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FISCAL IMPACT REPORT

SPONSOR <u>Cervantes</u>	LAST UPDATED <u>3/21/25</u>
	ORIGINAL DATE <u>2/25/25</u>
SHORT TITLE <u>Firearms in Unfair Practices Act</u>	BILL NUMBER <u>Senate Bill 318/aSFI#1/aHJC</u>
	ANALYST <u>Chavez</u>

REVENUE* (dollars in thousands)

Type	FY25	FY26	FY27	FY28	FY29	Recurring or Nonrecurring	Fund Affected
Fines and Forfeitures	No fiscal impact	Indeterminate but minimal gain	Indeterminate but minimal gain	Indeterminate but minimal gain	Indeterminate but minimal gain	Recurring	General Fund

Parentheses () indicate revenue decreases.

*Amounts reflect most recent analysis of this legislation.

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

Agency/Program	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
NMAG	No fiscal impact	Indeterminate but minimal	Indeterminate but minimal	Indeterminate but minimal	Recurring	General Fund
Courts	No fiscal impact	Indeterminate but minimal	Indeterminate but minimal	Indeterminate but minimal	Recurring	General Fund

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent analysis of this legislation.

Conflicts with House Bills 60, 61, 62, 224, and 245.

Sources of Information

LFC Files

Agency Analysis for Introduced Bill Received From

Administrative Office of the Courts (AOC)
 Regulation and Licensing Department (RLD)
 Department of Public Safety (DPS)
 New Mexico Attorney General (NMAG)

Agency Analysis was Solicited but Not Received from for Introduced Bill

Tax and Revenue Department (TRD)

Because of the short timeframe between the amendment to this bill and its hearing on the Senate Floor, LFC has yet to receive analysis from state, education, or judicial agencies. This analysis could be updated if that analysis is received.

SUMMARY

Synopsis of HJC Amendment to Senate Bill 318

The House Judiciary Committee (HJC) amendment to Senate Bill 318 (SB318) adds language to the definition of “online marketplace” to exclude entities who only offer classified advertisements from the definition. The amendment changes the definition of “trade” or “commerce” by making it that an entity that has “sold or otherwise placed a product **or** goods into the national market or the stream of commerce.” The amendment also modifies Section 8 by making it so any documentation produced in a civil investigative demand will not be shared; the amendment removes language explaining that the information from a civil investigative demand be subject to the Inspection of Public Records Act and discoverable by any party to an action brought pursuant to UPA. It brings back old language in the bill that was originally stricken out. Finally, the amendment adds a new section, Section 12, detailing the severability of the bill.

Synopsis of SFI#1 to Senate Bill 318

The Senate Floor amendment #1 (SFI#1) to Senate Bill 318 amends the definition of “firearm accessory” by striking the original definition and replacing it with a more concise definition that is broader and encompassing. The amendment also strikes the section related to amending Section 57-12-3.1 NMSA 1978, the statute governing unauthorized use of delivery containers, in its entirety from the bill.

SFI#1 further amends Section 57-12-10 NMSA 1978, the private remedies statute, by changing amount recoverable where the trier of fact (a person or group of people who determines disputed issues of fact in a legal proceedings) finds that the party has willfully engaged in a unlawful trade practice from actual damages or \$10 thousand, whichever is greater, to actual damages or \$30 thousand, whichever is greater. SFI#1 reduces the award for individuals granted an injunction against unfair, deceptive, or unconscionable trade practices involving firearms, destructive devices, or related accessories from \$250 thousand to \$30 thousand per violation. SFI#1 reduces the award a requesting party could receive in statutory damages if an online marketplace or third-party seller willfully fails to or refuses to comply with a subpoena seeking information about a third-party seller from \$250 thousand and attorney fees and costs to \$30 thousand and attorney fees and costs. The amendment allows the court to award the party requesting the subpoena, rather than requiring the court to do so.

SFI#1 amends Section 57-12-11 NMSA 1978 to raise civil penalties to \$30 thousand per violation (up from \$25 thousand) and removes language that would have raised the fine to \$250 thousand for firearm-related infractions.

SFI#1 renumbers the succeeding sections accordingly.

Synopsis of Senate Bill 318

Senate Bill 318 seeks to amend various sections of New Mexico law to regulate firearms and destructive devices under the Unfair Practices Act (UPA).

