

Somos Un Pueblo Unido

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NM Taxation & Revenue Dept.
Director of Tax Policy
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Dear Director:

We are writing to call your attention to several apparent flaws in the proposed revisions to the regulations on drivers' licenses that were published on Sept. 15, 2016, in Volume XXVII, Issue 17, of the New Mexico Register.

Identification number not necessary for non-REAL-ID licenses or ID cards

The first deficiency in the draft revisions concerns the proposed requirement that applicants for non-REAL-ID-compliant licenses (Driver's Authorization Cards or "DACS") and identification cards that are not intended to be used for federal purposes ("non-Real-ID-compliant ID cards") shall submit proof, not only of their identity, age and residency, but also of an "identification number." The requirement for proof of an "identification number" is an evident holdover from the regulations implementing the 2003 driver's license law (§§18.19.5.6 et seq. NMAC). That earlier law required applicants for a driver's license or ID card to provide a social security number ("SSN"), but permitted foreign nationals to submit an individual tax identification number ("ITIN") "as a substitute for a social security number" and allowed the secretary to designate other documents whose numbers could be used "as a substitute for a social security number or an individual tax identification number" (HB 99 as amended, 2016 Regular Session, amending §66-5-9(B) NMSA). The regulations adopted to implement the former statute accordingly required all applicants for drivers' licenses or ID cards to provide proof of one of these kinds of identification numbers in addition to proof of their identity, age and residence (§§18.19.5.12(A), (C), (D) and (F) NMAC).

But the amendments enacted this year by HB 99, changed this scheme entirely by creating a two-tiered system of licensing with one set of requirements for REAL-ID-compliant licenses and ID cards and another for non-REAL-ID-compliant license and ID cards.

Under the new statute, the only persons who are required to show proof of identification number are the applicants for a Real-ID-compliant license or ID card. They must furnish

either an SSN or, for foreign nationals, a “unique identifying number” of a document showing the applicant’s lawful immigration status (§§66-5-9 (B) and (F); 66-5-401(A) and (B) NMSA). Applicants for DACs and non-Real-ID-compliant ID cards, by contrast, are subject to no such statutory requirement, but are instead obliged to prove only their identity, age and residency (§§66-5-9(G) and (B); 66-5-401(C) and (A) NMSA).

Although a SSN and an ITIN are listed among the several documents that *may* be used, at the applicant’s option, to prove their identity and age, there is no separate requirement for these applicants to submit proof of an “identification number” in addition to proof of their identity, age and residency (§66-5-9(G); 66-5-401(C) NMSA).

The attempt in the proposed regulations to impose such a requirement on these applicants therefore has no basis in the governing statute and it could leave countless New Mexico residents, including U.S. Citizens, who do not possess their physical social security card or employment documents without access to a DAC or Non-REAL-ID-compliant ID card.

We urge the secretary to correct this deficiency by deleting from the proposed regulations both (a) the requirement for applicants for DACs and non-Real-ID-compliant ID cards to prove their “identification number,” and (2) all of the provisions of the draft regulations that would implement this requirement by specifying how these applicants should go about proving their “identification number.”

Fingerprinting & Background checks

The remaining deficiencies we have identified in the proposed new regulations concerns fingerprinting and background checks for certain applicants for DACs and non-Real-ID-compliant ID cards, proposed new §18.19.5.17 NMAC. This section is apparently intended to implement the corresponding section of the new statute, §66-5-15.2 NMSA, but in fact it departs from the statute in several important respects.

First, the regulation would introduce an ambiguity not present in the statute concerning the definition of precisely which categories of persons are subject to the requirement for fingerprinting and background checks. On that issue, the statute provides as follow:

“A. The taxation and revenue department shall take a full-face or front-view photograph and the fingerprints of an applicant for a driving authorization card or an identification card not intended to be accepted by federal agencies for official federal purposes who does not provide proof of lawful status and who does not possess a valid New Mexico license or identification card. The taxation and revenue department is authorized to submit fingerprint data to the department of public safety and obtain the criminal history record of an applicant from the department of public safety. The department of public safety is authorized to submit the fingerprint data to the federal bureau of investigation to conduct a background check of the applicant’s criminal history pursuant to the federal bureau of investigation appropriation in Title 42 of Public Law 92-544.”

The initial sentence of this section makes clear that the fingerprints and photographs are to be taken only from those applicants for DACs and non-Real-ID-compliant ID cards who do not have a current New Mexico license or ID card and do not submit proof of their lawful immigration status. The remaining two sentences of the section then go on to specify how the fingerprints and photographs taken from these applicants shall be used to conduct the background checks. It is thus clear that the entire procedure for fingerprints, photographs and background checks applies only to those applicants who do not have current NM licenses or ID cards and have not proven their lawful status.

