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| LFC Requester: | Christine Boerner |
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**AGENCY BILL ANALYSIS
2014 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 X **Amendment**
Correction **Substitute**

Date Jan. 31, 2014

Bill No: HB192-305 Jan 31

Sponsor: Rep. William R. Rehm

Reviewing Attorney General's Office

Short Driver's Licenses for Foreign

Person Writing Sean Cunniff, AAG

Title: Nationals

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SECTION II: FISCAL IMPACT **FOR LFC OFFICIAL PURPOSES******
AGO STAFF SHOULD LEAVE SHADED AREAS BLANK

APPROPRIATION (dollars in thousands)

| Appropriation | | Recurring or Nonrecurring | Fund Affected |
|---------------|------|------------------------------|------------------|
| FY14 | FY15 | | |
| | | | |
| | | | |

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:

Duplicates/Relates to Appropriation in the General Appropriation Act

REVENUE (dollars in thousands)

| Estimated Revenue | | | Recurring or Nonrecurring | Fund Affected |
|-------------------|------|------|---------------------------------|------------------|
| FY14 | FY15 | FY16 | | |
| | | | | |
| | | | | |

(Parenthesis () Indicate Expenditure Decreases)

Duplicates, Relates to, Conflicts with, Companion to

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY14 | FY15 | FY16 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|-------------|-------------|-------------|------------------------------|--------------------------------------|--------------------------|
| Total | | | | | | |

(Parenthesis () Indicate Expenditure Decreases)

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Opinion Letter. This is a staff analysis in response to the agency's, committee's or legislator's request.

BILL SUMMARY

HB 192 amends several provisions of the Motor Vehicle Code effecting provisions related to driver's license and state identification cards. With respect to foreign nationals seeking driver's licenses or identification cards, the legislation proposes requiring applicants to furnish the state with a "unique identifying number" from a passport, visa, arrival-departure record, or other document issued by the federal government. Only those foreign nationals able to demonstrate "lawful status" in the United States would be eligible for driver's licenses or state identification cards under HB 192. The Bill also proposes limiting the duration of licenses or identification cards issued foreign nationals to the applicant's authorized period of stay in the United States. In the event that period cannot be ascertained, the Bill proposes an expiration date one year from the date the card or license is effective.

The Bill also seeks to revise the criminal provisions contained in NMSA 1978, Sections 66-5-37 and 66-5-409 related to the "unlawful use" of a license or identification card, including reclassifying certain application fraud from a misdemeanor to a felony, adding provisions criminalizing solicitation and conspiracy under Sections 66-5-37 and 66-5-409, and clarifying the definitions of certain existing crimes. Section 11 of the Bill clarifies that criminal sanctions related to fraud in the issuance of licenses and cards apply to both the state and private contractors. In addition, the Bill addresses the contents of licenses and identification cards and the applications therefor, specifying the contents for both.

Section 12 of the Bill proposes a new statutory section that requires the state to cancel any driver's license issued to a person who cannot provide proof of a valid social security number. The Bill enumerates certain procedures the state must follow, including providing notice to the person affected and providing a mechanism whereby a person can furnish the state with proof of a valid social security number.

The legislation confers rulemaking authority on the Secretary of the Taxation and Revenue Department to "implement and enforce the provisions" of the legislation. Lastly, Section 14 of the Bill declares an emergency, indicating that "[i]t is necessary for the public peace, health and safety that this act take effect immediately."

FISCAL IMPLICATIONS WITH ENACTING THIS BILL

SIGNIFICANT LEGAL ISSUES

1. **REAL ID:** The federal REAL ID Act of 2005 (“REAL ID”) has implications for the changes proposed in HB 192. REAL ID establishes mandatory standards governing state issuance of secure driver’s licenses and identification cards. Residents of states which fail to comply with REAL ID will be unable to utilize their state-issued identification cards to board airplanes, enter federal buildings, or for a range of other “official purposes.” REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 312 (May 11, 2005). New Mexico is currently not in compliance with REAL ID and many of the state’s provisions governing the issuance of driver’s licenses and identification cards are at odds with REAL ID.

The federal Department of Homeland Security (“DHS”) has repeatedly delayed implementation of REAL ID, but has recently issued new guidance setting forth a new timeline for implementation by the states. Originally, DHS established a May 2008 compliance deadline, 73 FR 5272 (Jan. 29, 2008), but has subsequently delayed implementation on multiple occasions. In its latest directive, issued December 20, 2013, DHS establishes a “phased enforcement plan” for the legislation. See Real ID Enforcement in Brief, United States Dept. of Homeland Security, Dec. 20, 2013.¹ For certain limited “federal facilities,” initial enforcement is slated to begin on April 21, 2014, and scheduled to be fully implemented for all federal facilities by January 19, 2015. The universe of these federal facilities subject to the January 2015 deadline apparently includes federal buildings, other federally-owned properties, and nuclear power plants. A second round of enforcement, which is slated to begin “no sooner than 2016,” governs the use of identification cards to board aircraft regulated by the federal government.

New Mexico is one of only 15 states or U.S. territories that has not either achieved compliance with REAL ID or been granted a compliance extension by DHS.

