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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/18/09

SPONSOR Griego, P. LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Local Hispano Arts & Crafts Sales Act SB 582

ANALYST Ortiz

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
NFI	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB92 and HB723

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General's Office (AGO)  
Administrative Office of the Courts (AOC)

#### No Responses Received From

Administrative Office of the District Attorneys (AODA)

### SUMMARY

#### Synopsis of Bill

Senate Bill 582 enacts the "Local Hispano Arts and Crafts Sales Act," to prohibit the bartering, trading, selling or offering for sale or trade any product represented as produced by a local Hispano unless the product is produced, designed or created by the labor or workmanship of a local Hispano. The following are also unlawful under the Act:

- Selling or offering for sale any products represented to be local Hispano handmade or authentic local Hispano arts and crafts unless such products are in fact local Hispano handmade or authentic local Hispano arts and crafts;
- Selling or offering for sale any products represented to be local Hispano crafted unless such products are in fact local Hispano crafted;
- Representing that any local Hispano arts and crafts product is made of a material unless it is made of that material;

- Soliciting or buying for resale as authentic local Hispano arts and crafts any products that are known in fact not to be authentic; or
- Preparing, disseminating or otherwise engaging in any unfair or deceptive trade practice, including any false, misleading or deceptive advertising, or any unconscionable trade practice, regarding local Hispano arts and crafts.

The AGO or a district attorney with jurisdiction over the matter shall enforce and may take action to enforce the provisions of the Act. The district court may order temporary or permanent injunctive relief for a violation under the Act, and shall order restitution and such other relief as may be necessary to redress injury to any person resulting from the violation. If the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by the Act, the AGO or district attorney may petition the court to recover, on behalf of the state, a civil penalty of \$500 or less per violation. SB582 also provides the following penalties for willful and knowing violation of the Act:

- (1) **property valued at less than \$2,500** = petty misdemeanor = fine of from \$100 per violation per day, up to maximum \$500 or imprisonment of 6 months or less, or both
- (2) **property valued at \$2,500 but less than \$20,000** = misdemeanor = fine of from \$100 per violation per day, up to maximum \$1,000 or imprisonment of 1 year or less, or both
- (3) **property valued at \$20,000 or more** = fourth degree felony = fine of from \$100 per violation per day, up to maximum of \$5,000 or imprisonment of 18 months or less, or both.

The Act also provides a private right of action for damages stemming from a violation of the Act, to be brought in the District Court. For an active violation, the court may award damages and order injunctive relief and shall award costs and reasonable attorney fees. Upon a finding of a willful violation of the Act, the court may award treble damages.

SB582 provides definitions for the following terms: “authentic local Hispano arts and crafts”; “local Hispano”; “local Hispano crafted”; “local Hispano handmade”; and “made by machine.”

SB 582 provides a duty of inquiry under the Act for a person selling or offering for sale a product represented to be authentic to make inquiry of suppliers concerning the true nature of the materials, product design and process of manufacture to determine whether the product may be lawfully represented as authentic local Hispano arts and crafts. The bill also permits labeling or disclosing as authentic all articles that are authentic in accordance with the Act and rules promulgated by the AGO pursuant to the Act.

## **SIGNIFICANT ISSUES**

According to the AGO, SB582 uses the Indian Arts and Crafts Sales Act (§ 30-33-1) as a template, including the penalties provision, notes the AGO. Similarly, HB92 is attempting to amend the penalty provision of the Indians Arts and Crafts Sales Act by bring penalty equalization with the general fraud statute, § 30-16-6. The penalties in SB582 make fraud in any amount less than \$20,000 a misdemeanor or petty misdemeanor. In contrast, under the general fraud statute (§ 30-16-6) fraud over \$500 is penalized as a felony. The extremely high felony threshold (\$20,000) contained within the penalty provision of SB582 subverts the purpose of the statute by removing any meaningful criminal penalty for its violation. Moreover, law enforcement’s experience with the current penalties provision in the Indian Arts and Crafts Sales Act is that it renders the Act criminally unenforceable because, in reality, there is seldom, if ever,

a violation in the amount of \$20,000, and prosecutors seldom have the time or resources to prosecute misdemeanors. Replacing the proposed criminal penalty structure of SB582, which mirrors the existing penalty structure of the Indian Arts and Crafts Sales Act, with the structure established by § 30-16-6 as proposed by HB92, will substantially increase the likelihood of meaningful enforcement.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

It relates to HB92, which passed by the House, also proposes to amend the civil penalty provision of the Indian Arts and Crafts Sales Act from \$500 to \$5,000 for a willful violation. This amount is taken from the Unfair Practices Act. S.B. 582 proposes a civil penalty of \$2,000 per willful violation.

It also relates to HB723, which creates a new crime of knowingly manufacturing, possessing, or selling counterfeit goods.

### **TECHNICAL ISSUES**

Administrative Office of the Courts highlights the following issues.

- 1.) There is no guidance in SB582 as to what constitutes a Spanish surname.
- 2) There is no definition in SB582 for the terms “unfair or deceptive trade practice” or “unconscionable trade practice” as they are used in Section 5(E) of the Act. In a similar provision of the Indian Arts and Crafts Sales Act, Section 30-33-7 NMSA 1978, the following language is added:
- 3.) For the purpose of this subsection, “unfair or deceptive trade practice” and “unconscionable trade practice” mean “unfair or deceptive trade practice” and “unconscionable trade practice” as those terms are defined in Section 57-12-2 NMSA 1978.” Chapter 57, Article 2 NMSA 1978 constitutes the Unfair Practices Act.

EO/svb