SB318 amends Section 53-17-2 NMSA 1978, governing powers of a foreign corporation, to provide that a foreign corporation that has received a certificate of authority under the Business

Corporation Act consents to general personal jurisdiction in New Mexico.

The bill amends Section 57-12-2 NMSA 1978 to include firearms and destructive devices within the definition of goods and services covered by UPA, thereby subjecting their manufacture, advertising, distribution, and sale to consumer protection laws. The bill also amends to the definition of "unfair or deceptive trade practice" to include representing goods and services as legal to purchase when they are not, exempting representations or activities authorized under the Lynn and Erin Compassionate Use Act or the Cannabis Regulation Act. SB318 also defines terms including online marketplaces, third-party sellers, and other factors related to online exchanges.

SB318 amends Section 57-12-7 NMSA 1978, the statute governing exceptions to UPA, to now exclude actions or transactions explicitly permitted by federal or state law or by a regulatory body, instead of exempting just what was expressly permitted by a regulatory body. It also exempts cases where a person, business, or entity has legal immunity under U.S. or New Mexico law. Additionally, UPA would not apply when specific legal requirements, such as proving proximate cause of harm or demonstrating that the alleged unfair practice took place within New Mexico, are not met.

Section 57-12-9 NMSA 1978 would also be amended to bar recovering any damages in an action if the individual accepts restitution from an assurance to now allowing them to bring forth an action if the defendant fails to make restitution as agreed.

The bill amends Section 57-12-10 NMSA 1978, the private remedies statute. The proposed amendment would increase the amount recoverable in an action under UPA from actual damages or \$100, whichever is greater, to actual damages or \$10 thousand, whichever is greater. It also increases the amount recoverable where the trier of fact (a person or group of people who determines disputed issues of fact in a legal proceedings) finds that the party has willfully engaged in a unlawful trade practice, from an award of up to three times actual damages or \$300, whichever is greater, to an award of up to three times actual damages or \$10 thousand , whichever is greater. SB318 would allow courts to grant an injunction against a person engaged in an unfair, deceptive, or unconscionable trade practice involving firearms, destructive devices, firearm parts, or accessories that violate New Mexico or federal law. The person granted the injunction would also be awarded \$250 thousand per violation. SB318 also strikes two sections related to mediation use to resolve disputes under UPA.

SB318 also amends Section 57-12-10 NMSA 1978 to have multiple parties, who work together in the manufacture, advertise, distribute or offer for sale a firearm, destructive device, firearm part or firearm accessory, incur joint and several liability. Online marketplaces would also be jointly and severally liable for any violations of UPA that occur on the online marketplace. Online marketplaces would also be required to comply with validly issued subpoenas that seek information about a third-party seller. If an online marketplace or third-party seller willfully fails to or refuses to comply with the subpoena, that itself will be considered a violation of UPA and would be liable to award the requesting party \$250 thousand and attorney fees and costs if the violation revolves around a third-party seller dealing with a firearm, destructive device, firearm part or firearm accessory. If the subpoena is issued involving any other allegation under UPA, the online marketplace or third-party seller would be liable for a \$10 thousand award to the requesting party. The bills finally amend this section to have an online marketplace, seller, or third-party seller without a U.S. business location, or one that hides its location while selling in

New Mexico, is considered to have minimum contacts with the state, benefit from its laws, conduct business there, and be subject to legal action in its courts.

SB318 also amends Section 57-12-11 NMSA 1978 to increase civil penalties for violations, raising the fine to \$25 thousand (from \$5,000) and \$250 thousand per violation if the infraction involves firearms.

Further, the bill strengthens enforcement mechanisms by granting the New Mexico Attorney General (NMAG) broader authority under Section 57-12-12 NMSA 1978 to investigate and prosecute such violations by being able to issue civil investigative demands (CID). The bill does provide provisions that NMAG will not publish the findings from CIDs unless ordered by the court. SB318 also provides that documentary material produced pursuant to a CID, unless ordered by the court, is subject to the Inspection of Public Records Act and discoverable by any party to an action brought pursuant to UPA.

The bill amends Section 57-12-16 to clarify that UPA does not apply to media, unless the publication, broadcast or reproduction violates the laws of New Mexico or the U.S.

Finally, the bill seeks to create a new section, Section 57-12-3.2 NMSA 1978, making it unlawful to engage in unfair or deceptive trade practices related to firearms and destructive devices, specifically prohibiting violations of Section 30-7-7 NMSA 1978 (governing the unlawful sale, possession or transportation of explosives) and other state or federal laws governing firearm commerce.

