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## FISCAL IMPACT REPORT

SPONSOR Powdrell-Culbert/ Gallegos, DM ORIGINAL DATE 3/6/17 LAST UPDATED \_\_\_\_\_ HB 494

SHORT TITLE Taxpayers Rights Advocate Office Act SB \_\_\_\_\_

ANALYST Romero

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	\$0.0	\$18.5	\$18.5	\$37.0	Recurring	TRD Operating

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

Responses Received From

Taxation and Revenue Department

### SUMMARY

#### Synopsis of Bill

House Bill 494 adds a new act titled, “Taxpayers’ Rights Advocate Office Act”. This bill would create a new office known as the Office of the Taxpayers’ Rights Advocate. The bill states that the office will be administratively attached to the Department of Finance and Administration, per Section 9-1-7 NMSA 1978. The taxpayers’ rights advocate (advocate) will be appointed by the governor for a term of six years subject to the confirmation of the senate.

The advocate would be responsible for coordinating resolution of taxpayer complaints and problems. This bill outlines the process for the cases taken by the advocate in terms of statutes of limitations, penalties, and interest. This bill also has the advocate establish a process for an independent review of the Taxation and Revenue Department (TRD) actions concerning unpaid tax or liens. If the advocate believes that the assessments issued were incorrect, or illegally made, the advocate will direct TRD to comply to abate that assessment. The advocate would also have authority to stay TRD actions that would pose a hardship to a taxpayer. This bill also directs the advocate to develop and implement a taxpayer education/information program that will guide the taxpayer through TRD forms, procedures, rules, or laws and provide clarity. It will also include communication with taxpayers or industry groups, small business seminars, revision of taxpayer educational material, recommending remedial legislation, and a continuing education program for auditors.

The taxpayer advocate, with the assistance of TRD, shall report with the work completed back to the appropriate interim legislative committee on or before November 1 of each year. The advocate will also conduct an annual hearing where industry representatives and individual taxpayers can present proposals on changes to TRD statutes in front of the secretary of TRD. The advocate shall also include in the report suggestions for improvements to be made at TRD, changes to statutes and rules, enforcement and summary of cases where relief was granted and the reasons why.

This bill also adds a new section under the Tax Administration Act (TAA) that directs TRD to develop and implement a program with the advocate to evaluate individuals' contact with taxpayers. This section also indicates that the review collected and assessed by TRD should not be used to evaluate or suggest quotas for individuals and each year TRD shall certify by letter to the legislature that this was complied to.

A second new section added by this bill under the TAA requires TRD to have a meeting at least once a year and invite members of the community where recommendations intended to increase fairness and efficiency of TRD's administration of New Mexico's tax laws. After the completion of the meeting TRD will report back to the appropriate interim legislative committees.

This bill also amends Section 7-1-8.2 NMSA 1978 requiring that TRD upon request of the advocate will provide returns and return information to carry out the purposes of the Taxpayers' Rights Advocate Office Act.

This bill also adds a subsection on written claims for refund and the process in which TRD will use for both complete and incomplete refund claims submitted to the department.

Section 7-1-26 NMSA 1978 is amended to include different situations in which a taxpayer can provide evidence of the taxpayer's failure to pay tax timely was without intent to evade or defeat tax.

Lastly, this bill has a temporary provision that for the fiscal year of 2018, \$200 thousand will be transferred from the contractual services and other TRD categories to the Office of the Taxpayers' Rights Advocate to pay administrative costs of that office.

## **FISCAL IMPLICATIONS**

Minimal impact to the Revenue Processing Division (RPD) of \$18,500 for 0.25 FTE to develop and implement the new program to evaluate employee contact with taxpayers. The bill will also require (RPD) to update forms, instructions, and publications about the new Taxpayers' Rights Advocate Office and training staff.

## **SIGNIFICANT ISSUES**

This bill implicates several policy concerns. First, it is duplicative of TRD's current Taxpayer Advocate Office. In 2016, TRD reinstated a Taxpayer Advocate Office that is attached to the Office of the Secretary, the primary contact point for fielding taxpayer complaints. Since reinstatement, the Taxpayer Advocate has reviewed and resolved 255 cases involving taxpayer complaints and has a current pending inventory of 29 cases. Common resolutions have included full and partial abatements, refunds, lien releases, levy reductions, and successful referrals to managed audit. The advocate has helped taxpayers get hardship status, a temporary reprieve

from collections, and innocent spouse protection and referred them to the IRS when appropriate for federal relief. In addition to cases, the advocate has hosted a table at the tax help center during tax season to help with inquires. The advocate has also met with the enrolled agents, CPAs and other tax professionals. As part of their role, the advocate also regularly communicates with TRD supervisors regarding the manner in which their employees interact with the public and reminds them when our customer services procedures require changes. The advocate also makes recommendations to the Tax Policy Office.

