

MAINE STATE LEGISLATURE

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(Filing No. H- 838)

MAJORITY

BUSINESS, RESEARCH AND ECONOMIC DEVELOPMENT

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
121ST LEGISLATURE
SECOND SPECIAL SESSION

COMMITTEE AMENDMENT "A" to H.P. 1369, L.D. 1843, Bill, "An Act To Require Surety Bonding by Payroll Processing Companies"

Amend the bill by striking out everything after the title and before the summary and inserting in its place the following:

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 10 MRSA §1495, sub-§1-A is enacted to read:

1-A. Administrator. "Administrator" means, except in cases in which the payroll processor is a wholly owned subsidiary of a supervised financial organization as defined by Title 9-A, section 1-301, subsection 38-A, the Director of the Office of Consumer Credit Regulation within the Department of Professional and Financial Regulation. In cases in which the payroll processor is a wholly owned subsidiary of a supervised financial organization as defined by Title 9-A, section 1-301, subsection 38-A, "administrator" means the Superintendent of Financial Institutions within the Department of Professional and Financial Regulation.

Sec. 2. 10 MRSA §1495-A, as amended by PL 1999, c. 172, §1 and affected by §2, is repealed.

Sec. 3. 10 MRSA §1495-B, sub-§§1 and 2, as enacted by PL 1997, c. 495, §1, are repealed.

Sec. 4. 10 MRSA §1495-B, sub-§§3 to 6 are enacted to read:

2 3. Periodic reports to employers. On a regular basis not
less frequently than quarterly, a payroll processor shall provide
4 to each employer an accounting of:

6 A. Funds received from that employer; and

8 B. The aggregate amounts disbursed for:

10 (1) Payroll;

12 (2) Each category of local, state and federal tax; and

14 (3) Unemployment compensation premiums.

16 4. Disclosure of methods of verification. On a regular
basis not less frequently than quarterly, a payroll processor
18 shall clearly and conspicuously and in easily understood language
disclose to each employer for which it provides payroll
20 processing services the specific method or methods whereby each
employer can contact state and federal tax and unemployment
22 insurance authorities, including but not limited to Internet
address and toll-free telephone number information, to verify
24 that payments have been made and properly credited on behalf of
the employer.

26 5. Disclosure of limitations of surety bond. Whenever a
payroll processor promotes, markets or advertises itself or its
28 services and uses the phrase "bonded with the State" or "fully
bonded" or other language that in the opinion of the
30 administrator would lead an employer to believe that the bond
coverage provides full compensation for potential losses should
32 the payroll processor fail to make required payments or become
insolvent, the payroll processor shall also include a clear and
34 conspicuous disclaimer stating that use of the language
referencing bonding does not signify or ensure that the bond will
36 cover all potential claims if the payroll processor fails to
comply with its responsibilities under this chapter. A payroll
38 processor also shall provide this disclaimer to an employer
before contracting for payroll processing services to that
40 employer.

42 6. Notices of nonpayment to be sent to employers. A
payroll processor may not designate itself as the sole recipient
44 of notices from state or federal authorities for nonpayment of
taxes or unemployment insurance contributions. A payroll
46 processor shall ensure that such notices are provided directly to
the affected employers.

48 Sec. 5. 10 MRSA §1495-C, sub-§1, ¶B, as enacted by PL 1997, c.
50 495, §1, is amended to read:

2 B. A payroll processor that conducts business in this State
and fails to ~~register with~~ obtain a license from the State
4 ~~Tax-Assessor~~ administrator as required by section 1495-A
1495-D commits a civil violation for which a penalty of not
6 less than \$500 \$1,500 nor more than \$2,500 \$7,500 may be
adjudged.

8
9
10 **Sec. 6. 10 MRSA §§1495-D to 1495-I are enacted to read:**

11 **§1495-D. Licensing; proof of insurance and bonding; fees**

12
13 **1. License required.** A person desiring to engage or
14 continue in business in this State as a payroll processor shall
apply to the administrator for a license under this chapter on or
16 before January 31st of each year. The application must be in a
form prescribed by the administrator. The administrator may
18 refuse the application if it contains erroneous or incomplete
information. A license may not be issued unless the
20 administrator, upon investigation, finds that the financial
responsibility, character and fitness of the applicant and, where
22 applicable, its partners, officers or directors, warrant belief
that the business will be operated honestly and fairly within the
24 purposes of this chapter.

