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VIA EMAIL

Representative William Bush, Chair
House Economic Development/Banking/Insurance & Commerce Committee
Delaware Legislature

Re: S.B. 104 – Unclaimed Property

Dear Chair Bush and Members of the Committee:

On behalf of the Council On State Taxation (“COST”), I am writing in opposition to S.B. 104, which relates to unclaimed property. The bill represents a further delegation of Delaware’s power to private, for-profit, bounty hunter contract/contingent-fee auditors, allowing them to continue to harass businesses with overbroad document requests designed to force businesses into inequitable settlements or protracted litigation. We encourage you to instead study the litigation over current audit tactics used by these contract/contingent-fee auditors and take action that will reduce similar litigation and ensure that Delaware’s unclaimed property laws are administered in a fair and equitable manner.

About COST

COST is a nonprofit trade association consisting of over 500 multistate corporations engaged in interstate and international business. COST’s objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST has a significant number of members that own property, employ workers, make substantial sales, and are incorporated in Delaware.

Delaware Should Discourage, Not Encourage Conduct that “Shocks the Conscience”

In 2016, a federal district court held in *Temple Inland v. Cook* that the actions of Delaware and its unclaimed property auditors, to put the matter gently, “have engaged in a game of “gotcha” that shocks the conscience.”¹ Although Delaware has taken small steps to mitigate the actions of its auditors, some of the most egregious conduct persists today. S.B. 104 would exacerbate the current situation by expanding the powers of the contract/contingent-fee auditors, whose interests conflict with Delaware’s interests. While the bill would eliminate contingent fees in limited circumstances, paying third party auditors on an hourly basis would continue to incentivize the auditors to drag out audits, albeit for a different reason. Specifically, the bill would:

- Impose interest at 20% (We realize this is a reduction, but interest at this amount is usurious in today’s economy. Interest should be intended to compensate for the time-value of money, not as additional penalty.);
- Delegate to the contract/contingent-fee auditor the power to determine the “verification of completeness and accuracy of records;”

¹ 192 F.Supp.3d 527 (D. Del. 2016)

- Provide that if a holder pays or delivers property to Delaware in good faith, and another state claims the property, Delaware will not indemnify the holder for penalties and interest (Some states, using the same third party auditors as Delaware, refer to their estimation techniques as a “penalty,” which would preclude indemnification under the bill);
- Delegate to contract/contingent-fee auditors the power to examine the records of separate entities neither under audit nor subject to Delaware’s escheat laws as part of an audit of an entity that is subject to Delaware’s escheat laws; and
- Delegate to contract/contingent-fee auditors the power to unreasonably request records that do not identify property reportable to the State and provide that the contingent-fee auditor has no obligation to provide any justification for the request.

S.B. 104 Could Jeopardize Future Revenue

Since Delaware is America’s corporate home, it has enjoyed the benefits of the second priority rule set forth in federal common law.² This has for decades fostered the misguided view that unclaimed property should be viewed as a revenue source, as opposed to simply a mechanism to reunite unclaimed property with its rightful owner.

If Delaware persists, however, in fostering conduct designed to arbitrarily inflate contingent fee audit fees and Delaware revenue, it could cause the priority rules to be reexamined, either by federal courts or the U.S. Congress. And if such priority rules are changed, they will unlikely award such a windfall to a state whose only connection with the owners of property is the incorporation of the holder of that property.

Conclusion

When Delaware should be moving away from egregious conduct that “shocks the conscience,” this bill would instead foster and encourage such conduct. COST therefore urges the Committee to vote against S.B. 104 and instead take steps to discourage, not encourage, the conduct that the federal court held to “shock the conscience.”

Sincerely,



Patrick J. Reynolds

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

² The second priority rule of *Texas v. New Jersey* is escheatment to the state of corporate domicile of the holder.