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February 9, 2022

Representative Vanessa Atterbeary, Chair  
Representative Alonzo Washington, Vice-Chair  
Maryland General Assembly  
House Ways and Means Committee

**Re: In Opposition to House Bill 457, Throwback Rule and Combined Reporting**

Dear Chair Atterbeary, Vice-Chair Washington, and Members of the Committee:

Thank you for the opportunity to provide testimony today on behalf of the Council On State Taxation (COST) in opposition to House Bill 457 (H.B. 457), Corporate Income Tax – Throwback Rule and Combined Reporting, which would impose a “throwback” rule for sales by Maryland corporate taxpayers and would also impose mandatory unitary combined reporting (MUCR).

MUCR arbitrarily assigns income to a state, negatively impacts the real economy, has an unpredictable effect on state revenue, and imposes significant administrative burdens on both the taxpayer and the State. This conclusion has been supported by Maryland’s Commission in 2016 and Virginia’s Work Group in 2021<sup>1</sup>—both validated by estimated revenue reports from actual informational unitary combined reporting filings for the respective states. The Maryland Economic Development and Business Climate Commission, established at the request of the General Assembly’s leadership, has expressed that Maryland should not adopt MUCR because it would: (1) create revenue volatility, (2) pick winners and losers among taxpayers, and (3) lead to additional litigation and administrative costs. Virginia’s Work Group, similarly established by the Virginia General Assembly, concluded that “[a]t this point in time, Virginia should not proceed with further study into the implementation of unitary combined reporting in the Commonwealth[.]”<sup>2</sup>

<sup>1</sup> In 2021, Virginia required corporations that are members of a “unitary business” to file informational unitary combined reporting filings and the Division of Legislative Services and the Department of Taxation established a work group to study the administrative feasibility and the projected impact on Virginia’s tax revenue of adopting mandatory unitary combined reporting. H.B. 1800 (Va. 2021); H.J.R. 563 (Va. 2021 Special Session 1). The 25-member work group was composed of state officials, tax administrators, business representatives and tax practitioners.

<sup>2</sup> Work Group to Assess the Feasibility of Transitioning to a Unitary Combined Reporting System for Corporate Income Tax Purposes, published November 1, 2021, p. 40. This recommendation was centered on “the additional complexity of combined filing compared with Virginia’s current system, the uneven impact the transition may have on certain taxpayers, and the potential damage to Virginia’s business climate. Additionally, Work Group members argued that current provisions in Virginia law such as its add-back statute already address the common tax shifting strategies that combined reporting is intended to remedy.” *Id.* at 4.

Under a “throwback” rule, taxpayers would see their Maryland tax liability increase as their income would be assigned (apportioned) to Maryland based not only on their Maryland sales, but also on sales to customers in other states where they are not taxable. This rule violates fundamental tax principles, by levying the wrong tax at the wrong rate in the wrong state.

### **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 over 500 major corporations engaged in interstate and international business. COST’s objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. Many COST members have operations in Maryland that would be negatively impacted by this legislation.

### **COST’s Position on “Throwback” Rules and Mandatory Unitary Combined Reporting**

The COST Board of Directors has adopted a formal policy statement on MUCR and on “throwback” and related “throwout” rules. COST’s policy position on MUCR is:

*Mandatory unitary combined reporting (“MUCR”) is not a panacea for the problem of how to accurately determine multistate business income attributable to economic activity in a State. For business taxpayers, there is a significant risk that MUCR will arbitrarily attribute more income to a State than is justified by the level of a corporation’s real economic activity in the State. A switch to MUCR may have significant and unintended impacts on both taxpayers and States. Further, MUCR is an unpredictable and burdensome tax system. COST opposes MUCR.*

COST’s policy position on “throwback” and related “throwout” rules is:

*Throwback and throwout laws seek to require companies to pay tax in one state on income that another state has chosen not to tax or is legally unable to tax. A company’s tax liability in one state should not be measured by its tax in another state. Throwback and throwout rules also discourage investment in a state. Such rules must not be adopted and must be repealed where they presently exist.*

### **Problems with Mandatory Unitary Combined Reporting**

One of the most controversial business tax policy issues currently debated by state legislators, tax administrators, and business taxpayers is the breadth of a state’s corporate income tax base. The first approach, “separate entity reporting,” treats each corporation as a separate taxpayer. This is the method Maryland currently uses; it is also used by Maryland’s regional competitor-states, including Delaware, Pennsylvania, and Virginia. The second approach, MUCR, treats

affiliated corporations (parents and subsidiaries) engaged in a “unitary business” as a single group for purposes of determining taxable income.<sup>3</sup> MUCR has several serious flaws.

