ADMINISTRATIVE RULES COMMITTEE

DECEMBER 7, 2015

WRITTEN TESTIMONY OF THE NORTH DAKOTA ATTORNEY GENERAL AND THE BUREAU OF CRIMINAL INVESTIGATION ON CRIMINAL HISTORY RECORD INFORMATION AND CRIMINAL JUSTICE DATA INFORMATION SYSTEM RULE CHANGES

TO: Chairman Bill Devlin and Members of the Administrative Rules Committee

The following written testimony is submitted in response to the November 20, 2015 request of Vonette J. Richter, Assistant Code Revisor. The written testimony is submitted by Dallas Carlson, Director, North Dakota Attorney General's Office Bureau of Criminal Investigation.

1. **Whether the rules resulted from statutory changes made by the Legislative Assembly.**

The proposed rulemaking implements Senate Bills 2003 and 2215 enacted by the Sixty-fourth Legislative Assembly.

Senate Bill 2215 establishes a biometric data system for identification purposes for criminal history record information. See pages 9, 24, and 28 of the proposed rules. Senate Bill 2215 also authorizes retention of fingerprints and other identifying information by the Bureau of Criminal Investigation and the Federal Bureau of Investigation, see page 15 of the proposed rules and N.D.C.C. § 12-60-24(1)(d), and the exchange of criminal history record information with another state's criminal identification bureau or central repository for criminal history record information, see page 14 of the proposed rules and N.D.C.C. § 12-60-24(1)(e).

Senate Bill No. 2003 was the Attorney General's Appropriation bill. Section 9 of SB 2003 transferred the Criminal Justice Data Information Sharing System from the Information Technology Department to the Office of the Attorney General. See pages 48-52 of the proposed rules and N.D.C.C. § 54-12-34.

2. **Whether the rules are related to any federal statute or regulation. If so, please indicate whether the rules are mandated by federal law or explain any options your agency had in adopting the rules.**

The rules for criminal history record information and criminal justice data information sharing are related to the National Crime Prevention and Privacy Compact, 42 U.S.C. § 14616, which provides for an electronic information sharing system between the federal government and the states for the exchange of criminal history records for noncriminal justice purposes such as background checks for licensing and employment.

The rules for criminal history record information and criminal justice data information sharing are also related to Title 28, of the Federal Code of Regulations, Part 20, relating to access, use, and dissemination of criminal history record information.

The National Crime Information Center ("NCIC") is operated by the Federal Bureau of Criminal Investigation ("FBI"). The NCIC is a nationwide computerized information system of criminal justice data established by the FBI for federal, state, and local criminal justice agencies. The NCIC includes the Interstate Identification Index ("III" or "Triple I") System data base and the National Fingerprint File. .

The FBI assigns a nine-character identifier, originating agency identifier ("ORI"), to criminal justice agencies that meet the FBI's criteria for access to the NCIC. It is necessary to have an ORI to acquire and obtain direct access to the Triple I and to enter or update information in the Triple I System. In order to obtain the ORI, the criminal justice agency has to agree to comply with all rules, policies, and procedures of the NCIC and the FBI. The proposed rules are in accordance with the rules, policies, and procedures of the NCIC and the FBI.

3. **A description of the rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.**

The Bureau of Criminal Investigation ("BCI") followed the statutory rule-making procedures required under N.D.C.C. ch. 28-32. Public notice of the rule-making was published in all official newspapers in accordance with the requirements of N.D.C.C. ch. 28-32. Notice of the rule-making was provided by e-mail with attachments to the Sponsors of House Bill 2015, Senators Jonathan Casper, Carolyn Nelson, and Nicole Poolman, and to Representatives Lois Delmore, Jason Dockter, and Karen Karls.

Senate Bill No. 2003 is the appropriation bill for the Office of the Attorney General and does not have any individual sponsors.

A public hearing was held at the BCI Conference Room on October 13, 2015, and after comment period, the BCI and the Criminal Justice Information System Advisory Board reviewed written comments, made changes to the proposed rules based on the comments, and submitted the matter to the North Dakota Attorney General for review and an opinion. No oral comments or testimony was presented at the hearing.

The North Dakota Attorney General issued his opinion approving the rules on October 28, 2015.

4. **Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules. If so, describe the concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint. Please summarize the comments of any person who offered comments at the public hearings on these rules.**

   a. A written comment was received regarding the proposed CJIS definition for "criminal history record information". The comment was the proposed administrative rule definition varied from the statutory definition in N.D.C.C. § 12-60-16.1 because the CJIS definition included domestic violence protection orders and disorderly conduct restraining orders. Criminal history record

information is linked to biometric data for identification purposes, but domestic violence protection orders and disorderly conduct restraining orders are not linked to biometric data.

RESPONSE: The definition was corrected by removing domestic violence protection orders and disorderly conduct restraining orders from the definition and including them in a new definition for "criminal justice data information." (Pages 48- 49).

b. A written comment was received regarding the definition of "criminal justice data information sharing system". The comment was the proposed administrative rule definition stated that CJIS collected criminal history record information. That is incorrect. CJIS provides access to criminal history record information, but only BCI collects criminal history record information.

RESPONSE: The definition was corrected by removing the word "collection". (Page 49).

c. A written comment was received that the CJIS definition section should have a definition of "criminal justice data information."

REPONSE: A definition of "criminal justice data information" was added to the CJIS definition section. (Page 49).

5. The approximate cost of giving public notice and holding any hearing on the rules and the approximate cost (not including staff time) of developing and adopting the rules.

The cost of publication of the public notice was $2052.84. There was no cost to hold the hearing and there were no other costs in developing and adopting the rules.

6. **An explanation of the subject matter of the rules and the reasons for adopting those rules.**

a. N.D.C.C. § 28-32-02(2) requires each agency to include a description of the agency's organization and functions and how the public may obtain information or make submissions or requests. The amendments to N.D. Admin. Code Chapter 10-01-01 relate to the organization of the Office of the Attorney General and includes divisions that are not in the present rule, including the Attorney General Administration Division, the Crime Laboratory Division, the Lottery Division, the Criminal Justice Information Sharing Division, and the Information Technology Division. The amendment also adds a new rule for inquiries, requests for records, and correspondence to the Attorney General. The rules to meet these requirements appear at Pages 3-8 of the proposed rules.

b. N.D.C.C. § 12-60-07(1) requires BCI to cooperate and assist with the United States Department of Justice and similar departments in other states in establishing and carrying on a complete system of identification. N.D.C.C. § 12-60-16.3 requires the Attorney General to adopt rules for criminal justice agencies regarding the reporting (page 9), collection (page 10), maintenance (page 11), dissemination of criminal history record information (pages 12-15), security of the information (page 16), inspection of the information (pages 17-19), auditing (page 20), agreements with other criminal justice agencies (page 21), use of criminal history record information for research and statistics (page 22), criteria for purging and sealing criminal history records (page 23), reportable events to be reported by criminal justice agencies (pages 24-27), and time requirements for reporting reportable events (page 27). Definitions are at pages 28-29.

c. N.D.C.C. § 54-12-34(6) requires the Attorney General, after consultation with the CJIS Advisory Board, to adopt rules to establish eligibility for access to the criminal justice data information system, to implement the sharing of criminal

justice information and the systems necessary to perform those functions, and to address the operation of the CJIS Advisory Board. The rules to meet these requirements appear at Pages 48-52 of the proposed rules. Definitions are at pages 48-49 of the proposed rules; organization of the criminal justice information advisory board is at page 49 of the proposed rules; access procedures to the criminal justice information sharing system are at page 50 of the proposed rules; security requirements are at page 50 of the proposed rules; and denial, suspension, or revocation of access criteria and notification procedures are at page 51-52 of the proposed rules.

7. **Whether a regulatory analysis was required by North Dakota Century Code (NDCC) Section 28-32-08 and whether that regulatory analysis was issued. Please provide a copy.**

   A regulatory analysis was not required.

8. **Whether a regulatory analysis or economic impact statement of impact on small entities was required by NDCC Section 28-32-08.1 and whether that regulatory analysis or impact statement was issued. Please provide copies.**

   A regulatory analysis and economic impact statement on small entities were prepared. Copies are submitted with this testimony.

9. **Whether these rules have a fiscal effect on state revenues and expenditures, including any effect on funds controlled by your agency. If so, please provide copies of a fiscal note.**

   The proposed rules do not have a fiscal impact on state revenues and expenditures, including funds controlled by the Attorney General.

10. **Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. Please provide a copy if one was prepared.**

    The rules do not involve the taking of real property and a constitutional takings assessment was not required.

11. If these rules were adopted as emergency (interim final) rules under NDCC Section 28-32-03, provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support that declaration and provide a copy of the Governor's approval of the emergency status of the rules. If these rules were adopted as emergency (interim final) rules, what steps were taken to make the rules known to persons who can reasonably be expected to have a substantial interest in the rules?

These rules were not adopted as emergency or interim final rules.

SMALL ENTITY REGULATORY ANALYSIS

The following analysis is submitted in compliance with N.D.C.C. § 28-32-08.1 and pertains to:

1. PROPOSED AMENDMENTS TO: CHAPTER 10-01-01 of ND ADMINISTRATIVE CODE ARTICLE 10-01;

2. PROPOSED AMENDMENTS TO CHAPTERS 10-13-01, 10-13-02, 10-13-03, 10-13-04, 10-13-05, 10-13-06, 10-13-07, 10-13-08, 10-13-09, 10-13-10, 10-13-11, 10-13-12, 10-13-13, and 10-13-14, ND ADMINISTRATIVE CODE ARTICLE 10-13;

3. PROPOSED NEW RULES TO CHAPTER 10-18-01, ND ADMINISTRATIVE CODE ARTICLE 10-18

GENERAL:

The North Dakota Attorney General anticipates the proposed amendments in Article 10-01, 10-13, and 10-18, ND Administrative Code, do not have a substantial small entity regulatory impact.