The changes proposed in HB 192 addressing the issuance of licenses and identification cards to foreign nationals conform to certain general standards set forth in the REAL ID Act for secure licenses. Like REAL ID, HB 192 imposes the requirement that secure licenses and identification cards be issued only to a person able to evidence lawful presence in the United States, and that such licenses and identification cards be valid only for a period that conforms to the person’s period of lawful presence in the United States. See 6 CFR Parts 37.11 and 37.21.

However, in order for a state to issue licenses that are acceptable for federal purposes, all REAL ID provisions must be satisfied, and HB 192 does not address a number of provisions set forth in the federal law. To be clear, under REAL ID, states must comply with all substantive provisions of the federal law to achieve “full compliance.” 6 CFR Part 37.51. Any identification card issued by a state that falls short of full compliance “is not in compliance with [REAL ID]...and is not acceptable as identification by Federal agencies for official purposes.” 6 CFR Part 37.65.

Much of the minutia set forth in HB 192 is at odds with REAL ID’s secure license standards. This includes the enumeration of documents in HB 192 that is proposed to

¹ <http://www.dhs.gov/sites/default/files/publications/REAL-ID-IN-Brief-20131220.pdf> (last accessed Jan. 21, 2014)

establish a person's identity and lawful status, see 6 CFR Part 37.11, the physical requirements for the license or identification card, see 6 CFR Parts 37.15, 37.17 & 37.19, the physical plant requirements for facilities issuing licenses and cards, see 6 CFR Part 37.15, requirements for taking and retaining photos of applicants, see 6 CFR Part 37.11, etc. While some of these issues may be addressed through agency (Taxation and Revenue Dept.) rulemaking, the Legislature may wish to provide the agency with more direction and clarity in the body of the proposed legislation.

Finally, it should be noted REAL ID authorizes states to issue cards that are not compliant with the Act. Thus, states may have "tiers" of cards, based upon whether a given card is in compliance with REAL ID. Non-compliant cards must be clearly identified as such and feature a design distinctive from compliant cards.

2. **Due Process and the Cancellation Provision:** The provision requiring the cancellation of certain licenses implicates the due process rights of license-holders. While the Bill does include certain due process protections for license-holders, there is no opportunity for a person affected by a cancellation to seek a hearing. See Maso v. State Taxation & Rev. Dep't, 2004-NMSC-28, ¶ 10, 136 N.M. 161, 164 ("Due process requires notice and an opportunity for a hearing before the State can suspend or revoke a person's driver's license."). However, given the straightforward basis for cancellation in HB 192 (i.e. whether a person has a valid social security number), the protections set forth in the bill may be adequate. See generally Mills v. New Mexico State Bd. of Psychologist Exam'rs, 123 N.M. 421, 426 (N.M. 1997) ("The specific requirements of procedural due process depend on the facts of each case.").

As our Supreme Court has counseled,

[T]hree factors [are] to be considered in determining what [due process] procedures are required: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Bd. of Educ. v. Harrell, 118 N.M. 470, 478 (N.M. 1994).

PERFORMANCE IMPLICATIONS WITH ENACTING THIS BILL

ADMINISTRATIVE IMPLICATIONS WITH ENACTING THIS BILL

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP WITH BILLS INTRODUCED THIS SESSION

TECHNICAL ISSUES OR DRAFTING ERROR

OTHER SUBSTANTIVE LEGAL ISSUES

Because the legislation may result in the enactment of distinctions in legal rights based upon the alienage (or nationality) of the applicant, it potentially runs afoul of state and federal constitutional provisions that demand equal treatment of people by the government. See N.M. Const. art. II, § 18; U.S. Const. amend. XIV; see generally Alexander L. Mounts, Note, A Safer Nation? How Driver’s License Restrictions Hurt Immigrants & Noncitizens, Not Terrorists, 37 Ind. L. Rev. 247 (2003). It is well-settled that non-citizens enjoy constitutionally-granted equal protection rights. See Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). In New Mexico, where the people are afforded heightened constitutional equal protection rights, disparate treatment of a disfavored group potentially gives rise to especially searching scrutiny by the judiciary. See, e.g., Breen v. Carlsbad Mun. Schools, 2005-NMSC-028, 138 N.M. 331.

The courts are especially skeptical of government actions which withdraw existing rights from such disfavored groups. See Romer v. Evans, 517 U.S. 620 (1996); Perry v. Brown, 671 F.3d 1052, 1079-1080 (9th Cir. 2012). HB 192 would almost certainly have the effect of preventing certain currently licensed foreign national motorists from maintaining driver’s licenses, especially those lacking a designation of “deferred action for childhood arrivals.” If the courts of New Mexico or the United States find that legislation affronts basic constitutional protections, it will be invalidated. See, e.g., Griego v. Oliver, No. 34,306 (N.M. Dec. 19, 2013).

ALTERNATIVES TO ENACTING THIS BILL

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

If New Mexico does not come into compliance with REAL ID, the state runs the risk that it will be unable to issue its residents identification cards that can be used for federal purposes.

AMENDMENTS NEEDED TO IMPROVE THIS BILL