

LFC Requester:	Marty Daly
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**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

<i>Check all that apply:</i>				Date Prepared:	2/2/2024
Original		Amendment		Bill No:	HB 137
Correction		Substitute	X		

Sponsor:	Andrea Romero and Charlotte Little	Agency Name and Code Number:	305 – New Mexico Department of Justice
Short Title:	Gas-Operated Semiauto Firearms Exclusion Act	Person Writing Analysis:	Peter Valencia
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	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 Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. 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 NM Department of Justice.

BILL SUMMARY

Synopsis:

House Bill (“HB”) 137 proposes to add several sections of Chapter 30 Article 7 NMSA 1978 to criminalize or further regulate the possession, selling, import, manufacture, transfer, or receipt of gas-operated semiautomatic firearms identified as such by the Attorney General and large capacity ammunition feeding devices. Except as otherwise specifically provided, the bill proposes to make any violation a misdemeanor. The bill also proposes an additional fourth degree criminal penalty for crimes committed with a prohibited firearm or large-capacity ammunition feeding device.

HB 137 defines the terms “ammunition,” "cycle the action," "gas-operated," "large-capacity ammunition feeding device," "machine gun," "machine gun attachment," and "semiautomatic firearm."

HB 137 proposes to make it unlawful for any person to import, sell, manufacture, transfer or receive a firearm, any modified firearm, or combination of part and firearm which are included on a list of prohibited gas-operated semiautomatic firearms identified by the attorney general or that effectively operate as one of the listed prohibited firearms. HB 137 would further criminalize the importation, selling, manufacture, transfer or receipt of a large-capacity ammunition feeding device and the possession of such a device manufactured after July 1, 2024. These criminal prohibitions would not apply to several governmental agencies including the United States, other states, or any Indian nation, tribe or pueblo or department. This prohibition would also not apply to security organizations related to nuclear energy under Title 1 of the federal Atomic Energy Act of 1954. The prohibition would further not apply to firearms possessed prior to January 1, 2025, as long the person certifies possession of the firearm in accordance with the proposed act.

HB 137 would allow the transfer of a lawfully owned firearm to an immediate family member or a person in another state. Lawful possession of a firearm would be limited to private property, while on the premises of a licensed firearms dealer or firing range, or while traveling from or to these locations. Licensed firearm dealers would be required to mark all prohibited firearms manufactured after January 1, 2025. Persons in possession of a large-capacity ammunition feeding device would be required to mark the item in a manner prescribed by the Attorney General before any transfer and would be required not to alter any such marking.

HB 137 would make it a fourth degree felony to import, sell, manufacture, transfer, receive or possess any machine gun or machine gun attachment. This criminal prohibition would not apply to several governmental agencies including the United States, other states, or any Indian nation, tribe or pueblo or department. This prohibition would also not apply to security organizations related to nuclear energy under Title 1 of the federal Atomic Energy Act of 1954 or machine guns or machine gun attachments registered with the United States bureau of alcohol, tobacco, firearms and explosives pursuant to the National Firearms Act.

HB 137 proposes to require the Attorney General to consult with the department of public safety to identify and publish on their website a list of gas-operated semiautomatic firearms that will be subject to prohibition and regulation. This bill requires the department of public safety to require each licensed firearm dealer record a purchaser acknowledgement before any sale of any nonprohibited firearm, submit clear and convincing evidence to the attorney general that a firearm should be removed from the prohibited list, and advise the attorney general on creating the prohibit list. The bill provides a list of firearms including certain rifles, shotguns, and handguns that shall not be included in the categorization of a "gas-operated semiautomatic firearm." The Attorney general and in consultation with the department of public safety would also be required to develop a system for certifying lawful possession of gas-operated semiautomatic firearms. The information contained in the certification of the firearm would be confidential and would require the affidavit declaring the affiant is subject to perjury penalties. The Attorney General would be further required to prescribe manners in which all prohibited firearms would be marked by licensed firearm dealers and how all applicable large-capacity ammunition feeding devices would also be marked.

HB 137 provides that nonresidents may lawfully possess prohibited firearms or parts for twenty-four hours as they are transporting the items through the state. Nonresidents moving into the state would be required to certify their applicable firearms within sixty days. Firearms dealers possessing an otherwise prohibited firearm for purpose of lawful transfer or repair would be exempt from criminal liability under the act.

Finally, HB 137 includes a section specifying that if any part or application of the proposed law is held invalid, the remainder of the law would be unaffected.

