

LFC Requester:	
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**AGENCY BILL ANALYSIS
2017 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original	<input checked="" type="checkbox"/>	Amendment	<input type="checkbox"/>	Date	<u>1-26-17</u>
Correction	<input type="checkbox"/>	Substitute	<input type="checkbox"/>	Bill No:	<u>HB240</u>

Sponsor:	<u>M. Youngblood</u>	Agency Code:	<u>264</u>
Short Title:	<u>Child Protection Registry Act</u>	Person Writing	<u>Gail MacQuesten</u>
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		
0	Unknown	recurring	n/a

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		
0	0	0	n/a	n/a

(Parenthesis () Indicate Expenditure 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	unknown	recurring	general

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: SB444, HB71, SB61
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

HB240 enacts the “Child Protection Registry Act.” The purpose of the Act is to provide a mechanism to safeguard minors from receiving communications that advertise a product or service that a minor is prohibited by law from purchasing, or that contain or have the primary purpose of advertising or promoting, material that is harmful to minors under Section 30-37-1(F) NMSA 1978. That statute defines “harmful to minors” as that quality of any description of representation, in whatever form, of nudity, sexual conduct, sexual excitement or sado-masochistic abuse when it predominantly appeals to the prurient, shameful or morbid interest of minors and is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors and is utterly without redeeming social importance for minors.

HB240 requires the Attorney General to establish and administer the child protection registry. A person responsible for a “contact point” (defined as any electronic identification to which a communication can be sent, such as an email address, a telephone number or an instant message identity) to which a minor may have access may register that contact point with the registry. Schools and other entities that primarily serve minors may also register contact points. The registration is valid for three years, is free, and is not a matter of public record.

A person desiring to send a communication that is described in the Act must verify whether the contact point they wish to send the communication to is registered. The Attorney General shall charge a fee of not more than three cents per contact point checked against the registry.

The Act prohibits knowingly sending, causing to be sent or conspiring with a third party to send a communication to a contact point that has been registered in the registry for more than thirty days if the primary purpose of the communication is to directly or indirectly advertise or otherwise link to a communication that advertises a product or service that a minor is prohibited by law from purchasing or that contains or has the primary purpose of advertising or promoting material that is harmful to minors.

The Act provides for criminal and civil penalties.

The registrant or the Attorney General may bring a civil action for violations of the Act. A civil action may be brought in addition to a criminal action. A registrant bringing an action may recover actual damages or the lesser of \$5,000 per communication transmitted to the contact

point or \$250,000 per day that the violation occurs. If the Attorney General brings an action, the Attorney General may recover a penalty not to exceed \$10,000 per communication or \$500,000 per day that the violation occurs, whichever is less.

HB240 provides that violations may be prosecuted under the Computer Crimes Act. The only criminal provision in HB240 itself appears in Section 7(E), which makes it a misdemeanor to:

- Use information obtained from the registry to violate the Act;
- Improperly obtain or attempt to obtain contact points from the registry; or
- Use or transfer to a third party to use, information from the registry to send communication.

Internet service providers are not in violation of the Act simply by transmitting a communication across the network. Consent of the minor is no defense. Prior consent by an adult is a defense, but Section 8 of HB240 sets out strict requirements for obtaining that consent.

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

HB240 creates the “child protection registry fund” consisting of appropriations and fees collected, to be used to establish, operate and administer the registry and to enforce and defend the Act. It is unknown how much will be collected in fees. The bill does not appropriate any additional funds.

HB240 creates new misdemeanors related to misuse of the registry, although it is unlikely that the district attorneys will have many prosecutions.

SIGNIFICANT ISSUES

It is not clear how the Child Protection Registry Act relates to existing criminal statutes regarding sexually oriented material harmful to minors. See Section 30-37-1 NMSA 1978, *et seq.* Those statutes provide criminal penalties for sale, distribution, and display of visual representations that come within the definition of “harmful to minors.” The statutory scheme requires notice prior to prosecution, and provides various defenses and exemptions. These provisions were probably enacted to prevent charges that the statutes were constitutionally overbroad. Section 30-37-8 NMSA 1978 provides that the statutes in Section 30-37-1 NMSA 1978 *et seq.* are intended to be the sole and only regulation of such representations.

