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VIA EMAIL TO: david.gregor@state.de.us
David M. Gregor
State Escheator
Delaware Department of Finance

Re: Proposed Regulations on Unclaimed Property Estimation

Dear Mr. Gregor:

On behalf of the Council On State Taxation (COST), thank you for the opportunity to provide comments regarding the Department of Finance's proposed regulations establishing an Abandoned or Unclaimed Property Reporting and Examination Manual. COST believes that the proposed regulations run afoul of the U.S. District Court's holding in *Temple-Inland v. Cook* regarding the estimation and projection methodology to be used in an unclaimed property audit. Specifically, the proposed regulations provide that names and addresses identified in the base period shall not be used to determine which state has the priority claim to the abandoned property estimated to be due over periods where records of owners' addresses do not exist. COST is concerned that such a blatant contradiction of the Court's direction will only invite further litigation, causing uncertainty for both Delaware and businesses incorporated in Delaware.

About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of approximately 600 major corporations engaged in interstate and international business. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multistate business entities, with many of its members incorporated in Delaware.

The Proposed Regulations Directly Contradict the Direction of the United States District Court.

As recognized by the U.S. District Court in *Temple-Inland v. Cook*, an estimation is properly performed when it is based on the principle that the unclaimed property in reach-back years has "all the same qualities and characteristics" as unclaimed property in the base years. The *Temple-Inland* court specifically addressed Delaware's practice of determining unclaimed property liability based on an estimation method in which it multiplies holders' sales or revenue for reach-back years by a "ratio estimator" in which the numerator equals the sum of (i) all

unclaimed property reported to any state; (ii) any funds returned to the rightful owner not in the ordinary course of business; and (iii) any amounts not remediated, and the denominator equals the sales or revenue for the base years. The court expressly addressed the aspect of the State's estimation methodology that included in the numerator of the ratio estimator "both unclaimed property reported to other states and unremediated checks with a known address that was not Delaware." The court held that Delaware's method was contrary to the fundamental principle of estimation that the characteristics of a sample set should be extrapolated across the whole, and that the State's method raises the impermissible risk of multiple liability. The court analyzed and unequivocally rejected Delaware's arguments that any estimation of unclaimed property reflects "unknown" property pursuant to the secondary priority rule and only the state of incorporation is entitled to estimate unclaimed property, noting that this is "neither the law nor the custom." It held, "If the property in base years shows an address in another state, then the characteristic of that property has to be extrapolated into the reach back years."

To ensure proper estimation, COST suggests you revise the proposed regulation to ensure that names and addresses identified in a base period are used to determine which state has the priority claim to the abandoned property estimated to be due over periods where records of owners' addresses do not exist. We further encourage you to make clear in the regulation that only property properly identified with a Delaware owner during the base years should be projected to reach-back years. Property with a non-Delaware owner, exempt in another state, or with a foreign owner should not be projected.

Blatant Contradiction of the Court's Direction Will Invite Further Litigation and Cause Uncertainty.

COST realizes that temptation exists for Delaware to continue using the same flawed estimation and projection methodology of the past with hope that such methodology alone will not, in the words of the U.S. District Court, "shock the conscience." COST is concerned, however, that such a strategy will invite further litigation and cause uncertainty for both Delaware and its business community. COST instead encourages you to adhere to the Court's direction and abandon the flawed methodology.

Conclusion

COST respectfully urges you to amend the regulations to reflect the comments above. If you have any questions or would like to discuss further, please do not hesitate to contact me.

Sincerely,



Patrick J. Reynolds
Senior Tax Counsel

cc: COST Board of Directors
Douglas L. Lindholm, COST President & Executive Director