

DEPARTMENT OF TAXATION

2018 Fiscal Impact Statement

1. **Patron** Mark L. Keam

2. **Bill Number** HB 788

3. **Committee** Passed House and Senate

House of Origin:

 Introduced

 Substitute

 Engrossed

4. **Title** Requirement that Paid Tax Return Preparers
Use Preparer Tax Identification Numbers;
Civil Penalty

Second House:

 In Committee

 Substitute

 X **Enrolled**

5. **Summary/Purpose:**

This bill would require that any income tax return preparer include his or her preparer tax identification number ("PTIN") on any tax return that he or she prepares or assists in preparing. Any income tax return preparer who does not fulfill this requirement would be subject to a civil penalty in an amount equal to \$50 per offense, but not to exceed \$25,000 per calendar year. This bill also would permit the Department of Taxation ("the Department") to bar or suspend any income tax return preparer for repeated failures of this requirement.

This bill would be effective for taxable years beginning on and after January 1, 2019.

6. **Budget amendment necessary:** No.

7. **Fiscal Impact Estimates are:** Not available. (See Line 8.)

8. **Fiscal implications:**

Administrative Costs

The Department considers implementation of this bill as "routine," and does not require additional funding.

Revenue Impact

This bill would have an unknown positive revenue impact to the extent that it would assist in identifying and preventing tax preparer fraud.

9. **Specific agency or political subdivisions affected:**

Department of Taxation

10. **Technical amendment necessary:** No.

11. Other comments:

Virginia's Oversight of Income Tax Return Preparers

Virginia law defines the term "income tax return preparer" as any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any income tax return or any claim for refund of tax. For purposes of determining whether a person is an "income tax return preparer," Virginia law provides that the preparation for compensation of any portion of a return or claim for refund are treated as if it were the preparation of the return or claim for refund. However, Virginia law excludes from the definition of "income tax return preparer" any person who merely:

- Furnishes typing, reproducing, or other mechanical assistance;
- Prepares a return or claim for refund of the employer (or of an officer or employee of the employer) by whom he is regularly and continuously employed;
- Prepares as a fiduciary a return or claim for refund for any person; or
- Prepares an application for correction of an erroneous assessment or a protective claim for refund for a taxpayer in response to any assessment issued to the taxpayer or in response to any waiver of time limitation on assessment after the commencement of an audit of the taxpayer or another taxpayer if a determination in such audit of such other taxpayer directly or indirectly affects the tax liability of such taxpayer.

During the 2005 Session, the General Assembly enacted legislation that permitted both criminal sanctions and civil injunctive actions to be brought against income tax return preparers who prepare fraudulent tax returns. Such legislation provides that income tax return preparers who aid, assist in, counsel, or advise the preparation or presentation of a fraudulent tax return, affidavit, claim or other document, even if the taxpayer is unaware of the fraud. A Class 6 felony carries a penalty of imprisonment for not less than 1 year nor more than 5 years or confinement in jail for up to 12 months and a fine of not more than \$2,500, or both.

This legislation also authorizes the Department to commence a civil action to enjoin any income tax return preparer who has:

- Engaged in any conduct subject to penalty under federal tax law for understating a tax liability due to unreasonable positions, willful conduct, or reckless conduct;
- Engaged in any conduct subject to any criminal penalty provided by federal tax law or Virginia tax law; or
- Engaged in any other fraudulent or deceptive conduct that substantially interferes with the proper administration of the tax laws of the Commonwealth.

The Department's civil injunctive action may request that a court enjoin the income tax return preparer from further engaging in any conduct described above ("fraudulent conduct") or from further action as an income tax return preparer. The court may enjoin the income tax return preparer from further engaging in fraudulent conduct if the court finds that injunctive relief is appropriate to prevent the recurrence of such conduct. If the court finds that an income tax return preparer has continually or repeatedly engaged in the fraudulent and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of the tax laws of the Commonwealth, the court is permitted to enjoin such person from acting as an income tax return preparer.