26 **2. Proof of fidelity insurance.** Each applicant shall
27 provide to the administrator proof of one of the following, at
28 the applicant's option, in an amount 2 times the highest weekly
payroll processed by the applicant in the preceding year or in
30 the amount of \$5,000,000, whichever is less:

32 **A. Fidelity bond;**

34 **B. Employee dishonesty bond;**

36 **C. Third-party fidelity coverage; or**

38 **D. Liability insurance, including crime coverage.**

40 **3. Proof of surety bond.** An applicant under subsection 1
41 shall provide to the administrator proof of the surety bond
42 required pursuant to section 1495-E.

44 **4. Fees.** The initial application and annual renewal
45 application must include a fee of \$250 if the payroll processor
46 has fewer than 25 employers as payroll processing clients; \$500
47 if the payroll processor has from 25 to 500 employers as payroll
48 processing clients; and \$750 for those payroll processors that
have more than 500 employers as payroll processing clients. The
50 aggregate of license fees and other fees and assessments provided

for by this chapter is appropriated for the use of the
administrator. Any balance of these funds does not lapse but
must be carried forward to be expended for the same purpose in
the following fiscal year.

§1495-E. Surety bonding

1. Bond required; minimum amount; duration. Each application for a license under section 1495-D must be accompanied by evidence of a surety bond, in a form approved by the administrator, in an amount equal to the total of all local, state and federal tax payments and unemployment insurance premiums processed by the payroll processor on behalf of employers in this State in the 3-consecutive-month period of highest volume during the previous calendar year or \$100,000, whichever is greater, but not to exceed \$500,000. The bond must designate the administrator as payee. The bond paid to the administrator may be used for the purposes of the administrator and for the benefit of any employer who may have a cause of action against the payroll processor. The terms of the bond must run continuously until cancelled and the aggregate amount of the bond must be maintained at all times during the licensing period.

2. Modification of bond terms. If bonding is unavailable under the terms and conditions of subsection 1, the administrator, within the administrator's discretion, may modify those terms and conditions so as to ensure the maximum practicable protection for employers.

3. Cancellation notification. A surety company issuing a bond pursuant to this section shall immediately notify the administrator when that bond is cancelled or terminated or lapses. The notice must include the name and address of the payroll processor and the amount of the bond. The cancellation, termination or lapse is not effective until at least 30 days after the administrator receives notice.

§1495-F. Powers of administrator

1. Examinations. The administrator shall establish a program of regular examinations of payroll processors subject to the provisions of this chapter. The regular examinations must be conducted not less frequently than every 18 months. The administrator may, in the administrator's discretion, use an audit report of a payroll processor performed by the processor or another party to supplement or substitute for the administrator's own regular examination. In addition, the administrator may, at any time, conduct a special examination or investigation of any payroll processor the administrator believes has engaged in conduct that is a violation of any provision in this chapter.

For purposes of both routine and special examinations and investigations, the payroll processor shall give the administrator free and reasonable access to the offices, places of business and records of the payroll processor, and the administrator may make and procure copies of those records, books, documents or other materials without employing the subpoena powers provided by subsection 2. For purposes of both routine and special examinations and investigations, and in addition to reviewing for compliance with other provisions of this chapter, the administrator may review the safety and soundness of the payroll processor, including but not limited to an examination of its assets and liabilities and its investments of employer funds to ensure that the payroll processor is utilizing prudent investment practices with respect to those funds.

2. Subpoenas. For the purposes of this section, the administrator may administer oaths or affirmations and, upon the administrator's own motion or upon request of any party, may subpoena witnesses, compel their attendance, adduce evidence and require the production of any matter that is relevant to an examination or investigation, including the existence, description, nature, custody, condition and location of any books, documents or other material and the identity and location of persons having knowledge of relevant facts or any other matter reasonably calculated to lead to the discovery of admissible evidence.

3. Inspection of records. If the payroll processor's records are located outside this State, that payroll processor, at the administrator's option, shall either make the records available to the administrator at a convenient location within the State or allow the administrator or the administrator's representatives to inspect them at the place where the records are maintained. The administrator may designate representatives, including comparable officials of the state in which the records are located, to inspect them on the administrator's behalf.

