

New Hampshire Department of Revenue Administration Fiscal Note Quick Guide

16-2342

HB 1443-FN, *relative to the reasonable compensation deduction from gross business profits under the business profits tax and requiring the department of revenue administration to prepare draft rules relative to auditing.*

House Way & Means Committee

The proposed bill would repeal RSA 21-J:28-b, VIII, relative to burden of proof on a change to a compensation deduction; RSA 77:4-g, relative to dividend; and RSA 77-A:4, III(g), relative to burden of proof of reasonableness. The collective impact of repealing the above-listed sections is that the burden of proof will shift from the DRA to the taxpayer on the issue of the compensation deduction, making the burden of proof with respect to compensation consistent with other disputed tax issues.

The proposed bill would also provide for the consideration of the average of the three prior years' compensation taken and may use up to a 10 year average when justified by the nature of the business, when determining the reasonableness of a year of higher compensation.

The DRA notes that the case law and administrative rulings under IRC § 162(a)(1) already allow for the consideration of prior years' compensation when evaluating the reasonableness of the current year's compensation. The establishment of a set number of years that can be considered when evaluating the compensation deduction is a departure from the federal case law on this issue, which has not set forth a specific or maximum number of years that can be considered.

Lastly, the proposed bill would require that the DRA prepare draft rules to limit the ability of a future attempt to audit beyond established national auditing principles or to trigger legislative oversight at the time of expanding an audit. Those draft rules would be presented to the House and Senate Ways and Means Committees in the January 2017 Legislative session for legislative comment prior to adopting the rules pursuant to RSA 541-A.

The department is unsure what national auditing principles the proposed legislation is referring to and is concerned that the stated standard is so vague as to not be administrable.

The DRA has no way to calculate the exact increased revenue to the General and Education Trust Fund. However, the DRA suspects that shifting the burden of proof from the DRA to the taxpayer with respect to the compensation deduction may impact how taxpayers report this deduction to NH, resulting in an immediate indeterminable increase in revenues.

This act shall take effect 60 days after its passage.