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FISCAL IMPACT REPORT

SPONSOR Youngblood **ORIGINAL DATE** 02/13 /17
LAST UPDATED 03/01/17 **HB** 240

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

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
Total		Unknown	Unknown	Unknown	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with SB 444

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

House Bill 240 enacts the Child Protection Registry Act, which 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 misdemeanor. 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 240 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 Act, 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. 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 OAG is a defense to an action brought under the Act.

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

FISCAL IMPLICATIONS

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.

OAG notes that no appropriation is made to it to create and implement this registry.

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, LOPD, the courts and New Mexico Corrections Department could experience increased but unquantifiable budget impacts, which are reflected in the operating budget impact table as unknown.

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.

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.

Both AOC and AODA express concern as to the interplay between this bill 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 HB 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.

HB 240 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, HB 240 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 HB 240 is made subject to these notice requirements, defenses and exemptions, it could be very difficult to administer the Act.

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 Act’s definition of prohibited communication could be challenged for inhibiting free speech and interfering with interstate commerce. LOPD also suggests this bill may be subject to challenge under the First Amendment. For example, AODA notes 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 provides this same scenario as raising issues concerning free speech protections, which could make the imposition of penalties in such a case violative of that constitutional right.

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 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.

AOC also calls attention to the absence of a provision providing for removal of a contact point from the registry upon the minor reaching the age of majority. Additionally, it notes that Section 7(F) provides that a person who violates a provision of the 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 the Act would be prosecuted.

ADMINISTRATIVE IMPLICATIONS

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

CONFLICT

SB 444 provides for a virtually identical Child Protection Registry Act, although it makes a violation of the Act a fourth degree felony. SB 444 also contains the Do Not Contact Registry Act.

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

Exposing minors to materials “harmful to minors” may still be prosecuted under the statutes regarding sexually oriented material harmful to minors.