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FISCAL IMPACT REPORT

ORIGINAL DATE 03/01/17
SPONSOR McSorley **LAST UPDATED** _____ **HB** _____

SHORT TITLE Child Protection Registry Act **SB** 444

ANALYST Daly

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		
	Unknown	Unknown	Recurring	Child Protection Registry Fund

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
		\$100.0-250.0		\$100.0- 250.0	Nonrecurring	General Fund
Total		\$>300.0- 500.0	\$>300.0- 500.0	\$>660.0- 1,000.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Office of the Attorney General (OAG)
- Administrative Office of the Courts (AOC)
- Administrative Office of the District Attorneys (AODA)
- Children, Youth & Families Department (CYFD)
- Law Offices of the Public Defender (LOPD)

SUMMARY

Synopsis of Bill

Senate Bill 444 enacts the Child Protection Registry Act (CPRA) and the Do Not Contact Registry Act (DNCRA).

Child Protection Registry Act

The CPRA requires OAG, 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. OAG 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. OAG may charge a fee no greater than three cents per contact point checked.

A person who knowingly sends such a communication to a contact point that has been registered for 30 days is subject to prosecution under the Computer Crimes Act. 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. 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 SB 444 governing such consent and any applicable rules promulgated by OAG.

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 OAG to establish, operate and administer the registry and enforce and defend the Act.

In addition to criminal prosecutions for violations of the CPRA, either a registrant on behalf of a minor receiving a prohibited communication or OAG 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. OAG 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 OAG is a defense to an action brought under the CPRA.

Do Not Contact Registry Act

The DNCRA provides a mechanism for persons to prevent solicitations and unsolicited advertisements that are sent to their email addresses, instant messaging applications or other electronic or digital contact points. Solicitations do not include a message to a person with that person’s prior express invitation or permission, to a person with whom the message sender has an established business relationship, or by a tax-exempt nonprofit organization.

The DNCRA is structured like the CPRA, with the same administrative structure and the same civil and criminal enforcement provisions. Section 21 governs interpretation of the DNCRA, and directs that to the extent a conflict exists between the two acts, CPRA controls.

The effective date of this bill is July 1, 2017.

FISCAL IMPLICATIONS

This bill creates two new funds, the Child Protection Registry Fund and the Do Not Contact Registry Fund, and provides for continuing appropriations from these funds to the OAG establish, operate and administer the two registries and enforce and defend the two acts. 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.

OAG notes that SB 444 mandates it establish and operate the registries, establish rules and procedures for each registry and administer the two registry funds, but does not allow OAG to charge a registration fee, only a verification fee. Nor does the bill provide any appropriation for additional staff or resources. OAG estimates it will need between two to four attorney FTEs, two support staff FTEs, and one information technology FTE for each year, at a cost of approximately \$300 thousand to \$500 thousand. Additionally, the OAG reports it will need software and hardware, which may cost between \$100 thousand to \$250 thousand.

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

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

SIGNIFICANT ISSUES

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

AOC, OAG and AODA all express concern as to the interplay between the CPRA and existing criminal statutes regarding sexually oriented material harmful to minors. As AODA explains:

Sections 30-37-1 through 10, NMSA 1978 provide criminal penalties for sale, distribution, and display of visual representations that come within the definition of “harmful to minors” (the same definition that is used in this bill). The statutory scheme set out in those laws requires notice prior to prosecution and provides various defenses and exemptions. Section 30-37-8 provides that those statutes are intended to be the sole and only regulation of such representations, and any other laws covering such representations “shall be or become void, unenforceable and of no effect...” If SB 444 240 is not intended to be part of those laws, to the extent it regulates visual representations “harmful to minors” its validity could be challenged under Section 30-37-8.

The CPRA in SB 444 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 likely would not apply. Also, the CPRA may 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, however, this bill is intended to be part of that group of criminal statutes, additional issues may be raised. First, it provides no such link. Second, if CPRA is made subject to these notice requirements, defenses and exemptions, it could be very difficult to administer.

Additionally, AODA warned in its analysis of a substantially similar bill introduced in the 2015 Regular Legislative Session (HB 237) that the imposition of significant civil and criminal liability for anyone sending a communication that could fall within the CPRA’s definition of prohibited communication could be challenged for inhibiting free speech and interfering with interstate commerce. LOPD also suggests the CPRA bill may be subject to challenge under the First Amendment. For example, AODA noted that one picture that could 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.

Similarly, AOC questions whether prohibited communications under the DNCRA are subject to free speech protections, which could make the imposition of penalties in such a case violative of those constitutional rights.

In its 2015 analysis, AODA also noted 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 CPRA 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.

AOC also calls attention to the absence of a provision providing for removal of a contact point from either registry upon the minor reaching the age of majority. Additionally, it notes that Section 7(F) and Section 17(E) provide that a person who violates a provision of either Act is subject to prosecution under the Computer Crimes Act. The Computer Crimes Act contains three specific offenses: 1) computer access with intent to defraud or embezzle (Section 30-45-3); 2)

computer abuse (Section 30-45-4); and 3) unauthorized computer use (Section 30-45-5). It is unclear under which of those sections a violation of either Act would be prosecuted.

PERFORMANCE IMPLICATIONS

OAG reports that performance of its additional duties under this bill may adversely impact its other performance based budget targets.

ADMINISTRATIVE IMPLICATIONS

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

CONFLICT

HB 240 provides for a virtually identical CPRA, although the criminal penalty is a misdemeanor, whereas in this bill it is a fourth degree felony. HB 240 does not contain the DNCRA.

OTHER SUBSTANTIVE ISSUES

OAG notes no fees may be charged for registering a contact point, and the information in the registry is not a public record and shall not be made available to public inspection. It is assumed that verification of compliance by senders will be limited to a ‘yes’ or ‘no’ answer because the information contained within the registry is not public record and will not be made available for public inspection. There are no provisions for how one may identify registered contact points if the person or entity does not already know the specifics of that contact point.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

As to the CPRA, exposing minors to materials “harmful to minors” may still be prosecuted under the statutes regarding sexually oriented material harmful to minors.

MD/sb/jle