The corresponding section of the draft regulations, on the other hand, would muddle this clear legislative description of the categories of persons who are required to submit to the fingerprinting procedure. Only the first sentence of this section of the draft, which states that TRD “is authorized to obtain the criminal history of applicants for” DACs and non-Real-ID-compliant ID cards, contains a clear statement that the sentence is only meant to apply when the applicant does not possess a current NM license or ID card and does not provide proof of lawful status. The second sentence, which states that TRD “is further authorized to exchange fingerprint data” with the FBI and the DPS, contains no such limiting proviso, and neither does the entire succeeding subsection, which requires TRD to take fingerprints and photographs of the applicants and to request their criminal histories from DPS and the FBI, and which requires the applicants to file a written consent to a background check and to reimburse TRD for its cost.

Because these latter provisions contain no limiting language, it is left unclear whether they are meant to apply only to applicants without current licenses or ID cards and without proof of lawful status, or whether, on the other hand, these provisions are intended to cover all applicants for DACs or non-Real-ID-compliant ID cards. The language of these provisions is sufficiently unclear on this point to create a risk that MVD field personnel may misconstrue them and may improperly insist that all such applicants should submit to fingerprinting, photographs and background checks.

The regulations should be rewritten to more closely track the statutory language, which as noted above, is quite clear on this issue.

The **second** deficiency in this section of the proposed new regulations is that the procedure it prescribes for conducting background checks departs significantly from the prescription set forth in the governing statute. The statute, as quoted above, states that TRD is authorized to submit the applicants’ fingerprints to the state DPS and request their criminal history from DPS. DPS is then authorized to pass along the fingerprints to the FBI for background checks the results of which will be reported to TRD. In other words, the statute provides for no direct contact between TRD and the FBI and instead requires that all dealings between TRD and the FBI should take place only through DPS.

In contrast, the regulations, purport to authorize TRD “to exchange fingerprint data directly with the federal bureau of investigation” as well as with DPS, and to submit to

the FBI “a request for a current criminal history screening through the national crime information center.” In effect, the regulations would authorize the TRD to deal directly with the FBI and to ignore the statutory mandate that *only* DPS shall have direct contact with the FBI and shall be the only agency that transmits to the FBI any requests for background checks on these applicants

The **third** deficiency in this section of the proposed regulations reflects a similar attempt to expand the background-check procedure beyond what the legislature has authorized. Although the statute, as noted above, authorizes TRD to take both fingerprints and photographs of applicants who fall within the defined categories, it very pointedly goes on to provide that only the “fingerprint data,” not the photographs, shall be transmitted to DPS and then by DPS to the FBI for a background check. The proposed regulation, by contrast, expressly provides for transmission to these agencies of both the fingerprints and the photographs, and to that extent it clearly exceeds the authority granted to TRD by the legislature.

The **fourth** deficiency with this section of the draft relates to the subsequent paragraph of the statute and the corresponding paragraph of the proposed regulation in which TRD is authorized to refuse licenses to persons for whom their background check has revealed a criminal history. The statute provides that a license may be refused when the background check “reveals that the … applicant has an outstanding *valid* criminal arrest warrant” (§66-5-15.2(B)(1) NMSA; italics added). The draft regulation, however, glaringly omits the word “valid,” and instead purports to authorize denial of a license to anyone who “has an outstanding criminal arrest warrant,” valid or otherwise (proposed new §18.19.5.17(C)(1) NMAC). The Legislature must be presumed to have included the word “valid” for a reason, and the most plausible reason is that it intended to impose on TRD a duty to confirm the validity of the information revealed by the background check. Omission of the word “valid” from the proposed regulation therefore amounts to an unauthorized effort by TRD to relieve itself of this statutory duty. This dereliction should be corrected by (a) at the very least, accurately tracking the statutory language by inserting the word “valid” after the word “outstanding” in the draft regulation, or (b) preferably, spelling out the actual procedures by which TRD will perform its duty to confirm the validity of any criminal warrant that may have been turned up by the background check.

And finally, these draft regulations do not provide adequate due process for applicants who are denied a DAC or non-REAL-ID-compliant ID card because of a “mismatch” or outstanding criminal arrest warrant. NCIC and FBI criminal records databases have been proven to contain inaccurate, incomplete or ambiguous information that might lead MVD to improperly render an applicant ineligible. Under these draft regulations, MVD does not require that applicants be provided specific reasons for determination of ineligibility nor the documents that establish ineligibility. Nor do they provide an appeal process for those who have been deemed ineligible. To ensure that every eligible driver and resident in New Mexico is licensed, registered and insured, a suitable process for correcting errors and appealing determinations of ineligibility should be established.

We thank you for your attention.

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