Proposed House Judiciary Committee Substitute for House Bill 137

The amendments made in the substitute bill mostly clarifies text, modifies and accelerates some effective dates, and adjusts requirements for some firearms in the original bill.

Section 1 (C) (p. 2 line 15) adds a definition for the term "firearm."

Section 3 (A) (p. 5 line 12) changes the effective date of criminalizing the act of importing, selling, manufacturing, transferring or receiving prohibited firearms from January 1, 2025, to July 1, 2024.

Section 3 (B) p. 6 line 13) adds an explicit nonresident exception for illegal possession of a prohibited firearm.

Section 3 (C) (3) (a) (p. 7 line 11) changes the manufacture date deadline of a gas-operated semiautomatic firearm that could be legally possessed from January 1, 2025, to July 1, 2024.

Section 3 (C) (3) (c) (p. 7 line 16) adds a deadline that an owner certifies the possession of a gas-operated semiautomatic firearm by January 1, 2025. The original bill did not have a deadline for this certification.

Section 3 (C) (4) (p. 7 line 17) adds the term “and possession” to clarify that the resulting possession of an otherwise legal transfer of a firearm.

Section 3 (C) (5) (p. 8 line 5) adds the requirement that an owner first certify a gas-operated semiautomatic firearm prior to transferring it out of state or to a licensed firearms dealer.

Section 3 (F) (1) (a) (p. 9 line 15) clarifies that the definition of gas-operated semiautomatic firearm does not include firearms capable of shooting less than .22 caliber ammunition.

Section 3 (F) (1) (e) (p. 10 line 20) modifies the requirements for a handgun not to be classified as gas-operated semiautomatic. Specifically with the substitution, a handgun may only have a magazine capable of a maximum of 10 rounds of ammunition as opposed to the previous limit of 15.

Section 3 (F) (2) (p. 10 line 24) modifies, clarifies, and expands the definition of immediate family members to which gas-operated semiautomatic firearm can be legally transferred to.

Section 4 (B) (p. 11 line 6) adds an additional exception to the prohibition of large capacity ammunition feeding devices. This exception would allow transfer out of state or to a licensed firearms dealer, this would be consistent with the exception as outlined for gas-operated semiautomatic firearms.

Section 4 (D) (p. 12 line 8) would further require any licensed firearm importer or manufacturer, in addition to owners, to mark large-capacity ammunition feeding devices in accordance with the statute.

Section 5 (B) (3) (p. 13 line 19) would slightly modify the prohibition of machine guns or machine gun attachments to allow legal possession of such weapons registered in accordance with the federal Firearms Owner’s Protection Act.

Section 6 (A) and (E) (p. 13 line 25) would change and accelerate the deadline for the New Mexico Attorney to identify and publish the list the prohibited gas-operated semiautomatic firearms from December 1, 2024 to July 1, 2024. Additionally, the New Mexico Attorney General would be further required to update the list once per calendar year. Further, this bill substitution provides that an owner or manufacturer may appeal the determination of a firearm classification pursuant to further rules to be developed by the Attorney General.

Section 7 (A) (p. 15 line 22) would change and accelerate the deadline for the New Mexico Attorney to develop and make available a system for certifying gas-operated semiautomatic firearms from October 1, 2024, to September 1, 2024.

Section 7 (B) (p. 16 line 3) would further clarify lawful transfer of an otherwise prohibited firearm.

FISCAL IMPLICATIONS

Given the duties imposed on the NMDOJ by HB 137, NMDOJ would require highly specialized, technical staff to ensure the list of applicable weapons is up to date, particularly concerning the constant updates to firearms and accessories. Therefore, the NMDOJ would require a ballistics/firearms expert on staff to provide assistance and counsel on this bill, in coordination with DPS and ATF, at approximately \$115,000 per year, plus benefits. Additionally, in support of that individual, an investigator position at approximately \$85,000 per, plus benefits.

Additionally, the NMDOJ would need to ensure the technology is in place to host and manage the list of prohibited firearms and the certification database. In the timeline the bill provides and based off of similar technology used in creating the charities database, NMDOJ may need an additional \$400,000 of one-time funding to create and implement HB 137 and properly advertise the certification requirements.

