

LFC Requester:	
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**AGENCY BILL ANALYSIS
2015 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: Date 2-17-17
Original **Amendment** _____ **Bill No:** SB444
Correction _____ **Substitute** _____

Sponsor: Cisco McSorley **Agency Code:** 264
Short **Person Writing** Gail MacQuesten
Title: Child Protection Registry Act **Phone:** 466-0532 **Emai** gailmacquesten@q.com

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		
Unknown amount	Unknown amount	recurring	n/a

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		
0	0	0	n/a	n/a

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	minimal	minimal	minimal	unknown	recurring	general

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HB240
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

SB444 enacts the “Child Protection Registry Act” and the “Do Not Contact Registry Act.” The two acts have similar structures, and are administered and enforced the same way, but they have different objectives. The “Child Protection Registry Act” is designed to provide safeguards to prevent minor children from receiving certain communications. The “Do Not Contact Registry Act” is designed to allow anyone to opt out of receiving solicitations electronically.

“Child Protection Registry Act”

The purpose of this 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.

SB444 requires the Attorney General to establish 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 provides civil and criminal 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 \$5000 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.

It is a fourth degree felony to use information 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 a 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 the bill sets out strict requirements for obtaining that consent.

“Do Not Contact Registry Act”

The “Do Not Contact Registry Act” provides a mechanism for persons to prevent solicitations and unsolicited advertisements that are sent to their email addresses, instant messaging applications or other electronic or digital contact points. Solicitations do not include a message to a person with that person’s prior express invitation or permission, to a person with whom the message sender has an established business relationship, or by a tax-exempt nonprofit organization.

The Act is structured like the Child Protection Registry Act, with the same administrative structure and the same civil and criminal enforcement provisions.

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.

SB444 creates new crimes, and the district attorneys will have increased costs related to the prosecution of these new crimes.

Note that SB444 will have a significant fiscal impact on the Office of the Attorney General, which is charged with implementing the two Acts. SB444 provides for a “child protection registry fund” and a “do not contact registry fund” consisting of appropriations and fees collected, but no actual appropriation appears in the text of the bill. SB444 does provide for fees charged to verify whether an intended contact point is registered.

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.

SB444'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 SB444. And if Child Protection Registry Act is subject to the notice requirements, defenses and exemptions, it will make it very difficult to administer SB444.

The Child Protection Registry Act imposes significant civil liability for anyone sending a communication that could fall within the Act's definition of prohibited communication. SB444 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 huge 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. Similar arguments could be raised against the Do Not Contact Registry, in that the costs to check each contact point against the registry will be prohibitive.

PERFORMANCE IMPLICATIONS

To the extent SB444 creates new crimes, the district attorneys will have additional prosecution costs. And to the extent SB444 is subject to statutory or constitutional challenges, the district attorneys will have additional costs in pursuing prosecution.

ADMINISTRATIVE IMPLICATIONS

See Performance Implications, above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB240 provides for a virtually identical Child Protection Registry. Its criminal provision is a misdemeanor, instead of a fourth degree felony. It does not provide for a Do Not Contact Registry.

TECHNICAL ISSUES

None noted.

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 orient material harmful to minors.

AMENDMENTS

None suggested.