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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/21/13

SPONSOR Easley LAST UPDATED \_\_\_\_\_ HB 402

SHORT TITLE Restrict Assault Weapons & Large Magazines SB \_\_\_\_\_

ANALYST Trowbridge

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	Unknown*	Unknown*	Unknown*	Unknown*	Recurring	Unk- General?

\*See "Fiscal Implications" below

Duplicates, Relates to, Conflicts with, Companion to  
 Duplicates Appropriation in the General Appropriation Act  
 Relates to Appropriation in the General Appropriation Act

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Public Defender Department (PDD)  
 Attorney General's Office (AGO)  
 Association of District Attorneys (AODA)  
 Administrative Office of the Courts (AOC)  
 NM Sentencing Commission  
 Department of Public Safety (DPS)

### SUMMARY

#### Synopsis of Bill

HB 402 establishes a new section of criminal code restricting the ownership of assault weapons and large-capacity ammunition-feeding devices, establishes criminal penalties related to unlawful possession of the same and sets requirements on gun owners to enhance gun safety.

Section 1A: Makes it unlawful for an individual to knowingly possess or transport an assault weapon or a large-capacity ammunition feeding device with the following exceptions: 1) owners of said weapon or device in New Mexico prior to July 1, 2013; 2) certified law enforcement

officers as part of their official duties; 3) active members of the military as part of their official duties; 4) NM licensed gun dealers for use only at firing ranges owned by these dealers; 5) owners of the referenced equipment for use only at firing ranges owned by licensed NM gun dealers.

Section 1B: Places the responsibility for proving ownership on any individual possessing the referenced equipment who does not fall within one of the exceptions noted in Section 1A.

Section 1C: Requires those possessing such weapons to store the weapon in a locked gun safe except during transport.

Section 1D: Establishes the following requirements for transport of assault weapons, weapons must: 1) not be loaded with ammunition; 2) be disconnected from any detachable magazine; 3) have trigger locked secured.

Section 1E: Stipulates that transferring possession of the referenced equipment may only be done through a law enforcement purchase program.

Section 1F: Provides for impounding of referenced equipment by law enforcement agencies when there is probable cause of unlawful possession and for destruction of said equipment should the individual charged with unlawful possession be found guilty.

Section 1G: Makes unlawful possession of assault weapons and large-capacity ammunition feeding devices a misdemeanor offense.

Section 1H: Delineates those factors which classify a weapon as an assault weapon under this Act and the differences with those not so classified. Primary factors including protruding grip, detachable magazine, flash suppressor, amount of ammunition storage. Also defines large-capacity ammunition feeding device as a magazine or similar device that accepts more than 10 rounds of ammunition or contracts more than 7 rounds.

Section 2: Stipulates that if any section of the Act is invalidated, the remaining sections and their application remain valid.

Section 3: Effective date: July 1, 2013

## **FISCAL IMPLICATIONS**

The Association of District Attorneys (AODA) maintains HB 402 would have a definite fiscal impact on DA offices that would probably have more cases to evaluate and possibly prosecute, and they would likely have to use expert witnesses to prove the violations. The AODA indicates that this bill would create an entirely new category of crimes involving firearms and includes provisions that could, potentially, also implicate civil or administrative hearings in addition to criminal proceedings. The bill will probably require persons involved in implementing it to develop or have access to expertise regarding the weapons and magazines listed. Storage requirements and protocols for transfers will have to be developed by law enforcement agencies along with a broadened scope of investigative responsibilities. AODA adds that there are probably other unanticipated consequences.

The Attorney General's Office (AGO) states this bill, if enacted, could result in an increase in criminal matters filed in courts of jurisdiction. It could also result in additional investigative tasks to be conducted by state and local law enforcement personnel.

The Public Defender Department (PDD) states that enactment of this bill is unlikely to have significant fiscal effect on the PDD. Of course, while it is likely that the PDD would be able to absorb some additional cases under the proposed law, any increase in the number of such would bring a concomitant need for an increase in indigent defense funding in order to ensure constitutionally mandated effective assistance of counsel.

The Administrative Office of the Courts (AOC) reports that there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes.

## SIGNIFICANT ISSUES

The AGO identified the following significant legal issues pertaining to HB 402:

### Federal and State Constitutional Provisions and Jurisprudence

Article II, Section 6 of the New Mexico Constitution bars, in pertinent part, any law that “abridge[s] the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes...” The purpose of this provision is to “to establish the right of individual citizens ‘to keep and bear arms,’ and to limit interference with that right.” State ex rel. N.M. Voices for Children, Inc., v. Denko, 2004 NMSC 11, ¶7. While Art. II, §6 is not limitless, it provides broader rights to people than does the Second Amendment to the United States Constitution. State v. Dees, 100 N.M. 252; 669 P.2d 261 (Ct.App. 1983), at 253, 262. The State may legislate limitations on the right to keep and bear arms where it employs its police power to prevent a clear danger to the public. State v. Rivera, 115 N.M. 424; 853 P.2d 126 (Ct.App. 1993), at 427, 129.