SIGNIFICANT ISSUES

The bill's prohibition on the possession of large-capacity ammunition feeding devices and gas-operated semiautomatic firearms may face a challenge based on the Second Amendment of the United States Constitution. Previously, the Federal Assault Weapons Ban of 1994 imposed a federal prohibition against large capacity magazines. It should be noted that the ban was never ruled unconstitutional, including its ban on magazines capable of holding more than ten rounds of ammunition. However, it expired in September 2004 through a sunset provision. Years later, the U.S. Supreme Court in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S.Ct. 2111 (June 23, 2022) limited the previous two-part test approach that was widely used to evaluate Second Amendment challenges, stating, "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129–30.

Following the Court's ruling in *Bruen*, courts across the country have attempted to apply that framework on a number of bills that would regulate firearms in a similar manner as HB 137. Federal district courts in Connecticut, Delaware, and Washington have held that those challenging similar laws were unlikely to succeed. See *Nat'l Ass'n for Gun Rights v. Lamont*, 2023 WL 4975979 (D. Conn. Aug. 3, 2023); *Delaware State Sportsmen's Ass'n, Inc. v. Delaware Dep't of Safety & Homeland Sec.*, 664 F. Supp. 3d 584 (D. Del. 2023); *Hartford v. Ferguson*, 2023 WL 3836230 (W.D. Wash. June 6, 2023). Two other federal district court judges in Illinois have held that a similar Illinois law was likely constitutional, concluding: "Because assault weapons are particularly dangerous weapons and high-capacity magazines are particularly dangerous weapon accessories, their regulation accords with history and tradition." *Bevis v. City of Naperville*, 657 F. Supp. 3d 1052, 1075 (N.D. Ill. 2023); see also *Herrera v. Raoul*, 2023 WL 3074799, at *4 (N.D. Ill. Apr. 25, 2023).

The Seventh Circuit Court of Appeals upheld the district court's decision and concluded that there was a "strong likelihood" that the law is constitutional. See *Bevis v. City of Naperville*, 85 F.4th 1175 (7th Cir. 2023). Recently, the United States Supreme Court declined to reverse the Seventh Circuit's decision with no public dissents. See *Nat. Assn. for Gun Rights v. Naperville*, 2023 WL 8635036 (U.S. Dec. 14, 2023). Additionally, the Ninth Circuit Court of Appeal recently held that a similar California law prohibiting high capacity magazines was likely constitutional and stayed another preliminary injunction against California's assault weapon law. See *Duncan v. Bonta*, 83 F.4th 803, 805 (9th Cir. 2023); *Miller v. Bonta*, No. 23-2979 (9th Cir. Oct. 28, 2023).

In New Mexico, the Court of Appeals has held, prior to Bruen, that the applicable standard of review for such claims is intermediate scrutiny. See *State v. Murillo*, 2015-NMCA-046, ¶ 13, 347 P.3d 284. To survive a challenge under intermediate scrutiny, the government must show that the statute is substantially related to an important government purpose. *Id.* However, based on the Bruen opinion, that analysis might no longer be applicable, and the law might now need to be found “consistent with this Nation’s historical tradition of firearm regulation” to be upheld if it is found to address conduct covered by the plain text of the Second Amendment.

In addition to the United States Constitution, HB 137 could face a legal challenge pursuant to the New Mexico Constitution. Article II, § 6 of the Constitution of New Mexico provides: “No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.” Similar statutes in other states have been upheld when challenged pursuant to their own state constitutions. However, these states have different constitutional language as compared to Article II, § 6 of the Constitution of New Mexico. These states include Vermont in the case of *State v. Misch*, 2021 VT 10, ¶ 67, 256 A.3d 519, 546, and Colorado in *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 61, 467 P.3d 314, 329.

PERFORMANCE IMPLICATIONS

HB 137 proposes to require the Attorney General to identify and publish a list of prohibited gas-operated semiautomatic firearms on their website. The Attorney General, in consultation with the department of public safety, would also be required to develop a system for certifying gas-operated semiautomatic firearms. The Attorney General would be further required to prescribe manners in which all prohibited firearms manufactured after January 1, 2025 would be marked by licensed firearm dealers and how all large-capacity ammunition feeding devices created after January 1, 2025 would also be marked.

Proposed House Judiciary Committee Substitute for House Bill 137

The proposed bill substitute would further require the Attorney General to create and announce rules for appealing the classification of firearms as gas-operated semiautomatic firearms.

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

The legislative intent may be unclear for Section 3 Subsection (D) (1). This section states that an otherwise lawfully possessed gas-operated semiautomatic firearm “may only be possessed (1) on private property owned or immediately controlled by the person.” It is unclear whether this provision would allow lawful possession of a firearm not on private property so long as it is immediately controlled by the person possessing the firearm.

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS