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FISCAL IMPACT REPORT

ORIGINAL DATE 02/26/13

SPONSOR HHGIC LAST UPDATED 03/11/13 HB 442/HHGICS/aHJC

SHORT TITLE Mental Health Info to FBI Background Checks SB _____

ANALYST Trowbridge

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Unknown*	Unknown*	Unknown*	N/A	N/A

(Parenthesis () Indicate Expenditure Decreases)

*See Fiscal Implications

SOURCES OF INFORMATION

LFC Files

Responses Received From

Public Defender Department (PDD)
 Association of District Attorneys (AODA)
 Administrative Office of the Courts (AOC)
 Department of Health (DOH)
 Attorney General’s Office (AGO)
 Department of Public Safety (DPS)

SUMMARY

Synopsis of HJC Amendment

The HJC amendment strikes “de novo” on page 4, line 17 of the bill after “be” and inserts the term “on the record”. This substantially changes the bill as the amendment allows the appeals court to consider previous legal proceedings.

Synopsis of Original Bill

The Health, Government & Indian Affairs Committee substitute for House Bill 442 would adopt requirements for the Administrative Office of the Courts (AOC) to report to the Federal Bureau of Investigation (FBI) certain court actions taken with regard to the mental health status of persons. A part of the federal Brady law establishes the National Instant Criminal Background Check System (NICS) that sets forth requirements for states to report to the FBI’s Criminal

Justice Information Services Division in Clarksburg, West Virginia, certain court determinations of mental health. During certain regulated firearms transactions, a background check is required that includes notice to the FBI which then determines if a court has reported information on the prospective purchaser that is relevant to the proposed purchase. A firearms transaction may be prohibited by Title 18 USCA section 922(g)(4) for, among other reasons, a determination that the person has been “adjudicated as a mental defective or who has been committed to a mental institution.”

The HHGIC substitute for HB 442 appears intended to codify the current actual practice by which the AOC reports criminal dispositions and mental health determinations that meet the NICS qualifiers. Since July 2011, the AOC has reported just less than 6,000 mental health determinations as well as more than 100,000 criminal dispositions to NICS from New Mexico. The AOC observes that the HHGIC substitute for HB 442 requires some activities not currently part of its practices, and otherwise generally states that the AOC will provide the reporting required by NICS.

FISCAL IMPLICATIONS

There is a cost to the AOC for the required reporting in time and Information Technology resources needed to maintain the reporting. That cost is currently absorbed by the AOC. The Department of Public Safety (DPS) indicates that the AOC may apply for federal funds to aide in the implementation of NICS.

The Attorney General’s Office (AGO) reports that there are potential fiscal implications for it based upon the bill’s requirement that petitions seeking redetermination of certain mental health-related orders or judgment be served on the Attorney General, as discussed below.

SIGNIFICANT ISSUES

The AOC reports that the HHGIC substitute for HB 442 now conforms to the provisions that begin at section 9, page 6, in HB 77, while omitting the gun show background check provisions in section 1 to 8 of HB 77. With the one exception here noted, the HHGIC substitute for HB 442 sets out existing reporting practices by the AOC and codifies the process for challenging a disqualification resulting from that reporting.

The AOC adds that the only significant issue in the HHGIC substitute for HB 442 is in section F, line 17, page 4, where there is provision for an appeal de novo from the district court. In New Mexico, appeals from proceedings in courts of limited jurisdiction, of which no record is made, are the only de novo appeals. Appeals in New Mexico from recorded proceedings are made “on the record.” It would be singularly unique to provide for a de novo appeal from a record proceeding. The HHGIC substitute for HB 442 requires a record hearing. Appeals from that hearing should be on the record.

The AGO states that the committee substitute struck the reference in the original bill to the clear and convincing standard of proof for redetermination hearings without specifying what the standard of proof should now be. This means the standard of proof will be lowered to the usual civil standard of preponderance of the evidence, resulting in a lower burden of proof for the petitioner. This will result in the granting of more petitions. The committee substitute retains the requirement that the Attorney General be served with all petitions seeking a redetermination of

mental disability as it relates to eligibility to possess firearm, but fails to specify whom the Attorney General would represent in such cases or otherwise delineate what the Attorney General's role would be.

The Administrative Office of the Attorneys (AODA) notes that the only way to know which mental health adjudications must be reported to the FBI is to know how the terms 'mental defective' and 'committed to a mental institution' are defined in 27 C.F.R 478.11. The original bill set out the specific adjudications that are to be reported, without the need to look up another legal reference. The AODA suggests that if the definitions set out in the original bill are in conflict with 27 C.F.R 478.11, then amend that language rather than referring someone to a source outside the statute. The AODA adds that with no consequences for inaccurate reporting, no reporting or very late reporting, how will this new law be enforced?

The DPS indicates this Substitute Act will support the sharing of mental health records in compliance with the 2008 NICS Improvement Act by:

1. Codifying New Mexico Administrative Office of the Courts reporting disqualifiers to the Federal Bureau of Investigation (FBI), National Instant Background Check System (NICS); and
2. 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.

ADMINISTRATIVE IMPLICATIONS

The AGO states there are undetermined administrative implications for it based upon the committee substitute's requirement that petitions seeking redetermination of certain mental health-related orders or judgment be served on the Attorney General, as discussed above.

The Department of Health (DOH) operates the New Mexico Behavioral Health Institute (NMBHI), the state psychiatric hospital, and as a result is a party to over 300 petitions for guardianship and civil commitments annually and, therefore, could potentially be noticed on numerous redetermination hearings calling for staff time to participate in such proceedings.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The agencies report HB 77(CS) would create a state-based instant background check applicable to certain gun sales or transfers outside the coverage of the federal Brady law. Section 9(A) through (K) of the committee substitute for HB 77 appear identical to Section 1(A) though (K) of this committee substitute.

TECHNICAL ISSUES

The AOC suggests amending the bill to strike "~~de novo~~" on page 4 line 17 and insert "on the record."

The AODA suggests removing the reference to 27 C.F.R 478.11 and specify within this new law the types of mental health adjudications that must be reported to the FBI, making them consistent with 27 C.F.R 478.11. The AODA also suggests adding a penalty for inaccurate reporting, no

reporting or late reporting (include specific deadlines within the bill), either civil or criminal or both. If the AOC neglects to notify the FBI of a court finding of involuntary commitment to a mental institution and that person buys a gun and kills 10 people, shouldn't someone be held accountable?

OTHER SUBSTANTIVE ISSUES

The AGO suggests the following:

- On page 3 line 25 after the word "upon", insert "the administrative office of the courts and".
On page 4 Line 1 after the word "general", insert "who shall represent the administrative office of the courts." Strike "and" insert "The petition shall also be served upon"

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The AOC will continue to report to NICS those court determinations that meet the federal reporting requirements. The DOH observes that if HB 442 is not enacted, the AOC will not be required to report information regarding “individuals who have been adjudicated as a mental defective or committed to a mental institution”, as those terms are defined in federal regulation, to the federal bureau of investigation for entry into the national instant criminal background check system for use in determining a person’s eligibility to receive or possess a firearm or ammunition.

The DPS states that New Mexico is not currently in compliance with the 2008 NICS Improvement Act. Also, the AODA indicates that there will be no reporting requirement of person’s with mental conditions to the FBI to help prevent them from possessing or receiving a firearm or ammunition as provided by state and federal law.

TT/svb:blm