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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 02/06/15

**SPONSOR** Cook/Ivey-Soto      **LAST UPDATED** \_\_\_\_\_      **HB** 228

**SHORT TITLE** Revised Uniform Limited Liability Company Act      **SB** \_\_\_\_\_

**ANALYST** Cerny

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		
	\$1,076.2	\$1,076.2	Recurring	General Fund

(Parenthesis ( ) Indicate Revenue Decreases)

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

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		\$27.6	\$27.6	\$55.2	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Secretary of State (SOS)

Office of the Attorney General (AGO)

### SUMMARY

#### Synopsis of Bill

House Bill 228 would repeal the Limited Liability Company Act (“LLC Act”), Sections 53-19-1-74 NMSA 1978, in its entirety and enact the Revised Uniform Limited Liability Company Act (“Revised Act”) in its place.

The Revised Act will apply to all limited liability companies (“LLCs”) formed on and after July 1, 2016, except that an LLC formed prior to this date may elect to be governed by the Revised Act in accordance with its operating agreement/applicable law and after filing an amended and restated certificate of organization with the SOS expressing its desire to be governed by the Revised Act.

LLCs formed prior to July 1, 2016 that do not elect to be governed by the Revised Act will continue to be governed by the LLC Act, as if that act had not been repealed. Such LLCs shall not be renewed unless so provided in the original agreement, or in the manner provided in the limited liability company agreement, or by law for amending a limited liability company agreement. LLCs formed prior to July 1, 2016, and not electing to be governed by the Revised Act will nevertheless be subject to certain provisions of the Revised Act. Foreign LLCs will be governed by the Revised Act regardless of the time of formation.

Generally, the Revised Act adopts an approach that favors flexibility and contractual arrangements and brings New Mexico more in line with LLC law in Delaware and several other states. HB 228 is largely based on the National Conference of Commissioners on Uniform State Laws, which has been approved and recommended for enactment in all states, with certain deviations to reflect particular circumstances unique to New Mexico. Several states, including Minnesota and Florida have recently adopted versions of the Revised Act.

The Revised Act clarifies that the SOS is responsible for many of the duties pertaining to the oversight of LLCs, as opposed to the Public Regulation Commission, clarifies the effect of records filed with SOS on third parties with respect to actual and apparent authority of persons acting on behalf of the LLC and describes the rights of third parties who rely on those records when they contain inaccurate information.

The Revised Act further provides management structures for LLCs, namely, member-managed and manager-managed, and describes the duties of members and managers and the rights of third parties under each structure. The Revised Act also permits LLCs to file statements of authority with the SOS in order to place third parties on notice of the authority, restricted or otherwise, of certain members or managers of the LLC, as well as clarifies what authority those members or managers have to bind the LLC.

Other features of the Revised Act include changes to and clarification of the voting rights of members in certain circumstances; clarifies the duties of a transferee (“assignee” under the LLC Act); and places new and significant restrictions on access to and inspection of LLC records.

Additionally, the Revised Act imposes an obligation directly on the members or managers of an LLC to correct information in articles of organization that become inaccurate; allows for derivative actions to enforce a right of the LLC, when, within a reasonable time, an action is not instituted after a member or manager makes a demand; if it would be futile to wait for the members or managers to bring a derivative action following a demand, the Revised Act would permit a member to initiate the action unilaterally.

The Revised Act establishes more defined processes and limitations on provisions for apportioning distributions, profits/losses, member voting rights, dissociation (including the creation of special litigation committee procedures), service of process and allows for interest exchanges, in contrast to the LLC Act. The Revised Act further defines the processes and limitations on authorizations for mergers and conversions.

A series of amendments to the LLC Act since its inception may make it more difficult to understand and the Revised Act attempts to facilitate ease of understanding. The Revised Act appears to emphasize the importance of the operating agreement and provides LLCs and their officers an enhanced degree of flexibility in designing its management structure, capital and profit participation schemes, and other matters to facilitate its objectives.

