

Legislative Analysis



ALLOW PUBLIC OFFICIAL TO CONTEST FRAUDULENT FINANCING STATEMENT

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bills 5934 and 5935

Sponsor: Rep. Andy Coulouris

Committee: Banking and Financial Services

Complete to 6-23-08

A SUMMARY OF HOUSE BILLS 5934 AND 5935 AS INTRODUCED 4-8-08

According to the Department of State, a "financing statement" is a statement filed to perfect a security interest and provide a public notice of a security agreement between a debtor and a secured party. The financing statement describes certain types of collateral or property used as surety for the security agreement. In general, most financial statements are filed with the office of Secretary of State; in some instances, a filing is filed with a county register of deeds.

If an individual files a false or fraudulent financing statement in order to injure another person by falsely identifying that person as a debtor, the person's credit record can be affected. Public Act 212 of 2004, enrolled House Bill 5148, amended the Uniform Commercial Code to, among other things, require the secretary of state to provide written notice of the filing of a financing statement filed with that office to any debtor identified in the statement, if the debtor is an individual. Public Act 212 also made it a felony for a person to knowingly or intentionally file a false or fraudulent financing statement with the secretary of state, punishable by imprisonment for not more than five years or a fine of not more than \$2,500, or both. Those falsely identified in a financing statement can file a civil action seeking equitable relief and damages, and the court can, if the filer was convicted of the violation, order the false record ineffective.

House Bill 5934 would add a new section to the Uniform Commercial Code (MCL 440.9501a) to create an expedited process by which a financing statement naming a public officer or his or her spouse as a debtor could be terminated. "Public officer" would mean an individual who is or was employed by the state, the federal government, or a local unit of government (which would include a county, township, city, village, court, or other authority).

Affidavit of false filing. Under the bill, when a public officer or his or her spouse received a notice from a filing office that a financing statement as described above had been filed against him or her, the public officer or spouse could file an affidavit with the filing office stating that the financing statement was fraudulent. The filing office would then be required to terminate the financing statement effective on the date the affidavit had been filed. A fee could not be charged for filing an affidavit. The secretary of state would be required to adopt and make available a form affidavit to give notice of fraudulent filing statement. (Presumably, the notice referred to would be the notice

required under the provisions of Public Act 212 of 2004 required to be sent by the secretary of state to individuals named in a financing statement that had been filed with the secretary of state.)

Notice of termination. A filing office would have to send notice of the termination of a financing statement to the filer of the financing statement advising the filer that the statement had been terminated. The filing office could not return any filing fee paid for filing the financing statement, even if the financing statement had been terminated.

Reinstatement of financial statement. If the filer believed in good faith that the statement had been legally filed and was not fraudulent, the filer could file an action to reinstate the financing statement. If the financing statement named an employee of the state or his or her spouse, the action would be filed in the Ingham County Circuit Court. For all others, the action would be filed in the circuit court for the county in which the public officer or spouse resided.

If the court determined that the financing statement should be reinstated, the court order reinstating the statement would be filed with the filing office. The reinstatement would be effective as notice to bona fide purchasers or creditors only after the order was filed.

However, if the court determined the financing statement to be invalid, the filer of the statement would have to pay the costs and expenses incurred by the public official or spouse in defending the action.

Penalty for filing false affidavit. An individual who filed a false or fraudulent affidavit would be guilty of a felony punishable by imprisonment for not more than five years, a fine of \$2,500, or both.

House Bill 5935 would amend the Code of Criminal Procedure (MCL 777.14g) to specify that filing a false affidavit of fraudulent financing statement would be a Class E felony against the public trust with a maximum term of imprisonment of five years. The bill is tie-barred to House Bill 5934.

FISCAL IMPACT:

House Bill 5934 would have minimal fiscal impact on the Department of State. Any impact would be related to increased administrative costs stemming from the bill's requirement that the secretary of state adopt and make available a form affidavit for public officers or their spouses to use to be able to give notice of a fraudulent filing statement.

Regarding the impact to the judiciary by House Bill 5934, there would be an indeterminate, if not negligible, fiscal impact on state or local government as any fiscal impact would depend on the number of court proceedings emanating from this amendment.

The bills' impact on state and local correctional systems would depend on how they affected the numbers of felony convictions and severity of sentences. There are no data to indicate how many people might be convicted under the bills. The offense to be created by HB 5934 would be a Class E offense against the public trust. Under sentencing guidelines, the recommended range for an offender's minimum sentence for a Class E offense varies from 0 - 3 months, for which a local sanction is required, to 17 - 30 months, for which a prison sentence is required.

To the extent that the bills increased the number of offenders sentenced to prison or to felony probation supervision, the state could experience increased costs. Average appropriated costs of prison incarceration are roughly \$32,000 per prisoner per year, a figure that includes various fixed administrative and operational costs. Costs of parole and probation supervision average about \$2,000 per supervised offender per year. To the extent that more offenders were sentenced to jail, affected counties could experience increased costs; jail costs vary by county.

Any increase in penal fine revenues could benefit local libraries, which are the constitutionally-designated recipients of those revenues.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Viola Bay Wild
Ben Gielczyk
Marilyn Peterson

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.