Tax Return Preparers under Federal Law

Federal law defines the term "tax return preparer" in a substantially similar manner as the term "income tax return preparer" is defined under Virginia law. Moreover, federal law contains substantially similar provisions to Virginia law regarding criminal sanctions and civil injunctive actions that can be taken against tax return preparers who prepare fraudulent tax returns.

Unlike current Virginia law, federal law also contains a number of provisions affecting all tax return preparers. Among other things, federal law requires all tax return preparers to:

- Furnish a copy of a taxpayer's tax return to the taxpayer not later than the time such return is presented for such taxpayer's signature;
- Sign any tax return that they prepare;
- Furnish their identifying number on any tax return that they prepare; or
- Retain a copy or list of a return or for the period ending 3 years after the close of the return period.

If a tax return preparer fails to comply with these requirements, federal law imposes penalties. For a failure of the tax return preparer to furnish his or her identifying number on a return, a penalty of \$50 is imposed for each failure. The maximum penalty imposed on any tax return preparer per calendar year is \$25,000, adjusted annually for inflation.

Proposed Legislation

This bill would require that any income tax return preparer include his or her PTIN on any tax return that he or she prepares or assists in preparing. "PTIN" would be defined as the identification number that the Internal Revenue Service uses to identify tax return preparers.

Non-Compliance Provision to Enforce the PTIN Requirement

This bill would provide that no income tax return preparer may provide tax preparation services for Virginia income tax returns unless he or she provides his or her PTIN when submitting a return and signing as an income tax return preparer. Any income tax return preparer who fails to provide his PTIN would be required to pay a civil penalty to the Department in the amount of \$50 per offense, but not to exceed \$25,000 per calendar year. No penalty would be permitted if the violation is reasonable and unintentional as determined by the Department.

In addition to the civil penalty, this bill would provide that the Department may bar or suspend any income tax return preparers from filing returns with the Department for repeated failures to provide his PTIN. The Department would be permitted to bar or suspend such income tax return preparer without resort to using injunctive remedies.

This bill would provide that any income tax preparer barred or suspended would be permitted to apply for relief to the Department or appeal directly to the Circuit Court of the City of Richmond. Such application for relief or appeal would be required to be made within 30 days from the date of such barring or suspension.

If the income tax return preparer applies for relief to the Department, his application would be required to be in the form prescribed by the Department. Such application would be required to fully set forth the grounds upon which the taxpayer relies and all facts relevant to the taxpayer's contention. The Department would be permitted to require such additional information, testimony, or documentary evidence as he deems necessary to a fair determination of the application. If Department renders an adverse order or decision, the income tax preparer would be permitted to appeal to the Circuit Court of the City of Richmond. Such appeal would be required to be made within 15 days of the Department's order or decision.

During the time that the income tax return preparer's application for relief to the Department and appeal to the Circuit Court of the City of Richmond are pending, the income tax preparer would be barred from filing any Virginia income tax returns.

Administrative Provisions Relating to the PTIN Requirement

The Department would be required to promulgate regulations for using the PTIN as an oversight mechanism to assess returns and to identify high error rates, patterns of suspected fraud, and unsubstantiated bases for tax positions by income tax return preparers.

The Department would be required to establish formal and regular communication protocols with the Internal Revenue Service to share and exchange PTIN information on income tax return preparers who are suspected of fraud, who are disciplined, or who are barred from filing tax returns with the Department or the Internal Revenue Service. The Department would be permitted to establish communication protocols with other states to exchange the enforcement and discipline information.

Notwithstanding provisions regarding the secrecy of taxpayer information, the Department would be authorized to provide to the Internal Revenue Service and other state tax or revenue agencies for their confidential use preparer and return data, including PTIN information, taxpayer names, taxpayer identification numbers, and other information as necessary to enforce the Virginia law.

The bill would provide that the failure of an income tax return preparer to include his PTIN on a tax return would not be used by the Department as a basis for rejecting such return as improperly filed.

This bill would be effective for taxable years beginning on and after January 1, 2019.

Similar Bills

House Bill 183 and **Senate Bill 271** would require that signing income tax return preparers notify the Department of certain data breaches.

Date: 2/23/2018 JJS
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