## **TECHNICAL ISSUES**

This bill presents a significant New Mexico constitutional concern. Section 3 (page 3, lines 3-11) allows the new advocate office to stay actions, including collection and assessment actions, if taxpayers “have suffered or will suffer irreparable loss as the result of department action.” With respect to a final liability determined due on an assessment or a collection action for taxes legally due and owing, the bill may violate Article IV, Section 32 of the New Mexico Constitution, which provides that no debt to the state may be transferred, released, or diminished other than by payment into the proper treasury or via judicial proceeding. At several points within the last two decades, TRD has advocated for an “offer-in-compromise” provision, which allows partial payment of liabilities based on ability to pay to release all tax debt. However, TRD believes such as provision cannot be enacted without constitutional amendment. To the extent the proposed bill would operate in the same manner, constitutional amendment would similarly be required.

### TRD recommends language changes in the bill:

On page 15 subparagraph J: change the word “completed” on lines 14, 17 and 19 to “complete.”

Section 7-1-69 is amended to add, on page 18, the “taxpayer demonstrates that taxpayer was relying on guidance provided by a department employee”, which is unclear and much too broad. TRD recommends adding relying on “written guidance.” An oral response to a phone call from a taxpayer should not suffice to abate the penalty.

On page 19, subsection 4 keep the Department’s language “reasonable reliance on the advice of a competent tax counsel or” and change the next phrase to “competent certified public accountant.” (Reliance of a business on an elderly bookkeeper should not result in a non-negligence conclusion.) Page 20, subparagraph 8 is too vague, and will be difficult to determine a business’s “good faith doubt.”

Page 20, line 3 regarding whether an out of state business had good faith “doubt” regarding whether the taxpayer’s receipts were subject to the gross receipts tax. Any out of state business operating in the state that chooses not to pay their gross receipts tax could use this argument. The department would have difficulty proving or disputing good faith. Out of state businesses operating within the New Mexico should exercise due diligence and determine all applicable statutory obligations. The word “doubt” is too vague.

## **OTHER SUBSTANTIVE ISSUES**

### TRD has identified several concerns with the bill:

In addition to problems specifically pointed out with respect to Article IV, Section 32 of the New Mexico Constitution, the proposed bill has other potential legal and constitutional issues, as well as problems with how to interpret certain language. Page 3 line 1, the phrase “unsatisfactory

treatment of taxpayers by department employees” is so broad as to be unenforceable or rendered void for vagueness. Would this include behavior by a TRD employee that was not related to a tax issue, such as “rude or discourteous” behavior? Such behavior is generally handled through the current Taxpayer Advocate, in conjunction with the employee’s supervisor and Human Resources. TRD employees would not be employees of the Taxpayer’s Rights Advocate Office.

Additionally, page 3 subparagraph E will encourage taxpayers to file a complaint with the Taxpayers’ rights advocate whether meritless, or not simply to stay Department action. Even if not in violation of Article IV, Section 32 of the New Mexico Constitution, allowing the taxpayers’ rights advocate to direct TRD to abate an assessment without any other review may lead to inconsistent application of the tax laws and due process/equal protection violations, as well as confusion within and without the Department about how to apply and enforce the tax laws.

Page 8, subsection A (5) is too broad, allowing the taxpayer’s advocate unfettered access to tax returns and information seemingly without any restrictions such as conforming to the confidentiality requirements. TRD recommends to only allow only tax information for the taxpayer that has filed a complaint and provided the advocate with some form of tax information authorization.

Finally, the penalty exceptions added by the bill are unnecessary as written. While TRD has concerns with some of the language, taxpayers who meet these thresholds would most often be able to meet a standard to show non-negligence under existing law and regulations. Non-negligence is a civil penalty. The added provisions apply to attempts to evade or defeat a tax, which are criminal penalties.

## **ALTERNATIVES**

Set up this office as an independent branch of the Taxation and Revenue Department, much like the IRS Taxpayer Advocate is set up as an independent branch of the IRS. Being part of TRD would allow the taxpayers’ rights advocate falling under the disclosure statutes as a TRD employee and giving them access to more information, and better access to TRD processes, than just returns as is provided in Section 7 of the bill. This would also allow the taxpayers’ rights advocate reviewing administrative procedures and verifying that they are being administered as required by the taxpayer administration act, without creating conflicts with existing administrative appeal procedures, as discussed in more detail below. Depending on the anticipated size of the office and the funding the Legislature is willing to commit to it, it would also be prudent to ensure that the advocate is a classified position, or has access to classified deputies, as institutional knowledge builds over time.

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