4. Maintenance of records. A payroll processor shall maintain records of its payroll processing service activity in conformity with generally accepted accounting principles and practices and in a manner that will enable the administrator to determine whether the payroll processor is complying with the provisions of this chapter. The records need not be kept in the place of business where the activity took place if the administrator is given free access to the records, wherever located. All records relating to payroll processing services must be maintained for at least 6 years from the end of the fiscal year in which the activity took place.

5. Enforcement. If an individual without lawful excuse fails to obey a subpoena or to give testimony when directed to do so by the administrator or obstructs the proceedings by any means, whether or not in the presence of the administrator, that individual is guilty of contempt. The administrator, through the Attorney General, may file a complaint in the Superior Court of the county in which an act on which the complaint is based was performed or in which the individual resides or transacts business setting forth the facts constituting the contempt and requesting an order returnable in not less than 2 days nor more than 5 days directing the individual to show cause before the court why the individual should not be punished for contempt. If the court determines that the individual has committed any alleged contempt, the court shall punish the offender for contempt.

6. Expenses. At the discretion of the administrator, the expenses of the administrator necessarily incurred in the examination or investigation of any payroll processor engaged in conduct governed by this chapter may be charged to that payroll processor. That payroll processor may be assessed for the actual expenses incurred by the administrator, including, but not limited to, travel expenses and the proportionate part of the salaries and expenses of examiners engaged in the examination or investigation. Notice of any assessment of those costs must be given to the payroll processor by the administrator as soon as feasible after the close of the examination or investigation and the payroll processor must have the time specified by the administrator to pay the assessment, which may not be less than 30 days.

7. Rules. The administrator may adopt reasonable rules governing payroll processors in accordance with this chapter. These rules are routine technical rules pursuant to Title 5, chapter 375, subchapter 2-A.

§1495-G. Contracts and cooperation with other agencies

1. Other agencies' staff. The administrator may employ and engage experts, professionals or other personnel of other state or federal regulatory agencies as may be necessary to assist the administrator in carrying out the regulatory functions of this chapter. The administrator may contract agency staff to other state and federal agencies to assist those other state and federal agencies in carrying out their regulatory functions.

2. Cooperative agreements. The administrator may enter into cooperative agreements with other state, federal or foreign agencies to facilitate the regulatory functions of the administrator, including, but not limited to, the sharing between

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agencies of information that is otherwise confidential, coordination of examinations and joint examinations.

3. Confidentiality. Any information furnished pursuant to this section by or to the administrator that has been designated as confidential by the agency furnishing the information remains the property of the agency furnishing the information and must be kept confidential by the recipient of the information except as authorized by the furnishing agency.

4. Provision of information by state agencies. Notwithstanding any other provision of law, a state agency, including but not limited to the State Tax Assessor and the Department of Labor, shall provide such information to the administrator as is necessary for the administrator's enforcement of this chapter.

§1495-H. Enforcement actions

A payroll processor that fails to obtain a license under section 1495-D or that violates any provision of this chapter or any rule issued by the administrator, or through any unfair, unconscionable or deceptive practice causes or has the potential to cause damage to an employer or employee of that employer, is subject to one or more of the actions specified in this section:

1. Cease and desist order. A cease and desist order.

A. The administrator may issue and serve an order upon a payroll processor requiring that processor to cease and desist from the violation or practice if in the opinion of the administrator that payroll processor subject to the provisions of this chapter is engaging in or has engaged in or if the administrator has reasonable cause to believe that the processor is about to engage in any of the following violations or practices:

- (1) Violation of a law, rule or regulation relating to the supervision of the payroll processor;
- (2) Violation of any written agreement entered into with the administrator; or
- (3) An anticompetitive or deceptive practice or one that is otherwise injurious to the public interest.

B. Except as provided in paragraph C, prior to the issuance of any order to cease and desist in accordance with this subsection, the administrator shall provide notice to the payroll processor. This notice must contain a statement of

2 the facts upon which the order is to be issued and the date
3 upon which the order is to take effect. Upon petition of
4 any interested party, a hearing in conformity with Title 5,
5 chapter 375 must be provided prior to the effective date of
6 any order issued pursuant to this subsection, except as
7 provided in paragraph C.

