

LFC Requester:	Caroline Malone
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**AGENCY BILL ANALYSIS
2015 REGULAR SESSION**

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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: **Date** Feb. 23, 2015
Original **Amendment** **Bill No:** SB 653
Correction **Substitute**

Sponsor: Sen. Stuart Ingle **Agency Code:** Attorney General's Office
Short **Person Writing** Sean Cunniff
Title: Two-Tiered Driver's Licenses **Phone:** 827-6469 **Email** scunniff@nmag.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	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

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

BILL SUMMARY

SB 653 proposes the creation of two types, or “tiers,” of driver’s licenses and state-issued personal identification cards (“ID cards”): one type of licenses/ID cards that can be used for “official federal purposes” and one that cannot.

Applicants for federally-compliant (for “official federal purposes”) driver’s licenses and ID cards (first tier) must establish “lawful presence in the United States” by furnishing a social security number; or in the case of foreign nationals, the unique identifying number of the applicant’s valid visa, passport, employment authorization card issued under the applicant’s approved deferred action status, or other arrival-departure record. Subject to certain exceptions, federally-compliant first tier licenses and ID cards issued to foreign nationals will expire no later than the date that the foreign national’s period of authorized admission in the United States expires.

“Second” tier licenses and ID cards (not for “official federal purposes”) may be issued to persons regardless of lawful presence in the United States. For applicants unable to furnish a social security number, the applicant may establish identity by providing an individual tax identification number, a passport or national identification card, or any document the Secretary has identified as “an acceptable substitute for an individual tax identification number.”

The legislation also includes myriad requirements for the physical form and appearance of driver’s licenses and ID cards.

Finally, the legislation clarifies the scope and nature of criminal penalties related to the issuance of driver’s licenses and state identification cards.

FISCAL IMPLICATIONS

N/A.

SIGNIFICANT ISSUES

SB 653 is an effort (at least in part) 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 in the process of complying with the terms of REAL ID, but many of the state's provisions governing the issuance of driver's licenses and identification cards remain inconsistent with the requirements of the federal law. However, DHS has granted New Mexico an extension to achieve full compliance with REAL ID, thereby allowing federal agencies to continue accepting New Mexico-issued licenses and ID cards for the time being.

DHS has repeatedly delayed implementation of REAL ID, but issued guidance in late 2013 setting forth a new timeline for implementation. In that directive, DHS established a "phased enforcement plan" for the legislation. See Real ID Enforcement in Brief, United States Dept. of Homeland Security, Dec. 20, 2013. 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.

The changes proposed in SB 653 addressing the issuance of licenses and identification cards to foreign nationals and others conform to certain standards set forth in the REAL ID Act for secure licenses. Like REAL ID, SB 653 imposes the requirement that secure licenses 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 SB 653 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 card issued by a state for personal identification purposes 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.

Examples of inconsistencies between the requirements set forth in SB 653 and REAL ID include the following:

1. 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. SB 653 contains no such provision.
2. REAL ID requires that states verify documents submitted by applicants used to establish identity. 6 CFR Part 37.13. SB 653 contains no such provisions.
3. 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 SB 653.

While many of these issues may be within the scope of the Taxation and Revenue Department's rulemaking authority, more clarity in the legislation may aid in eliminating doubt with respect to the wishes of the Legislature and provide the agency with clear authority to promulgate appropriate and necessary rules.

Finally, it should be noted REAL ID does authorize states to issue licenses and identification cards that are not compliant with REAL ID. Thus, as proposed in SB 653, states may have tiers of drivers licenses, based upon whether a given license is in compliance with REAL ID. As this legislation requires, under REAL ID, non-compliant cards must be clearly identified as such and feature a design distinctive from compliant cards.

PERFORMANCE IMPLICATIONS

N/A.

ADMINISTRATIVE IMPLICATIONS

N/A.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Multiple bills have been introduced during this session that address the issuance of driver's licenses to foreign nationals and implicate state compliance with REAL ID. These include House Bills 32 (House Judiciary Committee Substitute) and 79. Both of these House Bills (in their current forms) limit the issuance of driver's licenses and ID cards to those able to establish lawful presence in the United States.

TECHNICAL ISSUES

N/A.

OTHER SUBSTANTIVE 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.

Based on limited research, it is not clear whether the two-tiered licensing structure authorized under REAL ID has been subjected to judicial scrutiny under the federal constitution and it also not clear whether the legislation would survive scrutiny by the New Mexico appellate courts under the New Mexico Constitution.

ALTERNATIVES

N/A.

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

Please see nos. 1, 2, and 3 as noted in the “Significant Issues” discussion above.