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## FISCAL IMPACT REPORT

ORIGINAL DATE 1/30/17

SPONSOR Candelaria LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Enrolled Agents at Tax Protests SB 138

ANALYST Graeser

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

	FY17	FY18	FY19	3 Year Total Cost	R or NR**	Fund Affected
<b>Total</b>	0	0.2	0	0	Nonrecurring	TRD operating

Parenthesis ( ) indicate expenditure decreases

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General’s Office (AGO)  
Taxation and Revenue Department (TRD)

### SUMMARY

#### Synopsis of Bill

Senate Bill 138 would allow enrolled agents to participate on behalf of clients in any tax protest before the tax hearing officer. An enrolled agent may under current statute participate on behalf of clients only in hearings on income tax issues. An “enrolled agent” is a federally licensed practitioner who may represent clients before the internal revenue service in income tax, corporate income tax and estate and trust taxes. Enrolled agents have also been known to represent taxpayers before the IRS in excise tax issues.

There is no effective date of this bill. It is assumed that the effective date is 90 days after this session ends (June 16, 2017).

### FISCAL IMPLICATIONS

This is neither a revenue issue, nor a tax expenditure. The likely impact is that more taxpayers will bring protests to TRD, with subsequent resolution or, in the absence of resolution, to a hearing before a tax hearing officer. This hearing officer is now independent of the department. However, some protests that are now handled by a CPA or tax attorney may be migrated to enrolled agents, who generally charge less for the representation than do CPAs or tax attorneys. This would lead to a decrease in state and local gross receipts taxes. On the whole, it is likely

that the increases from more protests would be about balanced by the decrease in representation fees charged the tax protestors

### **SIGNIFICANT ISSUES**

The issue is clearly whether by training and experience, an enrolled agent is competent to represent clients in gross receipts tax or excise tax issues. The ultimate judge of this competence would be the hearing officer. Most protests are resolved administratively, based on facts, not on interpretation of law. At most, 10% of protests are taken to a formal decision and order of a hearing officer. In this case, the representative is no longer acting as a tax advisor, but as an attorney and offering legal advice. This is specifically precluded by the canons of ethics of the bar. However, to the extent that enrolled agents are currently allowed to represent clients in personal income tax protests, the extension to allow the agents to represent clients in corporate income tax or excise tax protests is a modest expansion and would not alter the fact that neither a CPA, nor an enrolled agent would be able ethically to represent a client in a quasi-judicial hearing where interpretation of the law were material.

The bill does not propose to allow enrolled agents to represent clients in the proper judicial system to which aggrieved taxpayers have access after receiving a decision and order from the hearing officer.

TRD points out, "...there is no level of competency established for enrolled agents for state tax law and no oversight organization for enrolled agents (such as there is for attorneys and CPA's) practicing in New Mexico. This bill proposes to strike the language on page 2, lines 14-17, which identifies the enrolled agent's expertise. Because enrolled agents have knowledge and regulation with regard to federal income taxes, they have been permitted to represent state taxpayers with their state personal income tax administrative protests. State personal income taxes are predicated on federal income tax returns, and as such, are within the area of expertise of the enrolled agent. Because enrolled agents have no licensure requirements in New Mexico, and their federal oversight is limited to the practice of representing taxpayers with federal taxes, this bill errs in permitting an enrolled agent to represent taxpayers on state tax matters."

### **ADMINISTRATIVE IMPLICATIONS**

Minimal. TRD and/or the tax hearing officer would have to verify the valid license of a person who purports to be a licensed enrolled agent.

### **TECHNICAL ISSUES**

TRD notes: "... on pages 2 (lines 24-25) through page 3 (line 1) this bill correctly identifies that enrolled agents are limited to practicing in front of the administrative hearings at the internal revenue service. 31 U.S.C. §330 limits the practice of the enrolled agent to federal tax law, and provides mechanisms for regulating the enrolled agent's practice. There is no provision in 31 U.S.C. §330 to receive complaints against enrolled agents from state taxpayers.

Under current law at 7-1-8.1 NMSA 1978, the department may release information to a taxpayer's authorized representative. An enrolled agent may be designated as a taxpayer's authorized representative for any purpose, not just for personal income tax issues.

TRD notes that, "...this proposed bill will allow enrolled agents to represent their clients for any tax matters. If this change does go through, Regulation 3.1.3.13 NMAC of Section 7-1-8 NMSA 1978 would need to be reconstructed. Currently, Taxation and Revenue Department (TRD) employees can only speak to enrolled agents about New Mexico income tax matters without a tax information authorization form. If the enrolled agents are allowed to represent their clients for any tax matter in administrative hearings, TRD should follow that standard, and allow open discussions with enrolled agents about other tax matters.

### **OTHER SUBSTANTIVE ISSUES**

The author of this analysis was an enrolled agent from 1979 to 2009. The level of knowledge necessary to successfully pass the U.S. Treasury examination was extensive. There were four parts to the two-day test: (1) personal income tax; (2) partnership and corporate taxes; (3) estate and trust taxation; and (4) ethics. Subsequently, in discussions with other tax professionals, some of whom had taken the CPA exam and the enrolled-to-practice exam, the consensus was that on broad tax matters, the enrollment exam was more difficult to pass.

LG/jle