8 C. Whenever, in the opinion of the administrator, a
9 violation or practice requires immediate action for the
10 protection of the public or when the violation or practice
11 or the continuation thereof is likely to cause insolvency or
12 substantial dissipation of the assets or earnings of the
13 payroll processor, the administrator may issue an order
14 pursuant to this subsection which becomes effective upon
15 service of that order, without prior notice or hearing. If
16 an order subsequently is issued by the administrator
17 pursuant to paragraph A, the administrator shall afford an
18 opportunity for a hearing to rescind the order and action
19 taken promptly thereafter, upon application by an interested
20 party:

21 2. Bond forfeiture. After notice and hearing, forfeiture
22 of that portion of the required bond as proportionately may make
23 aggrieved parties whole;

24 3. Civil action by administrator. A civil action seeking
25 civil penalties, remedial action and injunctive relief by the
26 administrator through the Attorney General, after which a court
27 may assess a civil penalty of not less than \$1,500 nor more than
28 \$7,500 per violation or order remedial or injunctive relief.
29 When the violation consists of failure to maintain the surety
30 bond required by section 1495-E, each day in which coverage is
31 not provided constitutes a separate violation;

32 4. Private civil action. A civil action by an aggrieved
33 employer in which that employer has the right to recover actual
34 damages from the payroll processor in an amount determined by the
35 court, plus costs of the action together with reasonable
36 attorney's fees;

37 5. Regulatory oversight. Increased regulatory oversight by
38 the administrator, including requiring reports or other
39 information to be submitted at those times and in such forms as
40 the administrator considers appropriate for the proper
41 supervision and regulation of the payroll processor; and

42 6. Action on license. Revocation, suspension or nonrenewal
43 of the payroll processor's license.

44 §1495-I. Insolvency and liquidation

2 1. Voluntary liquidation. A payroll processor who
3 voluntarily ceases to do business in the State is subject to the
4 following provisions.

6 A. Prior to voluntarily ceasing business as a payroll
7 processor, a payroll processor shall:

8 (1) Notify the administrator of the proposed
9 termination at least 30 days prior to its effective
10 date;

12 (2) Notify all employers in writing of the proposed
13 termination at least 30 days prior to its effective
14 date;

16 (3) Provide all employers with detailed final
17 accountings of all accounts;

20 (4) Remit all money held by the payroll processor to
21 each respective employer or the appropriate taxing
22 authority; and

24 (5) Return its license to the administrator for
25 cancellation.

26 B. When terminating a business, a payroll processor whose
27 contract with an employer does not authorize the processor
28 to assign the account to another processor may not transfer
29 the account to another processor without first securing the
30 written permission of the employer.

32 2. Involuntary liquidation. A payroll processor who is no
33 longer eligible to do business in this State is subject to the
34 following provisions.

36 A. If, upon examination of a payroll processor, the
37 administrator is of the opinion that the payroll processor
38 is insolvent or can no longer obtain a surety bond or when
39 the license of a payroll processor has expired or terminated
40 for any reason, the administrator may appoint a receiver who
41 shall proceed to close the payroll processor. The person
42 appointed by the administrator as a receiver may be the
43 administrator, a deputy or such other person as the
44 administrator may choose, and a certified copy of the order
45 making such appointment is evidence of the appointment. A
46 receiver has the power and authority provided in this
47 chapter and such other powers and authority as may be
48 expressed in the order of the administrator. If the
49 administrator or a deputy is appointed receiver, no
50 other person shall be appointed receiver.

2 additional compensation need be paid, but any reasonable and
3 necessary expenses as a receiver must be paid by the
4 processor. If another person is appointed, then the
5 compensation of the receiver must be paid from the assets of
6 that processor.

