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FISCAL IMPACT REPORT

SPONSOR Herrell/Candelaria **ORIGINAL DATE** 02/14/15
LAST UPDATED 02/16/15 **HB** 237

SHORT TITLE Child Protection Registry Act **SB** _____

ANALYST Daly

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		
	Unknown	Unknown	Recurring	Child Protection Registry 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
Total		>\$250-400.0	>\$300.0	>\$550.0- 700.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General’s Office (AGO)
 Administrative Office of the District Attorneys (AODA)
 Children, Youth & Families Department (CYFD)

SUMMARY

Synopsis of Bill

House Bill 237 enacts the Child Protection Registry Act, which requires AGO, either directly or through a third-party administrator, to establish, operate and secure a voluntary child protection registry of minors’ electronic contact information (defined in the bill as a “contact point”). The registry is intended to prevent minors from receiving communications that 1) advertise a product or service that a minor is prohibited by law from purchasing or 2) contain, advertise or promote material that is harmful to children (including nudity, sexual conduct, sexual excitement or sado-

masochistic abuse as further defined in existing statute).

A person responsible for a contact point may register it at no charge. Schools and other entities that primarily serve children may register one or more contact points using one registration form, which may include the internet domain name of the school or entity. Registrations shall be valid for three years, and are not matters of public record. AGO must promulgate rules to prevent unauthorized use of the registry and ensure registrants meet the requirements of the Act.

Any person desiring to send a communication of the type described in the Act must first verify that the intended contact points are not included in the registry. AGO may charge a fee no greater than three cents per contact point checked.

Knowingly sending such a communication to a contact point that has been registered for 30 days is a petty misdemeanor for the first offense and a misdemeanor for each subsequent offense. Unauthorized use of, as well as improperly obtaining or attempting to obtain or using or transferring to a third party to use, information from the registry is a fourth degree felony. Each communication is a separate offense, and the consent of the minor is not a defense.

An internet service provider does not violate this Act solely by transmitting a communication across its network. Further, an adult who controls the contact point may consent to an otherwise prohibited communication if the sender follows the procedures set forth in HB 237 governing such consent and any applicable rules promulgated by AGO.

The Child Protection Registry Fund is created in the state treasury, which consists of appropriations and contact point checking fees. Money in the Fund is nonreverting and is appropriated to AGO to establish, operate and administer the registry and enforce and defend the Act.

In addition to criminal prosecutions for violations of the Act, either a registrant on behalf of a minor receiving a prohibited communication or AGO may bring a civil action alleging violations. A registrant may recover actual damages or the lesser of \$5 thousand per communication transmitted to the contact point or \$250 thousand for each day the violation occurs. AGO may recover a penalty not to exceed \$10 thousand per communication or \$500 thousand for each day the violation occurs, whichever is less. The prevailing party in such an action may be awarded costs and reasonable attorney fees.

Reasonable reliance on the mechanism for verification of compliance by senders established by AGO is a defense to an action brought under the Act.

The effective date of this act is July 1, 2015.

FISCAL IMPLICATIONS

AGO points out that HB 237 mandates AGO to establish and operate the child protection registry, establish rules and procedure for registry, administer the child protection registry fund, establish mechanisms for verification and establish rules for verifying valid consent, but provides no appropriation for additional staff. It estimates that it will need two attorney FTEs, two support staff FTEs, and one information technology FTE for each year, at a cost of \$300 thousand annually. Additionally, it anticipates start-up costs of \$100-250 thousand for computer

software and hardware. Those figures are reflected in the operating budget impact table above.

Additionally, AODA points out that to the extent this bill creates new crimes, the district attorneys will have additional prosecution costs, and if the Act is subject to statutory or constitutional challenges, those costs will be even higher. Similarly, the Public Defender, the courts and New Mexico Corrections Department could experience increased but unquantifiable budget impacts. Those impacts are represented by the “>” symbol in the operating budget impact table above.

Although the bill allows the AGO to charge a fee no greater than three cents for every contact point checked in the registry, the revenue generated by such a fee cannot be determined at this time, and is reflected in the revenue table as unknown.

Continuing Appropriations language

This bill creates a new fund, the Child Protection Registry Fund, and provides for continuing appropriations. The LFC has concerns with including continuing appropriation language in the statutory provisions for newly created funds, as earmarking reduces the ability of the legislature to establish spending priorities.

SIGNIFICANT ISSUES

CYFD calls attention to the extremely sensitive nature of the information to be collected in the registry database, which the bill allows a third party contractor to administer in all aspects. CYFD, as an entity that primarily serves minors, may register contact points. Although the Act is written permissively (“may register”), CYFD believes the Act may create an implied mandate for it to do so for children in its care and custody.

AODA expresses concern as to the interplay between this bill and existing criminal statutes regarding sexually oriented material harmful to minors:

Sections 30-37-1 through 10, NMSA 1978 provide criminal penalties for sale, distribution, and display of visual representations that come within the same definition of “harmful to minors” that is used in this bill. Those laws require notice prior to prosecution and provide various defenses and exemptions, and probably were enacted to prevent charges that the statutes were constitutionally overbroad. Further, Section 30-37-8 provides that those statutes are intended to be the sole and only regulation of such representations.

HB 237 appears to be a separate act, not contained within the existing criminal statutes regarding sexually oriented material harmful to minors. The notice provision and the exemptions and defenses provided in those statutes will therefore not apply. This opens this bill to possible charges of overbreadth. Also, HB 237 will likely be challenged on the ground that Sections 30-37-1 through 10 are the sole source of regulation regarding some of the material this bill purports to cover.

If this bill is intended to be part of this group of criminal statutes, that raises additional issues. It provides no such link. Further, if HB 237 is made subject to these notice requirements, defenses and exemptions, it will be very difficult to administer the Act.

Additionally, AODA warns that the Act’s imposition of significant civil and criminal liability for anyone sending a communication that could fall within the Act’s definition of prohibited communication could be challenged for inhibiting free speech and interfering with interstate commerce. For example, it notes, one picture that would be found “harmful to minors” (but not necessarily harmful or offensive to adults) emailed by one adult to another adult could result in civil and criminal penalties for the sender if that email address had been registered, even if no child ever saw the picture. AODA comments that a seller of products that cannot be sold to minors and who advertises through mass emails or other forms of communication covered by the Act, could incur significant costs: each contact point the sender intends to use will need to be checked against the registry (because there is no other way to know if it is registered), and the checking may have to be repeated as often as every month, at a cost of up to three cents per contact.

ADMINISTRATIVE IMPLICATIONS

CYFD may be required to register and then update contact points in the registry for children in its care and custody.

MD/aml/je/aml