This bill does not contain an effective date and, as a result, would go into effect 90 days after the Legislature adjourns if enacted, or June 20, 2025.

FISCAL IMPLICATIONS

Revenue. SB318 provides for a civil penalty that may be imposed in an action brought by NMAG under UPA for knowingly engaging in an illegal firearm trade practice of up to \$30 thousand per violation (reduced from up to \$250 thousand in certain circumstances by SFI#1). Because this is a new, relatively narrow category of unfair practice, it is still difficult to predict how many cases will result in the imposition of such a penalty, or the amount of any penalty imposed in a case. As a result, LFC staff estimates the fiscal impact on revenues to be indeterminate but have minimal gain.

Operating Budget Impact. Under existing law, NMAG is authorized to bring an action in the name of the state alleging a violation of UPA. SB318 expands the scope of coverage of UPA but would include a new and relatively narrow category of unfair practice, meaning that the operating budget impact on the courts and NMAG would be indeterminate but minimal.

SIGNIFICANT ISSUES

SB318, in its original form, is a duplicate of the House Judiciary Committee's amendments to Senate Bill 428 (SB428) that was sponsored by the Senate Judiciary Committee from the 2023 legislative session. While SB318 is no longer an exact duplicate of SB428, the significant issues discussed in this section are still relevant. The New Mexico Attorney General (NMAG) then

objected to the provisions of Section 9 which makes documents produced in response to a CID public record, absent a court ruling otherwise, which reverses the presumption in the current version of UPA that these documents are not public records. Section 8 of SB318, the corresponding section, remains unchanged from SB428 of the 2023 session. Because of this, NMAG's objection would remain. In previous analysis, NMAG explained the basis for the current law providing for nondisclosure of CID materials as a general rule:

The Office of the Attorney General uses CIDs as a tool to investigate potential violations of UPA before filing a lawsuit. By making information obtained through a CID subject to public disclosure under IPRA, the bill would significantly impact the Attorney General's ability to carry out its enforcement authority under UPA for at least three reasons.

First, CIDs often seek highly sensitive information, including HIPAA protected health information, private banking information including detailed transaction logs, and confidential trade secrets. Targets of CIDs commonly object to providing full responses on the basis that such material is too sensitive to turn over. The default confidentiality and IPRA exception in the current CID provisions of UPA provide a way for the Attorney General to overcome those objections and compel production of such materials because they will not be subject to public disclosure. If CID materials become subject to public disclosure through IPRA by default, the office will face extensive litigation over confidentiality over the majority of CIDs issued by the office.

Second, at times, the Attorney General issues CIDs to third party entities to obtain information about a potential defendant's UPA violation. When this happens, the fact that a third-party CID has been issued, and the information obtained, is not disclosed to any party unless and until the Attorney General files a lawsuit against the defendant. If documents obtained through a CID become subject to disclosure under IPRA by default, a potential defendant which has some reason to suspect that it is under investigation by the Attorney General may be able to submit its own IPRA request to obtain and review information obtained by the Attorney General from third parties before a lawsuit is filed. Generally, parties to litigation are not entitled to obtain materials created by an opposing party in anticipation of litigation, particularly when those materials may reveal the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." NMRA Rule 1-026(B)(5). The pre-suit disclosure of CID evidence sought and obtained by the Attorney General related to a potential UPA lawsuit would likely reveal much about the opinions or legal theories of the office leading up to the filing of the lawsuit and be a significant disadvantage to the office in pursuing its enforcement authority under UPA through litigation.

Finally, the Attorney General commonly participates in multi-state enforcement efforts with other Attorneys General to investigate a specific potential defendant or group of defendants whose conduct may have violated consumer protection laws in multiple states. These multi-state groups commonly involve entering into a Common Interest Agreement to allow the participating Attorneys General to communicate and share investigative materials without waiving attorney/client privilege or attorney work product privilege. If CIDs issued under the New Mexico UPA are subject to disclosure under IPRA, New Mexico may not be able to participate fully in such multi-state enforcement efforts in the future because of the confidentiality requirements included in group Common Interest Agreements.

This concern from NMAG was remedied with the HJC amendment that strikes that CIDs are subject to the Inspection of Public Records Act and discoverable by any party to an action brought pursuant to UPA.

NMAG also notes:

SB318 creates a private right of action if a person is “aware of an unfair trade practice involving the manufacture, marketing, distribution, sale or offering for sale of a firearm.

