place and informing the governor of the state’s new

obligation to register, and notify the public of, sex offenders who reside, attend school, or are employed on the tribe's lands.”

Additional information regarding Indian Country issues is contained on the above-listed SMART web site.

### **ADMINISTRATIVE IMPLICATIONS**

In its response, AOC reports new laws, amendments to existing law, and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. There is an administrative impact on the court resulting from added judicial time needed to dispose of these types of cases in the manner provided under the law.

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

HB 236 conflicts in part, duplicates in part and differs in part with HB 179.

### **TECHNICAL ISSUES**

According to the AOC, there may be a technical issue with the applicability provisions of HB236 found in Section 12. Inclusion of similar applicability provisions in prior amendments of SORNA has occurred. Under *State v. Druktenis*, the NM Court of Appeals found that the retroactive application of SORNA does not violate state or federal ex post facto clauses. 2004 NMCA 32 at ¶¶ 37-38. Also, 28 CFR 72.3 provides that the requirements of the federal Sex Offender Registration and Notification Act “apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.” However, some of the prior applicability provisions in the state law align in terms of the dates with those contained in Section 12. Others have different dates than the July 1, 2005 date included in Section 12. See, e.g., Sections 29-11A-3 and 29-11A-5.1, NMSA.

Another issue may relate to the inclusion of the new term “verification” where the statute formerly referred only to “registration.” In some places the term verification has been added, but in others not. See for example the new material added in Section 5 of the bill subparagraph (C)(1), which says “complied with registration requirements.” To fulfill the drafter’s intent it might be that it should read “complied with registration and verification requirements.”

Another minor technical issue is inclusion of the words “of public safety” after department when a definition of the word “department” has been added to mean “department of public safety.” See HB236, Section 4 (29-11A-4.1(B)) and Section 8 (29-11A-7(C) and (D)). In numerous places the words “of public safety” have been deleted, but not in every instance.

And another minor issue is that the definition of habitually lives in Section 2 is not in alphabetical order.

The requirement to register with the state police should be amended to “the Department of Public Safety” since the state police are simply a unit within a larger department and currently the registry is considered part of law enforcement support and is a service provided by the department to all law enforcement and criminal justice agencies.

ABS/lj