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FISCAL IMPACT REPORT

SPONSOR Picraux DATE TYPED 02/23/05 HB 734

SHORT TITLE Identity Theft Victim Remedies SB _____

ANALYST Ford

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
			\$2,000.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 246, SB 260, SB 560, SB 646

SOURCES OF INFORMATION

LFC Files
Federal Trade Commission
Identity Theft Resource Center
Javelin Strategy & Research/Better Business Bureau

Responses Received From

Administrative Office of the Courts (AOC)
Attorney General (AGO)
Department of Public Safety (DPS)
Corrections Department (NMCD)
Public Defender Department (PDD)

SUMMARY

Synopsis of Bill

House Bill 734 increases the crime of identity theft from a misdemeanor to a fourth degree felony, expands the definition of identity theft, provides a method for expunging court records of false information, requires law enforcement officers who interview identity theft victims to make a written report to the Attorney General, requires the AGO to issue a new form of identification, known as identity theft passports, to victims, requires the AGO to maintain a database of identity theft passports, and requires consumer reporting agencies to block inaccurate information on

consumer reports.

Significant Issues

Penalties and Prosecution

House Bill 734 changes identity theft from a misdemeanor to a fourth degree felony.

Changing the crime to a fourth degree felony allows district attorneys to subpoena witnesses from out of state, which may aid in prosecution.

The AGO suggests that it may be more appropriate for the penalty to be based on the severity of the monetary damages caused to each victim. Section 30-16-1 NMSA 1978 provides such a structure for the offense of larceny.

Definitions of Identity Theft

House Bill 734 expands the definition of identity theft to include using a person's identifying information *with the intent to sell or distribute the information to another*. Under current law, the offender must have intent to defraud the person.

The bill also extends the definition to include using personal identifying information of another person, or of a false or fictitious person, to avoid summons, arrest, or prosecution or to impede a criminal investigation.

House Bill 734 expands the definition of "personal identifying information" to recognize changes in technology and business practices and adds a definition of "biometric data."

Expungement from Police and Court Records

House Bill 734 establishes a process by which an identity theft victim whose identity was used by someone who was charged or arrested under his/her name can petition the court for a determination of factual innocence. If the court finds that there is no reasonable cause to believe that the person committed the offense with which the person's identity has been associated, the court shall issue an order certifying the person's factual innocence. The court shall then order that person's name to be removed from the records. The court shall order expungement of the arrest. The bill also provides a process for vacating the determination of factual innocence.

Written Police Reports

House Bill 734 requires a law enforcement officer who interviews a victim of identity theft to make a written report on forms provided by the AGO and to file the police report with the AGO.

Identity Theft Passport

House Bill 734 requires the AGO to issue an identity theft passport to persons who claim to be a victim of identity theft and provide specific verifying information. The passport shall be accepted as evidence of identity by law enforcement and others who may challenge the person's identity.

The bill requires the AGO to notify the Motor Vehicle Division (MVD) when a passport is issued and requires the MVD to make a note of this in the person's driver record.

The AGO shall be required to maintain a database of individuals who have been issued identity theft passports as well as files on each application for a passport and the associated police reports.

This provision raises concern regarding the security of identity theft passports, since considerable damage could be done by someone if a passport is stolen or forged, particularly since law enforcement is required to accept it as evidence of identity.

The AGO notes that the same or similar service could be provided to victims of identity theft by making a special notation on the driver's license or other existing identification, rather than creating a new form of identification.

The measure also requires the AGO to develop information on identity theft, distribute it to law enforcement and make it available to the public. This should be a relatively easy provision to implement given that the AGO already has information on its website and that numerous other government and private organizations have already developed identity theft resources.

Credit Reports

The measure requires a consumer reporting agency, within 30 days of receipt of a police report from an identity theft victim, to block any information the victim alleges appears on his report as a result of the identity theft. The bill establishes provisions for the consumer reporting agency to decline or rescind the block.

These provisions appear to duplicate federal law which prescribes the requirements of consumer reporting agencies to block fraudulent information. However, federal law requires the consumer reporting agencies to block the information within 4 business days of the receipt of the information. (See "Technical Issues" below.)

FISCAL IMPLICATIONS

HB 734 will result in significant costs to the general fund resulting from increased workload to the courts, NMCD, AGO and MVD.