HB240’s Child Protection Registry Act 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 will therefore not apply. This opens the Child Protection Registry Act to possible charges of over-breadth. Also, the Act will likely be challenged on the ground that Section 30-37-8 is the sole source of regulation regarding some of the material the Act purports to cover.

If the Child Protection Registry Act is intended to be part of the group of criminal statutes

regarding sexually oriented material harmful to minors, that raises additional issues. No such link is provided in HB240. And if the Child Protection Registry Act is subject to the notice requirements, defenses and exemptions, it will make it very difficult to administer.

The primary enforcement mechanism in HB240 is civil. It is the registrant or the attorney general who may bring an action for damages against a person who knowingly sends, causes to be sent, or conspires with a third party to send a communication to a contact point that has been registered if the primary purpose of the communication is to directly or indirectly advertise or otherwise link to a communication that advertises a product or service that a minor is prohibited by law from purchasing or that contains or has the primary purpose of advertising or promoting material that is harmful to minors. HB240 could be challenged for inhibiting free speech and interfering with interstate commerce. For example, one picture that would be found “harmful to minors” (but not necessarily harmful or offensive to adults), emailed by one adult to another adult could result in civil penalties for the sender if the recipient had registered that email address, even if no child ever saw the picture. A seller of products that cannot be sold to minors, who advertises through mass emails or other forms of communication covered by the Act, will encounter 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 will have to be repeated every three months, at a cost of up to three cents per contact.

The role of the district attorneys in enforcement of HB240 appears to be limited to the prosecution of the misdemeanors set out in Section 7 (E), which all relate to misuse of the registry itself. Section 7 (F) provides that violations of the Child Protection Registry Act are subject to prosecution under the Computer Crimes Act (NMSA 1978, Section 30-45-1 *et seq.*), which addresses misuse of computer systems. There does not appear to be a criminal enforcement provision related to sending prohibited communications to a registered contact point.

PERFORMANCE IMPLICATIONS

Minimal.

ADMINISTRATIVE IMPLICATIONS

See Significant Issues and Performance Implications, above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB444 also proposes a Child Protection Registry.

Other proposed legislation imposes criminal penalties for electronic transmission of certain images. See HB71, Communication of Certain Images to Children.

SB61, Electronic Communications Privacy Act, sets out procedures for governmental agencies to obtain access to electronic communications that will have to be followed in investigating and prosecuting crimes and statutory violations. It will have its greatest impact on the investigation of crimes and violations that are committed through electronic communications, such as those set out in HB240.

TECHNICAL ISSUES

It is not clear how the provisions in HB240 relate to New Mexico's existing statutory provisions addressing sexually oriented materials harmful to minors. NMSA 1978, Section 30-37-1, *et seq.* provides criminal penalties for sale, distribution, and display of visual representations that come within the definition of "harmful to minors." (HB240 refers to and incorporates Section 30-37-1, *et seq.*'s definition of "harmful to minors.") The statutory scheme set out in Section 30-37-1, *et seq.* requires notice prior to prosecution, and provides various defenses and exemptions. It is not clear if HB240 is intended to be part of Section 30-37-1 *et seq.*, and whether the notice provisions, defenses and exemptions in that Section will be incorporated into HB237. Note that Section 30-37-8 NMSA 1978 provides that the statutes in Section 30-37-1 NMSA 1978 *et seq.* 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 HB240 is not intended to be part of Section 30-37-1 *et seq.*, to the extent it regulates visual representations "harmful to minors" its validity could be challenged under Section 30-37-8.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

None noted.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Without this bill, there will be no registry to safeguard minors from being exposed to certain materials through emails, text messages, phone calls or other means. Exposing minors to certain materials may still be prosecuted under the statute regarding sexually oriented material harmful to minors.

AMENDMENTS

None suggested.