

LFC Requester: _____

**AGENCY BILL ANALYSIS
2018 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 **Amendment** _____
Correction _____ **Substitute** _____

Date Jan. 17, 2018

Bill No: SB 89

Sponsor: Bill Tallman & "Liz" Stefanics

Agency Code: 264

Short Human Trafficking & Child

Person Writing Gary Cade

Title: Exploitation

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY18	FY19		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY18	FY19	FY20		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

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

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: SB 89 would enact the “Human Trafficking and Child Exploitation Act” (hereafter “HTCEA”) that would require, “a person who manufactures, sells, offers for sale, leases or distributes a product in the state that makes content accessible on the internet,” unless it includes “...blocking software that renders obscene material on the internet inaccessible; prohibits access to content that is prohibited by the Sexual Exploitation of Children Act; prohibits access to revenge pornography; prohibits access to a website that facilitates prostitution; and prohibits access to a website that facilitates human trafficking...”

The bill defines obscene material in language from the so-called “SLAPS” test. In brief, that is: taken as a whole, the material appeals to the prurient interests; depicts or describes sexual conduct or excretory functions in an offensive way; and taken as a whole lacks serious literary, artistic, political or scientific value. *See, Miller v. U.S.*, 413 U.S. 15 (1973). Revenge pornography is defined as an image of a person engaged in sexual activity or displaying their uncovered genitals, pubic region, buttock or female breast, or covered or uncovered human male genitals in a discernibly turgid state, and the image contains or conveys their personal identification information and is posted to an internet website without the depicted person’s consent.

Violations would be a misdemeanor, punishable by up to 364 days in jail or a fine of up to \$500.00 for, “each prohibited image, video or audio depiction or website accessible.” The attorney general or a district attorney could seek injunctive relief against a distributor allowing access to prohibited content or a website. In addition, if a distributor subject to the HTCEA received a report that their product was permitting access and failed to block it within five days they could be sued by the AG or any person for civil damages of up to \$500.00 for each image, video or audio depiction of obscene material that was reported and not blocked within five days.

Distributors would be required to “make reasonable and ongoing efforts to ensure that the blocking software functions properly,” and establish a reporting mechanism to allow a person

to report unblocked obscene material or report blocked material that is not obscene. Content that is not obscene would have to be unblocked by the distributor within five days of it being reported as not obscene. Distributors would also be required to deactivate blocking software if the purchaser or lessee of their product specifically request it be deactivated, present proof they are at least 18 years old, pay a \$20.00 deactivation fee and acknowledge a written warning that deactivation of the blocking software will prevent blocking of obscene material.

FISCAL IMPLICATIONS

Unknown.

SIGNIFICANT ISSUES

SB 89 does not specifically define what a prohibited product is, other than saying the product, “makes content accessible on the internet.” That could encompass a variety of items, including some that are benign, such as computers, mobile telephones, telephone lines, satellite television receivers and more. That would require every person and company who manufactures, sells, offers for sale, leases or distributes any of those items to include blocking software and other devices to block access to obscene materials, child pornography, revenge pornography, and websites that facilitate prostitution and human trafficking.

The definition in the HTCEA of a distributor includes “individual,” in addition to corporation, business enterprise and other legal entity, so it would prohibit a private citizen from selling their personal computers, mobile phones, etc. to a friend or acquaintance unless those devices contained the required blocking software and devices. The individuals would also be required to, “make reasonable and ongoing efforts to ensure that the blocking software functions properly,” and establish a “reporting mechanism” to report material was being appropriately blocked.

Attempts to regulate content available via the internet must be narrowly tailored. See, Reno v. ACLU, 521 U.S. 844 (1997). Since the list of potential products covered by SB 89 is so sweeping it is certain to be challenged on that basis. In addition, legislation regulating content is frequently subjected to a challenge based on the First Amendment to the United States Constitution. Even regulating content deemed to be obscene has been subjected to changing standards in the community and in the courts. The definition in SB 89 of obscene material is even different from the definition of obscene provided in the Sexual Exploitation of Children Act, See, Sect. 30-6A-2(E), NMSA 1978. Language used in the bill to define obscene material includes, “normal” and “perverted,” terms which are subjective and open to interpretation.

SB 89 includes revenge pornography and requires that products distributed in the state prohibit access to it as well as obscene material, child pornography and access to websites that facilitate prostitution and human trafficking. The definition of “revenge pornography” includes both prohibited images that also contain personal identification information of the depicted person when the image is posted to an internet website without the depicted person’s consent. No explanation is provided in the bill regarding how a product distributor would know that a “revenge pornography” image was posted without consent. It’s also unclear exactly what the restricted personal identification information in an image might be. Some persons might be recognized if

their faces are shown, and distinctive features, like scars and birthmarks, might identify others. However, it is also possible that even if certain identifying characteristics are shown the person might still be confused with someone else. There is also a practical matter that if someone complains about a private matter, it attracts at least some people to view it who would otherwise be unaware of its existence.

The sanctions provided in SB 89 of a misdemeanor for criminal violation and *de minimus* damages are fairly minor but the proof required to establish guilt or liability are daunting. Prosecutors would have to prove that the product used in violation of the HTCEA was sold, leased or distributed in New Mexico, as opposed to being obtained in another state. Then they would have to prove that it did not contain blocking software, or if it did, the software was not effective, or that the product did not otherwise prohibit access to the prohibited materials or websites. To do that will almost certainly require that they obtain the product, probably by a search warrant, and that it be in an unaltered condition, and then they would need to have it analyzed by one or more experts. Finally, they would need to provide evidence regarding the images, video or audio depictions or websites accessed in violation of the HTCEA to include the date and what was accessed. As noted above, revenge pornography will probably be especially difficult because of its special requirements. Similar challenges are present in seeking injunctive relief and for private attorneys seeking civil damages for breaches in the blocking software or prohibited websites were accessible and the distributor failed to act timely.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS