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FISCAL IMPACT REPORT

ORIGINAL DATE 2/06/18

SPONSOR Scott LAST UPDATED _____ HB 284

SHORT TITLE Tax Evasion & Fraud SB _____

ANALYST Daly

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY18	FY19	FY20		
Indeterminate*	Indeterminate*	Indeterminate*	Recurring	General Fund

(Parenthesis () Indicate Revenue Decreases) *see Fiscal Implications below

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)
Taxation and Revenue Department (TRD)

SUMMARY

Synopsis of Bill

This bill amends several provisions of the Tax Administration Act (TAA) and the Taxation and Revenue Department (TRD) authorization statutes to modernize penalty and investigative authority provisions with respect to tax fraud and other criminal acts under laws that TRD administers.

Specifically, Section 1 of this bill repeals current law (NMSA 1978 Section 7-1-72) which makes attempted tax evasion a felony subject to imprisonment for one to five years, regardless of the amount of tax. The bill enacts a new section imposing graduated penalties for attempts to evade

or defeat tax depending on the amount of tax at issue. If the amount of tax owed or at issue is under over \$500 but not more than \$2,500, it is a fourth degree felony; if the amount is over \$2,500 but not more than \$20,000, it is a third degree felony; and if the amount is over \$20,000, it is a second degree felony. As under current law, the bill requires the offender to pay the costs of prosecution.

Section 2 amends NMSA 1978 Section 7-1-73 to classify tax fraud when the amount of tax owed or the value of any fraudulent refund claims filed is \$500 or less in the aggregate as a petty misdemeanor. If the amount owed or value of fraudulent claims filed is \$500 but not more than \$2,500 in the aggregate, it is a fourth degree felony. If the amount owed or value of fraudulent claims filed is over \$2,500 but not more than \$20,000 in the aggregate, it is a third degree felony. If the amount owed or value of fraudulent claims filed is over \$20,000 in the aggregate, it is second degree felony.

Section 3 amends NMSA 1978 7-1-74 to specify the elements of obstructing or impeding a tax-related investigation, which include knowingly providing false information or withholding information, knowingly altering, destroying, mutilating or concealing a document or record required to be retained, and knowingly preventing, obstructing, or delaying the communication of information or records related to a state tax-related investigation. Any person who commits obstruction of a tax-related investigation is guilty of a fourth degree felony.

Section 4 amends NMSA 1978 Section 9-11-14 to expand the duties of TRD tax fraud enforcement officers to include crimes within the department or under laws administered by the department, including under the Motor Vehicle Code. It also expands the pool of potential enforcement officers to include peace officers who are not yet certified, as long as within a year of hire they become certified as required by existing law (subsection B of this section) or by waiver pursuant another provision of existing law (NMSA 1978 Section 29-7-10). Additionally, commissioned tax fraud enforcement officers are authorized by HB 284 to make arrests with a court-approved warrant or if a crime within their scope of authority is committed in their presence.

FISCAL IMPLICATIONS

TRD believes this bill will have an unquantifiable potential positive impact on the general fund from increased compliance. It also reports that it can implement these new provisions within current resource levels.

SIGNIFICANT ISSUES

HB 284 revises the penalties related to tax fraud and evasion, and provides additional definitions for and imposes a new penalty for obstructing a tax fraud investigation. It also expands the authority of tax fraud investigators, along with increasing the TRD Secretary's ability to hire tax fraud investigators.

First, it appears that there are conflicts in the penalties imposed in Section 3 of the bill for the same course of conduct, which amends Existing law (NMSA 1978 Section 7-1-74) contained in subsection A which continues in effect in HB 284 provides in pertinent part that anyone who "obstructs or impedes" the due administration of the TAA shall be fined between \$50 and \$10,000 or imprisoned for a period of 3 months to a year or both. However, under the new

subsections B and C, this course of conduct constitutes a fourth degree felony that results in a sentence of 18 months imprisonment. See NMSA 1978 Section 31-18-5(A)(13).

Further, as to other amendments contained in HB 284, TRD's Tax Fraud Investigations Division (TFID) advises that it encounters challenges when attempting to charge tax fraud as state refund claims are usually for smaller dollar amounts, often less than \$500, especially in the cases of refund mills. TFID and the prosecuting district attorney's office will not use its resources to investigate or prosecute petty misdemeanors and/or misdemeanors. Indeed, there are specific instances in which the district attorney's office would not prosecute, even when some returns exceeded the \$500 felony threshold, because of the high percentage of returns below the \$500 threshold. Additionally, TFID reports has also encountered challenges when attempting to charge tax fraud because of the "tax owed" language. It is common for TRD to stop questionable refund claims from being issued; however, TFID points out that that does not change the fact that a fraudulent return was submitted to the department and an attempt to claim a refund was made. TRD reports a prosecuting district attorney's office has taken the position that no refund was actually issued, therefore, there is no "tax owed" as currently required. TRD notes these issues for prosecution are particularly troublesome given that identity theft fraud has increased at the state level by 3,700 percent.

Expanding the language to include the phrase "or the value of a fraudulent refund claim filed" and providing for aggregation of refund claims may help address these issues. TRD supports the language allowing for aggregation of the tax amounts particularly in those instances when a tax return preparer commits tax fraud as a continuing scheme.

NMAG comments, perhaps most particularly with regard to the new provisions of Section 3:

By adding greater clarity to the criminal fraud and evasion provisions contained in the TAA, the statutes are potentially less vulnerable to attack for vagueness, which could potentially be raised by a criminal defendant as an infringement on constitutional due process. See State v. Jacquez, 2009-NMCA-124, ¶ 6, 147 N.M. 313 ("A statute is void for vagueness if: (1) it fails to provide persons of ordinary intelligence using ordinary common sense a fair opportunity to determine whether their conduct is prohibited; or (2) it fails to create minimum guidelines for the reasonable police officer, prosecutor, judge, or jury charged with enforcement of the statute, and thereby encourages subjective and ad hoc application.").

TRD also notes that the penalties imposed in HB 284 correspond to the penalties imposed for forgery as set forth in NMSA 1978 Section 30-16-10. It explains the reasoning behind HB 284's amendments is to elevate the punishment for those found guilty of stealing from state coffers.

TECHNICAL ISSUES

See discussion re Section 3 in Significant Issues.

MD/jle