Significant costs will be incurred by the AGO, which will be charged with establishing the identity theft passport system and database. AGO suggests that it would incur startup costs to develop the database, as well as yearly costs to maintain the program. AGO analyzes that these costs will, among others, include staff of 1 general administrative staff, 1 data entry/data base maintenance staff, 1 attorney, 2 investigators, and 2 advocates. Combined with the costs of supplies, hardware, travel, training, equipment and other basic needs, these costs are estimated by the AGO to be \$1 million to start up and \$750 thousand annually thereafter.

The expansion of the definition of identity theft and the provision allowing for a determination of factual innocence will result in an increased number of judicial proceedings. However, according to the Federal Trade Commission, only 4.6% of New Mexico's 1,317 identity theft cases in

2003 involved the illegal/criminal use of the victim's identity. Thus, the number of individuals seeking to clear their criminal records is likely to be low.

Increasing identity theft from a misdemeanor to a fourth degree felony may result in an increase in costs to the NMCD. According to the Federal Trade Commission, there were 1,317 victims of identity theft in New Mexico in 2003. According to the Identity Theft Resource Center, the arrest rate for identity theft is under 5%. If even 2.5% of roughly 1,300 cases resulted in an arrest and 4th degree felony conviction, the NMCD could see an increased population of 32 individuals, generally serving 18-month sentences. Based on NMCD per-inmate cost estimates, this could result in increased costs of approximately \$990 thousand to \$1.26 million. This does not take into consideration any probation and parole costs.

Law enforcement may incur minor cost increases to make their police reports on the prescribed forms and to file those forms with the AGO. MVD will incur minor costs to update driver records.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

House Bill 734 duplicates many of the provisions of House Bill 246. Senate Bill 260 makes the crime of identity theft a fourth degree felony. Senate Bill 560 enacts the personal insurance credit information act and regulates the use of credit information for personal insurance. Senate Bill 646 codifies the process to expunge a criminal record for, among others, victims of identity theft.

TECHNICAL ISSUES

Section 5, relating to credit reports duplicates provisions of federal law regarding the blocking of inaccurate information. The Fair and Accurate Credit Transactions (FACT) Act provides:

15 USCS § 1681c-2 (2005) Block of information resulting from identity theft

(a) Block. Except as otherwise provided in this section, a consumer reporting agency shall block the reporting of any information in the file of a consumer that the consumer identifies as information that resulted from an alleged identity theft, not later than 4 business days after the date of receipt by such agency of--

- (1) appropriate proof of the identity of the consumer;
- (2) a copy of an identity theft report;
- (3) the identification of such information by the consumer; and
- (4) a statement by the consumer that the information is not information relating to any transaction by the consumer.

This provision went into effect on December 1, 2004. The law also provides authority to the consumer reporting agency to decline or rescind a block.

House Bill 734 may be pre-empted by the FACT Act, which prescribes 6 areas where states are specifically pre-empted from enacting their own legislation. Two of those areas are regulations relating to the time by which a consumer reporting agency must take any action in any procedure related to the disputed accuracy of information in a consumer's file, and regulations relating to information contained in consumer reports. Whether or not House Bill 734 is pre-empted may

be a moot point since it would appear that the FACT Act is more protective than what is proposed in this bill.

DPS suggests specifying that aliases cannot be cleared from records by inserting the following phrase in two places, page 4, line 1 after “identity” and page 5, line 5 after “1978”:

“except in the case of an alias entered into the arrest record of a person guilty of identity theft.”

The AGO also notes that the bill should specifically give the AGO authority to adopt regulations to effectuate the bill.

AOC notes that the bill provides that a court may vacate a determination of factual innocence but does not provide guidance as to who may challenge the court’s determination after petition proceedings have concluded, nor a procedure for presenting a challenge. The AOC also notes that there is no definition of identity theft passport and only limited direction as to what information such a document shall contain.

OTHER SUBSTANTIVE ISSUES

The crime of identity theft remains prevalent and costly. According to the 2005 Identity Fraud Survey Report co-released by Javelin Strategy & Research and the Better Business Bureau, 9.3 million American adults were victims of identity fraud in 2004 for a total cost of \$52.6 billion. Most thieves obtain personal information through traditional channels, such as through a lost or stolen wallet or theft of mail, rather than through electronic means

POSSIBLE QUESTIONS

Should the state require private individuals (such as businesses) to accept the identity theft passport as identification?

Is Section 5 of the bill necessary given that federal law already prescribes the requirements on consumer reporting agencies to block information resulting from identity theft?

Given the presumption created in the bill that the identity theft passport is accurate, does the bill create a new avenue for identity theft and/or fraud?

EF/lg