7 B. Upon taking possession of the property and business of a
8 payroll processor under this section, the receiver:

9
10 (1) May collect money due to the administrator and
11 perform all acts necessary to conserve the payroll
12 processor's assets and business and shall proceed to
13 liquidate the payroll processor's affairs;

14
15 (2) Shall collect all debts due and claims belonging to
16 the payroll processor and may sell or compound all bad
17 or doubtful debts;

18
19 (3) May sell, for cash or other consideration or as
20 provided by law, all or any part of the real and
21 personal property of the payroll processor;

22
23 (4) May take, in the name of the administrator, a
24 mortgage on the real property from a bona fide
25 purchaser to secure the whole or part of the purchase
26 price; and

27
28 (5) May borrow money and issue evidence of indebtedness
29 therefor. To secure the repayment of this money, the
30 receiver may mortgage, pledge, transfer in trust or
31 hypothecate any of the property of the payroll
32 processor, whether real, personal or mixed, superior to
33 any charge for expenses of liquidation.

34
35 C. The assets of the payroll processor in liquidation,
36 exclusive of any bond proceeds, must be disbursed in the
37 following order:

38
39 (1) First, the payment of the costs and expenses of
40 liquidation;

41
42 (2) Second, payment of payroll, tax and unemployment
43 insurance premium funds held by the payroll processor;

44
45 (3) Third, payment of all debts, claims and obligations
46 owed by the payroll processor;

47
48 (4) Fourth, the payment of claims otherwise proper that
were not filed within the prescribed time; and

(5) Fifth, the payment of any obligation expressly subordinated to claims entitled to the priority established by subparagraphs (1) to (3).

3. Judicial review. A payroll processor closed by action of the administrator pursuant to this chapter may bring an action challenging the administrator's appointment of receiver in Superior Court of Kennebec County or of the county in which the processor transacts business within 10 days after the administrator appoints a receiver. The court shall uphold the administrator's finding that a payroll processor is insolvent or that its condition is such as to render its further proceedings hazardous to the public or to those having funds in its custody and shall uphold the appointment of a receiver unless the court finds that the administrator's action was arbitrary and capricious.

Sec. 7. 36 MRSA §112, sub-§4, as repealed and replaced by PL 1999, c. 127, Pt. A, §49, is amended to read:

4. Examination of records and premises. Whenever necessary to the administration of this Title, the assessor may make, or cause to be made by an employee, an examination or investigation of the place of business, books and other documents and any other relevant personal property of any person who the assessor has reason to believe is liable for any tax imposed by this Title. ~~The assessor may also examine the books and records of a payroll processor, as defined in Title 10, section 1495, and client books and records in the possession of a payroll processor.~~

At the conclusion of an audit, the assessor or an agent shall conduct an audit conference with the taxpayer and shall give the taxpayer a written summary of the audit findings, including the legal basis for the audit findings and adjustments, along with copies of relevant bureau audit workpapers.

Sec. 8. 36 MRSA §182, sub-§2, as enacted by PL 2001, c. 583, §8, is repealed.

Sec. 9. 36 MRSA §191, sub-§2, ¶¶AA and BB, as enacted by PL 2003, c. 390, §4, are amended to read:

AA. The disclosure by employees of the bureau to designated representatives of the Finance Authority of Maine of information required to ensure that recipients of certain benefits under Title 20-A, chapter 417-E are eligible to receive such benefits; and

BB. The disclosure to an authorized representative of the Department of Human Services, Office of Head Start and Child

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2 Care of taxpayer information directly relating to the
3 certification of investments eligible for or the eligibility
4 of a taxpayer for the quality child care investment credit
5 provided by section 5219-Q; and

6 **Sec. 10. 36 MRSA §191, sub-§2, ¶CC** is enacted to read:

8 CC. The disclosure to an authorized representative of the
9 Department of Professional and Financial Regulation of
10 information necessary for the administration of Title 10,
11 chapter 222.

12 **Sec. 11. Appropriations and allocations.** The following
13 appropriations and allocations are made.

14 **PROFESSIONAL AND FINANCIAL REGULATION,**
15 **DEPARTMENT OF**

16 **Office of Consumer Credit Regulation**

17 Initiative: Allocates funds for a Senior Consumer Credit
18 Examiner position, a Clerk IV position and All Other
19 administrative costs to administer the licensing program for
20 payroll processors.

