

LFC Requester:	Christine Boerner
-----------------------	--------------------------

**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 **Amendment**
Correction **Substitute**

Date Feb. 18, 2014

Bill No: HB359-305 Feb 19

Sponsor: Rep. W. Ken Martinez

Reviewing Attorney General's Office

Short Distinct Real ID Cards

Person Writing Sean Cunniff, AAG

Title: _____

Phone: 827-6469 **Email** scunniff@nmag.gov

SECTION II: FISCAL IMPACT **FOR LFC OFFICIAL PURPOSES****
AGO STAFF SHOULD LEAVE SHAGED 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 359 directs the Taxation and Revenue Department (the "Department"), to issue "Real ID" personal identification cards that conform to certain requirements set forth in the federal law of the same name. The legislation sets forth a variety of parameters related to the issuance of the cards, including defining the populations eligible to receive the cards; setting forth the permissible validity durations of the cards; mechanisms for renewing the cards; fees to be assessed related to the issuance of the cards; and criminal penalties related to the proposed Real ID program, among other things.

The legislation requires that the cards be issued in accordance with the federal Real ID law.

FISCAL IMPLICATIONS WITH ENACTING THIS BILL

SIGNIFICANT LEGAL ISSUES

1. Background

HB 359 appears to be an effort to address the requirements of the federal Real ID Act of 2005 ("Real ID"), which is in the process of being implemented by the United States Department of Homeland Security ("DHS").

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 ultimately be unable to utilize their state-issued identification cards to board airplanes, enter federal buildings, or for a range of other "official [federal] 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 the requirements of the federal law.

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.

2. Issues Related to the Contents of this Legislation

The program proposed by the legislation largely conforms with related requirements of the federal Real ID law.

However, in order for a state to issue identification cards that are acceptable for “official federal purposes,” *all* Real ID provisions must be satisfied, and HB 359 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.

On its own, HB 359 apparently fails to address certain requirements of the federal law. For instance,

- A. Real ID requires that the state “must” take and maintain photographs of every applicant for a Real ID card, regardless of whether the card is issued. 6 CFR Part 37.11. HB 359 contains no such provision.
- B. Real ID requires states to implement a security plan for state motor vehicle facilities. 6 CFR Part 37.41. No mention is made of such a plan in HB 359, and it does not appear to be within the grant of rulemaking authority granted to the Department in the Bill.
- C. Real ID requires that state personnel involved in the issuance of Real IDs be subject to certain security clearance requirements. 6 CFR Part 37.45. The pending legislation contains no such requirements.
- D. Real ID requires that states clearly identify non-compliant identification cards as such. Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 315. HB 359 includes no such requirement, while leaving intact existing state laws authorizing the issuance of non-Real ID personal identification cards and driver’s licenses.

PERFORMANCE IMPLICATIONS WITH ENACTING THIS BILL

ADMINISTRATIVE IMPLICATIONS WITH ENACTING THIS BILL

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

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

TECHNICAL ISSUES OR DRAFTING ERROR

OTHER SUBSTANTIVE LEGAL ISSUES

The legislation proposes empowering the Secretary of the Department to revoke or deny Real ID cards for “good cause.” This provision appears to grant the Secretary the authority to take final action regarding a Real ID card without affording the card-holder or applicant due process protections. It is the law of New Mexico that a person’s interest in state-issued personal identification cards give rise to due process considerations. See Maso v. State Taxation & Rev. Dep’t, 2004-NMSC-28, ¶ 10, 136 N.M. 161, 164 (“[d]ue process requires notice and an opportunity for a hearing before the State can suspend or revoke a person's driver's license.”). In this instance, because New Mexicans will only be able to secure a Real ID from the Department, and the rights attached thereto are significant, due process rights are a relevant consideration.

As our Supreme Court has explained, what due process may be “due” depends on the “facts of each case.” See 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 further 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).

ALTERNATIVES TO ENACTING THIS BILL

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS NEEDED TO IMPROVE THIS BILL

One, consider adding language to ensure full compliance with the federal law, and two, consider providing due process protections related to the Secretary’s authority to revoke or deny a Real ID.