Section 7 creates a private right of action allowing a person aware of an unfair trade practice involving the manufacture, marketing, distribution, sale or offering for sale of a firearm, destructive device, a firearm part, or a firearm accessory. It is possible that the expansion of a private right of action to give claims to any person who is “aware of” a violation of the Act may be found to violate the judicial principle requiring a litigant to have standing to bring a claim. Where a statute gives rise to a cause of action, an individual’s legal standing is a jurisdictional requirement for a court to hear the claim. *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 9, fn. 1. For a litigant to have standing to bring a claim, the litigant must generally be able to demonstrate that she was directly injured as a result of the action they seek to challenge, that there is a causal relationship between the injury and the challenged conduct, and that the injury is likely to be redressed by a favorable decision. *Id.* ¶ 1. Even if a statute purports to grant a cause of action to a person who is merely “aware of” a violation of the statute, courts may find that the person lacks legal standing to assert that claim unless the person can demonstrate some form of harm they have suffered as a result.

The Administrative Office of the Courts (AOC) points out that the Connecticut Supreme Court, in a 4-3 decision in *Soto v. Bushmaster Firearms Int'l, LLC* (2019), allowed a lawsuit against the manufacturer of the AR-15-style rifle used in the 2012 Sandy Hook massacre to proceed, despite federal protections under the Protection of Lawful Commerce in Arms Act (PLCAA). The plaintiffs, representing victims’ estates, argued that Bushmaster’s marketing violated the Connecticut Unfair Trade Practices Act (CUTPA) by promoting the rifle’s militaristic and combat capabilities, potentially encouraging criminal use. The Court ruled that this marketing strategy fell within PLCAA’s “predicate exception,” which permits lawsuits based on violations of applicable state laws.

The ruling marked a significant limitation on PLCAA’s broad immunity for gun manufacturers. In November 2019, the U.S. Supreme Court declined to review the case, upholding the Connecticut Supreme Court’s decision and allowing the lawsuit to move forward.

The Regulation and Licensing Department (RLD) provides the following on the proposed amendments to the Business Corporation Act:

SB318 amends the Business Corporation Act by imposing a requirement of a consent to registration. SB318 expands personal jurisdiction of a foreign corporation that received a certificate of authority under the Business Corporation Act, requiring that under SB318, all corporations “consent to personal jurisdiction” and corporations doing business in New Mexico “enjoy the same, but no greater rights and privileges as a domestic corporation... and is subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character.” pp. 1-2. This amendment to the Business Corporation Act may make it easier to establish personal jurisdiction over corporations. This consent to registration places foreign corporations on equal footing with domestically organized and registered corporations in New Mexico,

allowing and expanding personal jurisdiction and authority to commence suit against corporations that prior to this change in law might have successfully argued they did not manifest contact with New Mexico sufficient for liability. Under SB318's amendment to the Business Corporation Act, there would not be any need for plaintiffs in New Mexico to establish minimum contacts against a corporation, including establishing the quantity of contacts necessary to establish personal jurisdiction.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB318 conflicts with House Bills 61, 224, and 245 because these bills also amend Section 57-12-2 NMSA 1978, part of UPA. SB318 conflicts with HB62 because it repeals Section 57-12-12 NMSA 1978, another section of UPA. SB318 conflicts with House Bill 60, which also expands the definition of "unfair or deceptive trade practice."

TECHNICAL ISSUES

Section 1 amends a section in the Business Corporation Act which does not appear to be reflected in the title of SB318.

Page 21, lines 14-19: this description of an illegal firearm trade practice does not encompass all the activities contained in the definition of this UPA violation at Section 1(J)(21) on page 9, lines 21-24. This technical issue was resolved by SFI#1.

NMAG notes the following:

The bill amends the definition of "seller-initiated telephone sale" to include internet sales. However, that defined term does not appear anywhere else in the UPA. NMSA, 1978, § 57-12-22 (1989) (amended 2003) formerly prohibited certain practices related to "seller-initiated telephone sales". However, that Section of the UPA was substantially rewritten by legislation passed in 2003, and the statute no longer uses the term "seller-initiated telephone sale." Most of the prohibitions contained in Section 57-12-22 are specific to telephone-based sales solicitation and are not applicable to email or website-based solicitation. An amendment of the definition of that specific term in the current bill may therefore have no effect on the scope or application of the UPA.

FC/hj/SL2/hj