The bill creates rules regarding the transportation and storage of assault weapons which may be possessed by way of specific exceptions to the bill (most notably, weapons already owned by individual before July 1, 2013). The bill requires assault weapons to be stored in a “securely locked gun safe” unless the weapon is being used or transported. When transported, the weapon must be unloaded, have its magazine removed, and be rendered inoperative with a trigger lock. These requirements would impose an obstacle to the immediate use of the weapon and thereby limit reasonable self-defense. Similar limitations have been found to violate the Second Amendment to the United States Constitution. District of Columbia v. Heller, 554 U.S. 570 (2008), at 683 (holding, *inter alia*, that a municipal ordinance requiring stringent techniques of domestic storage of permitted firearms violated the Second Amendment). The Second Amendment confers an individual right to keep and bear arms independent of militia service and has also been incorporated against the states. Heller, 554 U.S. at 582-83, McDonald v. Chicago, 130 S. Ct. 3020 (2010), at 3026.

### Assault Weapons and Crime

The bill defines “assault weapon” in a manner more stringent than was found in the Public Safety and Recreational Firearms Use Protection Act (“Federal Assault Weapons Ban”) of 1994. The expired federal law considered an assault weapon as a semiautomatic pistol or rifle having a detachable magazine and two additional enumerated characteristics or a semiautomatic shotgun with two enumerated characteristics. The instant bill considers a semiautomatic pistol or rifle having a detachable magazine and one enumerated characteristic or a semiautomatic shotgun having one enumerated characteristic (or a revolving cylinder) to be an assault weapon. As such, the bill could be challenged as being drafted in a fashion that results in an overly broad application relative to its legislative goal.

The AGO adds that many of the bill’s enumerated characteristics are stylistic or cosmetic in nature and do not make a firearm more lethal than one without the characteristic. Additionally, firearms classified as “assault weapons” by the instant bill and the expired federal law have not been found to be statistically significant in terms of national crime data relative to the use of firearms which would not be barred by this bill or the expired federal law. This is especially noteworthy given recent violent crime data relative to New Mexico. For example, in 2011, New Mexico experienced 121 murders. 45 of those murders were committed with handguns. Four were committed with rifles or shotguns. Eleven were committed with unknown firearm types. The remaining 61 murders were committed with something other than firearms. <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-20> Data regarding the use of assault weapons and high-capacity magazines contemplated by the instant bill was not available.

The AODA maintains that the most obvious issues inherent in this bill are whether it could comport with the Second Amendment to the United States Constitution (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”), and Article II, Section 6 of the New Mexico Constitution (“No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes...”)

AODA indicates a frequently anticipated defense to an alleged violation for unlawful possession of an “assault weapon” or “large capacity ammunition feeding device” is that it was owned before July 1, 2013. Other defenses are that a person is by their status allowed to possess an assault weapon or large capacity magazine. The bill, as drafted, would require a law enforcement officer on the street to make a determination immediately of several important issues: (1) is the weapon one that is prohibited because of how it was made, i.e does it have at least one of the characteristics that fit the definitions listed above, and what are its capabilities; (2) is the possessor someone who is exempt from the prohibitions against possession because of their job and their official duties, and/or their status as a gun dealer licensed in New Mexico; (3) is the assault weapon or large capacity magazine owned by the person who possesses it, and were they the owner prior to July 1, 2013. Before the officer can determine if there is probable cause that the person “is in unlawful possession” those questions must be resolved in order to decide whether to confiscate the weapon or magazine and impound it. Answering those questions will be very difficult, and will probably require someone with expert knowledge to even know whether the weapon or magazine meets the definitions so it is prohibited before they can decide to continue the inquiry and probe employment, job duties and duration of ownership.

The AODA also notes that several states, like Connecticut and Maryland, have a list of prohibited firearms so the initial determination is simpler. Violations could also occur under the bill if an assault weapon was not stored or transported as required, or the weapon or large capacity magazine was sold without approval but those circumstances will be easier to assess. Shifting the burden to the possessor to prove ownership of an assault weapons or large capacity magazine pre-dates July 1, 2013 would be unconstitutional in a criminal case. There might be a way to establish an administrative process to address that issue but since it might result in prosecution even that procedure could be challenged. It’s unclear what process that might take, including who might be the arbiter or represent the state in the proceeding. California simply declares that some weapons are a “public nuisance” and uses remedies outside the criminal law to deal with them.

AODA points to some inconsistencies in the bill as drafted. There are exceptions to the unlawful possession prohibition. One is that if the weapon or magazine is located on the premises of a firing range which is owned and operated by a gun dealer licensed in New Mexico. Another exception is if a person is in law enforcement or the military and use the assault weapons or large magazine as part of their official duties. Persons can transport an assault weapon if it is unloaded and does not have a detachable magazine in place and has a secured trigger lock in place. Arguably, if a person uses the weapon as part of their official duties they could not be able to be used in an emergency while they are being transported. If “transporting” is given a broad interpretation it could even include walking, let alone driving. And although private citizens can possess a prohibited firearm on a firing range—if it meets the range meets the requirements specified of being owned and operated by a gun dealer licensed in New Mexico, the bill does not plainly say that they could take it to the range. Proving that a gun dealer is: (1) licensed in New Mexico; (2) owns the firing range; and, (3) operates the firing range where assault weapons and large magazines can be lawfully possessed are additional hurdles if one of those two exceptions might come into play.