- **Reduces Jobs** – Proponents of MUCR have focused on the benefits in terms of reducing tax planning opportunities, but they fail to acknowledge the evidence that adopting MUCR hinders investment and job creation. Even if MUCR results in only a relatively small increase in net corporate tax revenue, there will be significant increases and decreases in tax liabilities for specific businesses. Depending on the industry distribution of winners and losers, adopting MUCR may have a negative impact on a state’s overall economy. Moreover, economic theory suggests that any tax increase resulting from adopting MUCR will ultimately be borne by labor in the State through fewer jobs (or lower wages over time) or by in-state consumers through higher prices for goods and services.

States that use MUCR have experienced lower job growth than have states that use separate entity reporting. From 1982-2006, job growth was 6% lower in states with MUCR than states without it (after adjusting for population changes).<sup>4</sup> Furthermore, MUCR has been found to reduce economic growth, especially when the tax rate exceeds 8%<sup>5</sup> (Maryland’s rate is 8.25%).

- **Uncertain Revenue** – Implementing MUCR would have an unpredictable and uncertain effect on Maryland’s revenue. The corporate income tax is the most volatile tax in every state in which it is levied, regardless of whether MUCR is employed. A study conducted by the University of Tennessee found no evidence that states with MUCR collect more revenue, and a later study found that MUCR may or may not increase revenue.<sup>6</sup>
  - **Maryland:** Maryland’s own commission found similar uncertainty and volatility, with MUCR increasing revenue in some years and reducing it in others. Maryland presently has five years of data on combined reporting, and, depending on which type of apportionment is used, MUCR may have resulted in less revenue than the State’s current corporate income tax structure in two or three of those years.<sup>7</sup>
  - **Virginia:** Based on informational unitary combined reporting filings for the 2019 tax year, Virginia’s 2021 Work Group found that “73% of corporations showed

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<sup>3</sup> The concept of a “unitary business” is a constitutional requirement that limits the states’ authority to determine the income of a multistate enterprise taxable in a state. Due to varying state definitions and case law decisions, the entities included in a unitary group are likely to vary significantly from state to state.

<sup>4</sup> Robert Cline, “Combined Reporting: Understanding the Revenue and Competitive Effects of Combined Reporting,” Ernst & Young, May 30, 2008, p. 16.

<sup>5</sup> William F. Fox, LeAnn Luna, Rebekah McCarty, Ann Boyd Davis and Zhou Yang, “An Evaluation of Combined Reporting in the Tennessee Corporate Franchise and Excise Taxes,” University of Tennessee, Center for Business and Economic Research, October 30, 2009, p. 39. Another study by the two lead authors commissioned by the National Conference of State Legislatures reached similar conclusions.

<sup>6</sup> *Ibid.* 3, p. 34.

<sup>7</sup> Andrew Schaufele, Director, MD Bureau of Revenue and Estimates, Report on Combined Reporting to Governor, President and Speaker, March 1, 2013.

essentially no change in tax liability, 13% showed an increase in tax liability, and 14% showed a decrease in tax liability before tax credits were applied.”<sup>8</sup>

- **Indiana:** The Indiana Legislative Services Agency conducted a study in 2016 finding that any potential positive revenue impact from adopting MUCR would be only short-term and would likely decline to zero in the long-term.<sup>9</sup>
- **Regional Outlier** – Most of the states that utilize MUCR are west of the Mississippi River or in the Northeast. Apart from the District of Columbia and West Virginia, none of Maryland’s neighboring competitor states currently utilizes MUCR, *i.e.*, it is not used in Virginia, North Carolina, Delaware, or Pennsylvania.
- **Administrative Complexity** – MUCR is, by definition, complex, requiring extensive fact-finding to determine the composition of the “unitary group” and to calculate combined income. This complexity results in unnecessary and significant compliance costs for both taxpayers and the State. Further, the bill inappropriately delegates many details of the administration of the tax that should be codified in Maryland’s law. The bill does not clearly specify how the tax should be administered; instead, it gives the Comptroller broad authority to adopt regulations to enforce the collection of the tax using MUCR.
  - *Determining the Unitary Group:* The concept of a “unitary business” is uniquely factual and universally poorly defined. It is a constitutional (Due Process) concept that looks at the business as a whole rather than individual separate entities or separate geographic locations. In order to evaluate the taxpayer’s determination of a unitary relationship, state auditors must look beyond accounting and tax return information. Auditors must annually determine how a taxpayer and its affiliates operate at a fairly detailed level to determine which affiliates are unitary. Auditors must interact with a corporation’s operational and tax staff to gather this operational information. In practice, however, auditors routinely refuse to make a determination regarding a unitary relationship on operational information and instead wait to determine unitary relationships until after they have performed tax computations. In other words, the tax result of the finding that a unitary relationship exists (or does not exist) often significantly influences, or in fact controls the auditor’s finding. Determining the scope of the unitary group is a complicated, subjective, and costly process that is not required in separate filing states and often results in expensive, time-consuming litigation.
  - *Calculating Combined Income:* Calculating combined income is considerably more complicated than simply basing the calculations on consolidated federal taxable income. In most MUCR states, the group of corporations included in a federal consolidated return differs from the members of the unitary group. In

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<sup>8</sup> Work Group to Assess the Feasibility of Transitioning to a Unitary Combined Reporting System for Corporate Income Tax Purposes, published November 1, 2021, p. 17.