## FISCAL IMPLICATIONS

With 127,713 currently active limited liability companies, the SOS anticipates 42,571 triennial reports being filed annually. At \$20 per report filing, the estimate annual revenue is projected to be \$851.4 thousand. This number will fluctuate based on new formations, dissolutions and withdrawals.

While this bill would maintain filing fees for new LLCs at the current \$50, it may be advisable to consider fees other states are charging. They currently range from a low of \$40 (Kentucky) to a high of \$400 (Nevada), but twenty-one states charge between \$100 and \$150 for this filing. Arizona charges \$200, Colorado \$50, and Texas \$310, looking regionally. Filing fees for new LLCs in each state may be found here:

<http://www.incorporatefast.com/filingfee.asp>

SOS analysis states that in 2013 there were 10,638 new LLCs registered and in 2014, 11,846.

The initial reports required by HB 228 would fluctuate based on newly formed and filed limited liability companies. However, utilizing the two-year average of 11,242 newly-created LLC's per year x \$20 (initial report fee), an additional \$224,840 in annual revenue would be generated by the initial report filing.

Therefore the total estimated annual increase in revenue generated by HB 28 is \$1,076,261 (\$851,421 + \$224,840).

The estimated additional operating budget impact is \$27,671 annually. This amount is to print and mail out postcards as follows: 42,571 x \$.65 (cost to print and mail postcard notices regarding report filings).

HB 228 authorizes the Attorney General to maintain actions to enjoin a foreign LLC from doing business in New Mexico contrary to the Revised Act, and to be given notice and an opportunity to be heard in proceedings by the district courts to specify the disposition of property held for a charitable purpose by a domestic or foreign entity relative to a merger, interest exchange, conversion or domestication. However, HB 228 contains no appropriation to the Attorney General's Office to maintain such actions or participate in such proceedings.

## SIGNIFICANT ISSUES

AGO analysis suggests some issues with HB 28 as currently drafted:

It is not clear how an LLC that was formed prior to July 1, 2016, and that has not elected to be subject to the Revised Act can be governed by the LLC Act despite the fact that the LLC Act would be repealed, in its entirety, by the Revised Act. Similarly, at p. 106, line 23, reference to NMSA 1978, Section 53-19-5 is made, but the Revised Act would repeal this section if enacted.

Further, the LLC Act explicitly authorizes the Attorney General to bring an action against an LLC to secure civil penalties, but the Revised Act makes no such provision; it is unclear whether this is intentional.

There are many limited liability companies on file that have outdated information or are no longer active in New Mexico yet are holding names that other filers may be interested in using. Customers requesting information on a registered limited liability company will receive current information if this bill is enacted.

The Office of Secretary of State currently has 127,713 registered limited liability companies in New Mexico (114,005 domestic and 13,708 foreign). Currently, there is no requirement for Limited Liability Companies to file any type of report to update information such as LLC address information, officers, directors, etc.

The proposed legislation would require an initial report with a fee of \$20.00 per report filed by the end of the first calendar month that follows the date on which the limited liability company's certificate of organization became effective. In addition it would require new triennial report filings with a fee of \$20.00 per report filed during the corresponding months of each third calendar year thereafter. The triennial report would identify a manager or member based on the type of management structure identified at formation of the limited liability company.

The limited liability company will also have the availability to file a Statement of Authority (with a filing fee of \$20.00), which will assist other businesses such as the financial industry, insurance industry and others to identify who is authorized to sign on behalf of the limited liability company.

At formation, the limited liability company may advise of a future effective date or delayed effective date which shall not be more than 90 days after the filing date. Currently a limited liability company has an option to select a period of duration as perpetual or advise of a specified period of time or date that the limited liability company will cease doing business.

The Revised Uniform Limited Liability Act will only allow for a perpetual duration requiring the limited liability company to formally dissolve or withdraw in New Mexico.

## **TECHNICAL ISSUES**

AGO analysis states that Section 709(B) (pp. 87-98) is unclear as to whether the fees, taxes, interest and penalties that would have been due to the SOS while the company was administratively dissolved are the same fees that the LLC would have been responsible had it not been dissolved.

## **AMENDMENTS**

See Significant Issues and Technical Issues, above.

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