1. Establishment of Less Stringent Compliance or Reporting Requirements

   Compliance requirements are established by state and federal law. The rules neither exceed federal and state law requirements, and they can be less stringent than federal and state law requirements.

2. Establishment of Less Stringent Schedules or Deadlines for Compliance or Reporting Requirements for Small Entities

   Criminal history record information requirements have been in effect since 1987. The proposed rules do not require different schedules or deadlines for compliance than already required under current state and federal law for reportable events under N.D.C.C. §§ 12-60-16.2, 12-60-16.4, or 12-60-16.5. All fees required are set by statute, specifically N.D.C.C. § 12-60-16.9, and the proposed rule-making does not establish any fees.

   Criminal justice data information sharing system requirements have been in effect since 2003. The proposed rules do not establish schedules or deadlines for compliance or reporting and does not establish reporting requirements. No fees are involved in the criminal justice data information sharing system.

3. Consolidation or Simplification of Compliance or Reporting Requirements for Small Entities

   Compliance and reporting requirements are set by federal and state law. The proposed rulemaking for criminal history record information and criminal justice data information sharing cannot modify, simply, or consolidate any federal or state law requirements.

4. Establishment of Performance Standards for Small Entities to Replace Design or Operational Standards Required in the Proposed Rules

   The proposed rulemaking for criminal history record information and criminal justice data information sharing do not establish performance standards to replace design or operational standards.

5. Exemption of Small Entities From All or Any Part of the Requirements Contained in the proposed Rules

   It is necessary for entities that have access to criminal history record information and criminal justice data information sharing to have an originating agency identifier ("ORI") authorized by the Federal Bureau of Investigation and be authorized by the North Dakota Attorney General. All entities, i.e., criminal justice agencies, are required to comply with all of the requirements in the rules. Otherwise, there cannot be access to the National Crime Information Center ("NCIC"), which is vital for all criminal justice agencies in the state.

SMALL ENTITY ECONOMIC IMPACT STATEMENT

The following small entity economic impact statement is submitted in compliance with N.D.C.C. § 28-32-08.1 and pertains to:

1. PROPOSED AMENDMENTS TO: CHAPTER 10-01-01 of ND ADMINISTRATIVE CODE ARTICLE 10-01;

2. PROPOSED AMENDMENTS TO CHAPTERS 10-13-01, 10-13-02, 10-13-03, 10-13-04, 10-13-05, 10-13-06, 10-13-07, 10-13-08, 10-13-09, 10-13-10, 10-13-11, 10-13-12, 10-13-13, and 10-13-14, ND ADMINISTRATIVE CODE ARTICLE 10-13;

3. PROPOSED NEW RULES TO CHAPTER 10-18-01, ND ADMINISTRATIVE CODE ARTICLE 10-18

The proposed amendments to chapters 10-13-01, 10-13-02, 10-13-03, 10-13-04, 10-13-05, 10-13-06, 10-13-07, 10-13-08, 10-13-09, 10-13-10, 10-13-11, 10-13-12, 10-13-13, and 10-13-14, ND Administrative Code Article 10-13 and the proposed new rules to chapter 10-18-01, ND Administrative Code Article 10-18, are for rules required by state and federal law, specifically NDCC Section 12-60-16.3 and Title 28, part 20, Code of Federal Regulations, which has the purpose to assure criminal history record information is collected, stored, and disseminated in a manner to ensure the accuracy, completeness, currency, integrity, and security of the information and to protect individual privacy. Title 28, part 20, Code of Federal Regulations, implements 28 U.S.C. § 534.

1. Small Entities Subject to Proposed Rule

   The North Dakota Judicial System and North Dakota State and Local Criminal Justice Agencies are subject to the proposed rules

2. Administrative and Other Costs for Compliance with the Proposed Rule

   The North Dakota Attorney General, the North Dakota Court System, and North Dakota State and Local Criminal Justice Systems have been participating in the state criminal history record system since 1987 and with the criminal justice data information sharing system since 2003. No additional administrative costs are expected for compliance with the proposed rules.

3. Probable Cost and Benefit to Private Persons and Consumers Affected by the Proposed Rule

   There is no probable cost to private persons and consumers. The proposed rule-making does not include any fees or costs for criminal history record information or criminal justice data information sharing. The fees for record checks are set by statute, and have been since 1987.

   The benefit is that criminal history record information will be collected, stored, and disseminated in a manner to ensure the accuracy, completeness, currency, integrity, and security of the information and to protect individual privacy.

4. Probable Effect of the Proposed Rule on State Revenues

   The proposed rules are not expected to have any effect on state revenues.

5. Less Intrusive or Less Costly Alternative Methods of Achieving the Purpose of the Proposed Rule

   The proposed rulemaking for criminal history record information and criminal justice data information sharing is not expected to have any effect on the costs or expenses for criminal justice agencies for criminal history record information or criminal justice data information sharing and are not expected to have any fiscal impact on the Office of the Attorney General. Therefore, there are no less intrusive or less costly methods of achieving the purpose of the proposed rule.