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FISCAL IMPACT REPORT

ORIGINAL DATE 3/4/15

SPONSOR Rue LAST UPDATED _____ HB _____

SHORT TITLE Uniform Securities Act “Corruptly” Definition SB 540

ANALYST Elkins

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		
	Indeterminate	Indeterminate		

(Parenthesis () Indicate Revenue Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Regulation and Licensing Department (RLD)

Attorney General’s Office (AGO)

SUMMARY

Synopsis of Bill

Senate Bill 540 amends the New Mexico Uniform Securities Act by defining “Corruptly” as acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

The bill also adds language to make it unlawful for any person to “corruptly” obstruct any inspection or audit conducted by the director of the Securities Division of RLD.

FISCAL IMPLICATIONS

The Securities Division, as well as the entire state, may have an opportunity to collect fines from violators of the Uniform Securities Act.

SIGNIFICANT ISSUES

RLD offers the following commentary:

Securities violations are often difficult to discover and prosecute; thus, conduct that

conceals or obstructs the discovery of such criminal activity by registered persons should also be a crime in this state, just as it is under federal law 18 U.S.C. 1517.

Section 58-13C-411(D) NMSA 1978 is the authority that allows the Securities Division to conduct inspections of registered Investment Advisers and Broker Dealers. Such persons are routinely involved in handling the investment of public funds and their cooperation in audits and inspections is critical to determine whether their activity is appropriate. Under the Dodd-Frank Act of 2010, the number of registered persons subject to state oversight has greatly increased.

The Securities Division has jurisdiction over broker-dealers or investment advisors in the state. Additionally, the division has jurisdiction over anyone else to the extent they have submitted paperwork with the state for an offering. It is important that these audits are meaningful and productive. When the division conducts an audit/inspection of these entities, it is focused on identifying unlawful business practices such as poor record-keeping, for example. If anyone makes an effort to “corruptly obstruct” the inspection, say, to prevent the discovery of something, there would be no repercussions. This bill will provide a deterrent for such behavior and promote better accounting and oversight. It will also give the state a method for prosecuting this behavior.

TECHNICAL ISSUES

The Attorney General’s Office notes the following concerns:

Some of the terms used in SB 540 may require further consideration. First, the term “improper purpose” could be construed as too vague because it is unclear what the term means beyond the limited illustrative examples offered (e.g. “making a false or misleading statement,” “withholding, concealing, altering or destroying a document or other information”).

Second, with respect to the bill’s use of the term “influencing another,” it is not clear if the influence would require threat, coercion, conspiracy or some other active wrongdoing, and it is not clear to what extent the bill would impose vicarious liability for essentially passive acts.

Third, the use of the term “corruptly” in the provision prohibiting obstruction of audits appears to create a new category of *mens rea*, i.e. mental state of the person committing the prohibited act. It is unclear from SB 540 precisely how this new term, which does not otherwise appear in the New Mexico Uniform Securities Act, differs from *mens rea* specified in other provisions of the Act, such as acts committed “willfully” or “knowingly.” *See United States v. Williamson*, 2013 WL 1658021 at *17-19 (D.N.M. Mar. 20, 2013) (comparing “corruptly,” “knowingly,” and “willfully”). The Legislature should consider whether it wishes to provide a separate category of *mens rea* for the specific act of obstructing an audit, as opposed to the other acts prohibited by the New Mexico Uniform Securities Act.