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House Bill 5144 (Substitute H-1 as passed by the House)  
House Bill 5145 (as passed by the House)  
Sponsor: Representative Penelope Tsernoglou (H.B. 5144)  
Representative Noah Arbit (H.B. 5145)  
House Committee: Elections  
Senate Committee: Elections and Ethics

Date Completed: 11-8-23

## **CONTENT**

**House Bill 5144 (H-1) would add section 932f to the Michigan Election Law to do the following:**

- **Prohibit a person from distributing, or entering into an agreement with another person to distribute, materially deceptive media under certain circumstances.**
- **Exempt eligible media from this requirement if the media included a disclaimer and prescribe requirements for this disclaimer.**
- **Prescribe misdemeanor and felony penalties for a violation of the bill.**
- **Allow individuals potentially harmed by materially deceptive media to seek permanent injunctive relief against the distributor; however, an individual could not seek preliminary injunctive relief in an action.**
- **Prescribe the process for seeking permanent injunctive relief.**

**House Bill 5145 would include sentencing guidelines in the Code of Criminal Procedure for the felony proposed in House Bill 5144 (H-1). The bill would make a subsequent offense of distributing or agreeing to distribute materially deceptive media a Class E felony against the Public Trust, punishable by up to five years' imprisonment.**

House Bill 5145 is tie-barred to House Bill 5144. House Bill 5144 (H-1) is described in greater detail below.

### **House Bill 5144 (H-1)**

#### **Materially Deceptive Media**

Under the bill, "materially deceptive media" would mean any image, audio, or video that meets all the following requirements:

- Falsely depicts an individual engaging in speech or conduct in which the depicted individual did not in fact engage.
- A reasonable viewer or listener would incorrectly believe that the depicted individual engaged in the speech or conduct depicted.
- Was produced by substantially relying on technical means other than another individual's ability to impersonate the depicted individual physically or verbally.

The bill would prohibit a person from distributing, or entering into an agreement with another person to distribute, materially deceptive media if the following applied:

- The person knew the media falsely represented a depicted individual.
- The distribution occurred within 90 days before an election.
- The person intended the distribution to harm the reputation or electoral prospects of a candidate in an election, and the distribution was reasonably likely to cause that result.
- The person intended the distribution to change the voting behavior of electors in an election by deceiving the electors into incorrectly believing that the depicted individual in fact engaged in the speech or conduct depicted, and the distribution was reasonably likely to cause that result.

This prohibition would not apply if the media included a disclaimer informing the viewer that the media had been manipulated by technical means and depicted speech or conduct that did not occur. The following disclaimer would be sufficient, but not necessary, to satisfy this requirement:

"This \_\_\_\_\_ (image, audio, or video) has been manipulated by technical means and depicts speech or conduct that did not occur."

If the media were a video, the disclaimer would have to meet the following requirements:

- Appear throughout the entirety of the video.
- Be clearly visible to and readable by an observer.
- Be in letters at least as large as the majority of any text communication, or if there were no other text communication, in a size that was easily readable by the average viewer.
- Was in the same language as the language used in the video media.

If the media consisted only of audio and contained no image or video, the disclaimer would have to be read at the beginning and end of the media in a clearly spoken manner, in a pitch that could be easily heard by the average listener, and in the same language as the audio media.

If the media were an image, the disclaimer would have to meet the following requirements:

- Be clearly visible to and readable by the average viewer.
- If the media contained other text, be in letters at least as large as most of the other text.
- Was in the same language as the language used in the image media.

### Penalties

A person that violated these requirements would be guilty of a crime as follows:

- For a first violation, a misdemeanor punishable by up to 90 days' imprisonment or a maximum fine of \$500, or both.
- If a violation occurred within five years of a previous conviction for a violation under the bill, a felony punishable by up to five years' imprisonment or a maximum fine of \$1,000, or both.

### Legal Proceedings and Injunctive Relief

The Attorney General (AG), a depicted individual, a candidate for office who had been injured or was likely to be injured by the distribution of materially deceptive media, or any organization that represented the interests of voters likely to be deceived by the distribution of materially deceptive media, could seek permanent injunctive relief against a person that violated these requirements in any of the following courts:

- The circuit court for the county in which a party to the alleged violation resided.
- The circuit court for the county in which the materially deceptive media at issue could deceive and influence electors in an upcoming election.

Upon the filing of a complaint for injunctive relief, the court would have to review the complaint to determine whether the complaint was frivolous. If the court determined that the complaint for injunctive relief was frivolous, the court would have to issue an order suspending the defendant's obligation to respond to the complaint and would have to order the plaintiff to show cause why the complaint for injunctive relief should not be dismissed. If the plaintiff failed to respond to the court or the plaintiff's response to the court's confirmation that the complaint for injunctive relief was frivolous, the court would have to dismiss the complaint for injunctive relief. If the plaintiff's response to the court assured the court that the complaint for injunctive relief was not frivolous, the court would have to direct the defendant to answer the complaint for injunctive relief.

If a court found that a complaint for injunctive relief was frivolous, the court, in addition to dismissing the complaint, could award costs and attorney fees to the defendant and could issue any appropriate sanctions permitted under the Michigan court rules or the court's inherent authority against the plaintiff and the plaintiff's attorney.

A plaintiff seeking permanent injunctive relief would have to prove by clear and convincing evidence that the defendant against whom the injunction was sought knew the media at issue falsely represented the depicted individual.

If a plaintiff, other than the AG, was awarded permanent injunctive relief, the court could award costs and attorney fees to the plaintiff; however, a plaintiff could not seek preliminary injunctive relief in an action.

Proposed MCL 168.932f (H.B. 5144)  
MCL 777.11d (H.B. 5145)

Legislative Analyst: Abby Schneider

### **FISCAL IMPACT**

House Bill 5144 (H-1)'s criminal penalties could have a negative fiscal impact on the State and local government. Violations of the proposed Act would be punishable as misdemeanors and felonies of different severity. More misdemeanor and felony arrests and convictions could increase resource demands on law enforcement, court systems, community supervision, jails, and correctional facilities. Misdemeanor convictions could increase county jail and local probation supervision costs, which vary by jurisdiction and are thus indeterminate. Based on 2022 data, the average cost to State government for felony probation supervision is approximately \$4,800 per probationer per year. For any increase in prison intakes the average annual cost of housing a prisoner in a State correctional facility is an estimated \$45,700. Per diem rates for housing a prisoner in a state correctional facility range from a low of \$98 to a high of \$192 per day, depending on the security level of the facility. Additionally, any associated fine revenue would increase funding to public libraries.

House Bill 5145 would have no fiscal impact on local government and an indeterminate fiscal impact on the State, in light of the Michigan Supreme Court's July 2015 opinion in *People v. Lockridge*, in which the Court ruled that the sentencing guidelines are advisory for all cases. This means that the addition to the guidelines under the bill would not be compulsory for the sentencing judge. As penalties for felony convictions vary, the fiscal impact of any given felony conviction depends on judicial decisions.

Overall, the bills would have an indeterminate fiscal impact on local court systems. Any impact would depend on the bills' impact on caseloads, administrative costs, and criminal fine revenue, which is constitutionally dedicated to county libraries.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.