21	Other Special Revenue Funds	2003-04	2004-05
22	Positions - Legislative Count	(0.000)	(2.000)
23	Personal Services	\$0	\$109,813
24	All Other	\$0	\$9,500
25		<hr/>	<hr/>
26	Other Special Revenue Funds Total	\$0	\$119,313

27 **Sec. 12. Effective date.** This Act takes effect January 31,
28 2005.

29 **SUMMARY**

30 This amendment replaces the bill. The amendment:

- 31 Designates the Office of Consumer Credit Regulation
32 within the Department of Professional and Financial Regulation as
33 the administrator for the licensing program for payroll
34 processors other than those payroll processors that are wholly
35 owned subsidiaries of financial institutions; for payroll
36 processors that are wholly owned subsidiaries of financial
37 institutions, the amendment designates the Superintendent of
38 Financial Institutions within the Department of Professional and
39 Financial Regulation as the administrator for the licensing
40 program;

2 2. Requires that payroll processors be licensed and
establishes a 3-tiered fee for licensure, based on the number of
4 client employers a payroll processor serves, as follows: \$250
for processors serving fewer than 25 client employers; \$500 for
6 processors serving 25 to 500 client employers; and \$750 for
processors serving more than 500 client employers;

8 3. Restores the current statutory requirement that payroll
10 processors provide proof of fidelity insurance;

12 4. Sets the amount for required surety bonds at between
\$100,000 and \$500,000, depending on the amount of employers'
14 taxes and unemployment insurance premiums handled, and authorizes
the administrator to modify the surety bonding requirement if the
16 bonds are not available;

18 5. Triples existing statutory fines for failure to register
per violation, from a range of \$500 to \$2,500 to a range of
20 \$1,500 to \$7,500 for failure to obtain a license per violation;

22 6. Requires disclosures by payroll processors to client
employers, including quarterly accountings of funds disbursed,
24 notice of methods by which the employers may verify that taxes
have been paid and limitations of surety bonds;

26 7. Prohibits payroll processors from being designated as
28 sole recipients of delinquency notices for tax payments;

30 8. Requires notification when bond coverage lapses, as in
the bill, and establishes each day of lapsed coverage as a civil
32 violation subject to a penalty of \$1,500 to \$7,500;

34 9. Establishes regulatory powers of the administrator of
the licensing program, including regular and special
36 examinations, subpoena power, inspection and maintenance of
records, assessment of expenses and rule-making authority. The
38 amendment also allows the administrator to use an internal or
external audit of a payroll processor to supplement or substitute
40 for the administrator's own regular examination;

42 10. Enables the administrator to contract with other
agencies, including for the purpose of sharing confidential
44 information in furtherance of the licensing program and
enforcement;

46 11. Establishes enforcement actions available to the
48 administrator, including cease and desist actions, bond
forfeiture, civil actions, increased regulatory oversight and

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license suspensions and revocations, as well as a private right
of action;

12. Establishes procedures for the administrator to appoint
a receiver in cases of insolvency or potential liquidation of a
payroll processor;

13. Makes technical corrections to existing statutes to
reflect the changes made by the amendment; and

14. Adds an appropriations and allocations section.

FISCAL NOTE REQUIRED
(See attached)

**121st Maine Legislature
Office of Fiscal and Program Review**

**LD 1843****An Act To Require Surety Bonding by Payroll Processing Companies****LR 2668(02)****Fiscal Note for Bill as Amended by Committee Amendment " "****Committee: Business, Research and Economic Development****Fiscal Note Required: Yes****Fiscal Note**

	2003-04	2004-05	Projections 2005-06	Projections 2006-07
Appropriations/Allocations				
Other Special Revenue Funds	\$0	\$119,313	\$130,290	\$135,241
Revenue				
Other Special Revenue Funds	\$0	\$120,000	\$124,560	\$129,293

Correctional and Judicial Impact Statements

Increases the number of civil suits

Fiscal Detail and Notes

The fiscal notes assumes two additional positions in the Office of Consumer Credit Regulation will be necessary to administer this program: a Clerk IV position to process license applications and renewals, compile and type exam reports and handle correspondence and communications; and a Senior Consumer Credit Examiner position for examinations and investigations. It is estimated that \$80,000 will be collected annually in application and renewal fees from the approximately 160 entities and \$40,000 will be collected in examination fees . Any savings to Maine Revenue Services are assumed to be minor.