

LFC Requester:	Ellen Rabin
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**AGENCY BILL ANALYSIS
2023 REGULAR SESSION**

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 January 19, 2023
Bill No: HB100

Sponsor: Rep. A. Romero
Short Title: 14 DAY WAITING PERIOD FOR FIREARM SALES

Agency Name and Code 305–Office of the Attorney General
Number: _____
Person Writing Jonathan Gardner, AAG
Phone: 505-795-3225 **Email** legisfir@nmag.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY23	FY24		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY23	FY24	FY25		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY23	FY24	FY25	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 Opinion nor an Attorney General Advisory Letter. This is a staff analysis in response to a committee or legislator's request. The analysis does not represent any official policy or legal position of the Office of the Attorney General.

BILL SUMMARY

Synopsis:

HB100 would make it a misdemeanor to give ownership, possession, or control of a gun to a buyer less than two weeks after submission of a federal instant background check. Effectively, this bill creates a 14-day waiting period for a gun purchase in New Mexico.

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SIGNIFICANT ISSUES

Bills criminalizing gun possession often raise a question of constitutionality. HB100 denies ownership, possession, and control of a firearm to a buyer for two weeks after a federal instant background check is submitted, no matter what the result of the background check or how soon the background check comes back. The Supreme Court of the United States has determined a total ban on handgun possession violated the Second Amendment. *D.C. v. Heller*, 554 U.S. 570, 635 (2008). HB100 prohibits possession of a specific gun by a specific person for a specific time, and may appear to be constitutionally suspect under *Heller*.

However, the Ninth Circuit Court of Appeals addressed a ten-day waiting period under California law in *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016), *cert denied*, 138 S. Ct. 945. California had established a ten day waiting period on all firearms purchases. *Id.* at 818. The case involved a challenge that the law was unconstitutional under the Second Amendment with respect to a purchaser who already owned a gun or had a conceal carry permit and who passed the background check in less than ten days. *Id.* at 818-819. The Ninth Circuit held the ten-day waiting period did not violate the Second Amendment “because the ten day wait is a reasonable precaution for the purchase of a second or third weapon, as well as for a first purchase.” *Id.* at 819. The Supreme Court of the United States declined to hear that case, *Silvester v. Becerra*, 138 S. Ct. 945 (2018).

Because New Mexico is not in the Ninth Circuit, federal courts in New Mexico would not be required to follow *Silvester*, and there are factual differences between the law in California and that proposed in HB100. It may be argued that HB100 is sufficiently different from California's statutory scheme that a different result should be reached; for example, it could be argued that California requires checking multiple databases often requires a “manual review” while HB100 only requires a federal instant background check, making a waiting period more justifiable under California's scheme than under New Mexico's. *See Silvester*, 843 F.3d 816, 825 (9th Cir. 2016). HB100 could be challenged in New Mexico courts as unconstitutional, citing reasonableness of the 14 day wait and differentiating facts from California's *Silvester* case.

PERFORMANCE IMPLICATIONS

None

ADMINISTRATIVE IMPLICATIONS

As drafted, to the extent that the NMOAG is called upon to investigate or prosecute this new misdemeanor, enactment of this bill could require additional staff and resources.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB50 (making it a felony to possess or transfer a large-capacity magazine)

HB72 (making it a felony to knowingly possess or transfer a semiautomatic firearm converter, subject to certain exceptions)

HB101 (making it a felony to possess a “large-capacity magazine” or “assault weapon” as those terms are defined in those bills)

TECHNICAL ISSUES

Paragraph E states each party to a “sale” may be charged separately and Paragraph F says each firearm “sold” is a separate offense, but the new proposed language in HB100 does not use the term “sale”, potentially raising a question as to whether or how Paragraphs E and F apply to the new proposed language.

OTHER SUBSTANTIVE ISSUES

The proposed language is silent on what type of intent, or mental state (“mens rea”) is necessary – must the crime be committed intentionally, knowingly, negligently, is there no mental state requirement at all (a strict liability crime)? Courts will likely assume that some mental state is required if the Legislature does not include a specific intent. *See Santillanes v. State*, 1993-NMSC-012, ¶ 11, 115 N.M. 215, 218 (“When a criminal statute is silent about whether a *mens rea* element is required, we do not assume that the legislature intended to enact a no-fault or strict liability crime. Instead, it is well settled that we presume criminal intent as an essential element of the crime unless it is clear from the statute that the legislature intended to omit the *mens rea* element.” (citation omitted, italics in original)). The Legislature may wish to define what mental state is required explicitly in the text so there is no question under the statute of the elements of the crime.

The language in HB100 does not explicitly prohibit conduct only by the seller of a gun; could a buyer transfer ownership, possession or control to themselves? Paragraph E says that each party to a sale can be charged, but the new language does not use the term “sale”. The Legislature may wish to be clear whether only the seller or both seller and buyer can be charged under the new language.

ALTERNATIVES

N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS

To address drafting issues, the Legislature may want to change the new section to read: “~~Ownership, possession or control of a firearm shall not be transferred~~ A seller shall not make a sale to the a buyer earlier than fourteen calendar days after submission of the federal instant background check.”

See other substantive issues above.