<sup>9</sup> A Study of Practices Relating to and the Potential Impact of Combined Reporting, Office of Fiscal and Management Analysis, Indiana Legislative Services Agency, October 1, 2016.

addition to variations in apportionment formulas among the states that apply to all corporate taxpayers, further compliance costs related to MUCR result from variations across states in the methods used to calculate the apportionment factors. From a financial reporting perspective, adopting MUCR is a significant change that requires states to consider ways to mitigate the immediate and negative impact those tax changes have on a company's financial reporting.<sup>10</sup>

- **Arbitrary** – Although proponents of MUCR argue that it helps to overcome distortions in the reporting of income among related companies in separate filing systems, the mechanics used under MUCR create new distortions in assigning income to different states. The MUCR assumption that all corporations in an affiliated unitary group have the same level of profitability is not consistent with either economic theory or business experience. Consequently, MUCR may reduce the link between income tax liabilities and where income is actually earned. Many corporate taxpayers may conclude that there is a significant risk that MUCR will arbitrarily attribute more income to a State than is justified by the level of a corporation's real economic activity in the State.

### **Problems with “Throwback” Sales Apportionment Rules**

Generally, throwback rules require a company, when calculating its tax in a state, to include income earned in another state if that other state chooses not to tax that income or is prohibited from taxing that income by the U.S. Constitution or by federal law.

A paper by three leading state tax economists addressed the case for and against these laws.<sup>11</sup> They cite two frequent claims made in favor of such policies but note that “the validity of each is questionable.” The first claim proponents make is that throwback laws discourage tax planning. The authors conclude, however, that such laws fail to accomplish this goal and are in fact potentially damaging to the state's economic climate “because firms are discouraged from locating in throwback states.”

The second claim proponents of throwback laws make is that such laws ensure that all corporate income is taxable in some state. The authors of the paper note that throwback laws do not accomplish this goal and argue that there is “little practical reason why any state's tax policy should be based on ensuring that out-of-state activity is properly included in some state's tax base.” A corporation's correct measure of tax in a state is determinable without reference to the tax a corporation pays in other states. Throwback laws tax income that is, by definition, earned outside of the state, and such laws tax that income at the wrong rate and direct the resulting revenue to the wrong state. Missouri became the most recent example of a state repealing its throwback law, beginning on or after January 1, 2020.<sup>12</sup>

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<sup>10</sup> ASC 740 (formally FAS 109) requires a recordation of tax expense under certain circumstances that can negatively impact a company's stock price and value. See Dr. Lauren Cooper and Joel Walters, “[Mitigating the Impact of State Tax Law Changes on Company Financial Statements](#),” State Tax Research Institute, June 2020.

<sup>11</sup> See Fox, Luna and Murray, “How Should a Subnational Corporate Income Tax on Multistate Businesses Be Structured?”, National Tax Journal, March 2005, pp. 153-5.

<sup>12</sup> See Missouri Senate Bill 884 (2018).

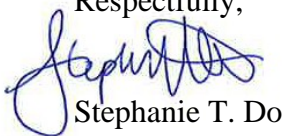
### Conclusion

Studies show that MUCR is the most costly way for the State to raise revenue because of its negative impact on job creation. In addition, the General Assembly's own commission, which was tasked with studying how to improve the State's economy, stated that MUCR should be expressly rejected because the legislature's continued consideration of MUCR discourages business investment in the State.<sup>13</sup> MUCR will not help Maryland attract jobs or investment and should not be adopted.

"Throwback" rules penalize manufacturers for investing and producing goods in Maryland. Manufacturers in the State already face additional challenges from the COVID-19 pandemic. Imposing a throwback rule further penalizes Maryland manufacturers and other taxpayers at a time when the State should be offering greater assistance. States that do not impose throwback rules are more attractive for location and expansion. None of Maryland's neighboring states impose such a rule.

For all of these reasons, COST urges members of the committee to please vote "no" on H.B. 457.

Respectfully,

  
Stephanie T. Do

  
Patrick J. Reynolds

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

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<sup>13</sup> Report of the Maryland Economic Development and Business Climate Commission, Phase II: Taxes, published January 19, 2016, p. 39.