Additionally, the AODA indicates that other issues may be raised. An argument about equal protection could be raised since the ammunition limits of five to ten rounds vary, and are different from other weapons. The definitions of assault weapons are different from other states, at least two of which require two of the additional criteria listed above instead of just one. It is possible someone could be passing through New Mexico and be unaware of the restrictions this bill would place on their possession of assault weapons and large capacity magazines and they could be confiscated. Unless charges are dismissed or a person is acquitted the bill says the weapons and magazines must be destroyed. Law enforcement agencies could face civil suits for confiscating private property without due process first. Most police agencies and district attorneys’ offices lack the resources to determine if an exception specified would apply so they would need to be augmented to carry out the new responsibilities added by this bill. The technical requirements noted above mean proving misdemeanor violations would be complex and, probably, costly.

The PDD also states that HB 402’s mandate that a person prove prior-to-ban ownership of a banned device likely would prove problematic under due process requirements.

The Department of Public Safety (DPS) notes that a section of the bill states “a person shall not transfer possession or ownership of an assault weapon or large capacity ammunition feeding device except under the auspices of a purchase program of a law enforcement agency.” The language of this provision is broad and could be challenged for vagueness. As written, it appears that the statute would allow multiple law enforcement agencies in various jurisdictions within the State of New Mexico to devise their own programs. The multiplicity of such programs would invariably lead to legal challenges and forum shopping. DPS as such an agency would be required to develop such a program and would be required to defend it against any legal challenges that might arise. In addition, the law enforcement agency would be required to maintain possession of the weapon or device pending the resolution of any criminal charges. This would require potentially additional agency resources and employee and space to properly secure the devices for a lengthy period of time should convictions be appealed.

Finally, DPS states that given the current emphases on the passage of federal gun control legislation by the executive and congress, passage of this bill may be premature and may conflict with whatever legislation is finally passed by Congress regarding the same devices addressed by

this bill.

## **PERFORMANCE IMPLICATIONS**

The AOC reports that the courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type.

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

The AGO identifies the following measures:

HB114 – “PROHIBIT ENFORCEMENT OF FEDERAL GUN LAWS”, would criminalize the enforcement of federal laws or regulations pertaining to firearms, firearm accessories, or ammunition if applied to circumstances involving a firearm, firearm accessory, or ammunition owned or manufactured and remaining within the borders of the State of New Mexico. Additionally, HB114 would render as unenforceable any federal firearms law or rule banning specific firearms or accessories or requiring registration of same. However, even if both bills pass, the law contemplated by the instant bill would still be in effect as HB114 focuses on the enforcement of federal laws.

HB77 – “FIREARMS TRANSFER ACT”, which would prohibit certain persons from purchasing or receiving firearms, require background checks prior to the transfer of firearms by persons other than licensed gun dealers, establish procedures for the conduct of background checks, and address private firearms transfers and transfers at gun shows.

HB 137 – “CONCEALED GUNS IN LIQUOR ESTABLISHMENTS, which amend §30-7-3 (“Unlawful carrying of a firearm in licensed liquor establishments”) to permit persons with valid concealed handgun permits to carry concealed firearms in establishments which serve alcoholic beverages for consumption on premises, irrespective of the type of beverage (for example, beer vs. “hard” liquor) and of whether the establishment also sells food for consumption on premises and what percentage of the establishment’s revenue is comprised of food vs. alcoholic beverage sales.

SB 230 – “SCHOOL EMPLOYEE CONCEALED HANDGUNS, would amend §§29-19-1 - 14 NMSA (“Concealed Handgun Carry Act”) to permit schools to designate a single employee with a valid concealed handgun permit to carry a concealed handgun on school premises.

## **TECHNICAL ISSUES**

DPS states that Section 1A(1) and Section 1B require clarification.

## **OTHER SUBSTANTIVE ISSUES**

The AGO states that another possible challenge to this bill is the doctrine of federal preemption, which can be characterized as a product of the United States Constitution’s Supremacy Clause (Art. VI) and its Commerce Clause (Art. I, Section 8). The federal government regulates most aspects of the manufacture and transfer of firearms and many aspects of the sale of firearms,

notwithstanding existing state firearms laws. The federal government's authority to so regulate is based on the notion that firearms are inexorably a part of interstate commerce. However, federal authority to regulate firearms based on interstate commerce is not absolute - recent U.S. Supreme Court jurisprudence has signaled that the Commerce Clause may not always justify federal regulation of things and activities ostensibly in interstate commerce. Nevertheless, this recent trend has not produced a clear precedent holding whether and/or under what circumstances the federal government can regulate firearms, exclusively or otherwise, based solely on interstate commerce.

### **ALTERNATIVES**

The PDD states the sponsor might consider amending the bill to implement a fund, similar to the Interlock Fund, to allow purchase of gun safes for indigent gun owners - this would foreclose any Equal Protection challenge.

TT/blm